SSDA News

Service Station Dealers of America and Allied Trades

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Legislative Update

By Roy Littlefield

MAYBE, MAYBE NOT

For our priorities - tax reform and debt reduction - bipartisanship is a key ingredient. Our hope going into the year was that Congress and the President would find some common ground on a couple of non-controversial issues, build upon that with a couple of more challenging issues and build to a crescendo with some grand deal for debt reduction and tax reform.

Needless to say, it has not gone quite to plan. There were a few good words when the President entertained various Senators and Representatives but those never turned into action.

The recent disclosure of the IRS mess was certainly at least a couple of steps backwards

We thought the farm bill might have been one of those challenging but not unreachable bipartisan goals. It moved according to our hopes in the Senate, but hit a bad wall in the House this past week when the House rejected a bill.

Immigration reform is a couple of notches up on the challenging issue ladder and things seem to be going a little better with bipartisanship prevailing in the Senate. There is a good chance the Senate will be able to go out for its July 4th recess with another bipartisan bill passed on its resume with passage of the immigration reform bill.

The immigration reform discussions in the House have not gone so well.

It would be nice for the entire Congress to finish immigration reform and find a work around on the farm bill before the August recess. Leave town for the summer with some good feelings of progress and bipartisanship.

We will hit the debt ceiling's technical maneuvering limits in the fall. The general outlook for a "grand deal" including debt reduction and tax reform is not very positive but we are not quite as pessimistic. We are still working with our tax reform allies and our debt reduction allies. We will need some luck, but we are laying the groundwork to capitalize on it if we can.

STUDENT LOANS

We will probably see a last minute bipartisan deal on a small but important issue this week. The current subsidy program for certain student loans is set to expire at the end of the month. The rate will double if there is not an extension. The

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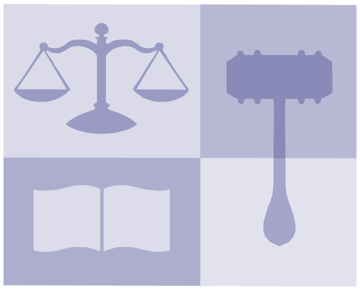
GENERAL COUNSEL CORNER



Putting Out a Welcome Mat May Not Be Enough

By Peter H. Gunst
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With the recent spate of hurricanes, rain storms and other nasty weather, it seems reasonable to consider potential dealer liability resulting from an injury suffered by a customer who slips and falls as a result of snow or rain water tracked into the c-store or station premises.

A vast number of slip and fall cases involving retail establishments have been decided by the courts, sometimes with apparently inconsistent results.

"A vast number of slip and fall cases involving retail establishments have been decided by the courts, sometimes with apparently inconsistent results."

Consider two Georgia state court cases. In *Sutton v. Winn Dixie Stores, Inc.,* 233 Ga.App. 424, 504 S.E.2d 245 (1998), the convenience store customer suffered a fall despite the fact that the store had undertaken significant safety precautions.

A safety mat had been placed near the store entrance and a "caution" sign warning of a wet floor had been placed nearby to where the customer fell. In addition, store employees been directed to regularly inspect and dry mop the entrance floor approximately every five minutes.

Despite the store's efforts, the Georgia appeals court reversed the summary judgment that had been entered in its favor by the trial court. Even though the store had done more than the law would normally require to protect its customers, a question still remained – the court said – as to whether it had adequately performed the additional duty that it had voluntary assumed through its safety efforts.

The store owner in *Alterman Foods, Inc. v. Munford,* 178 Ga.App. 214, 342 S.E.2d. 480 (1986), fared much better. There the evidence showed that the store owner responded to a rain storm by setting out rubber mats, placing a "wet floor" sign near the store entrance and by instructing employees to mop the entrance area periodically. Nevertheless, the trial court denied the store's motion for summary judgment, but allowed the store to take an immediate appeal from that determination.

Reversing the lower court and granting judgment for the store the Georgia appellate court concluded that the store owner's safety efforts were reasonably sufficient and that the customer should have been more careful.

Despite the sometimes inconsistent results reached in such cases, the general principles governing liability appear to be agreed upon. In order to prevail against a store owner, a customer must show that the weather conditions created a foreseeable risk of harm; that the owner knew or should have known of the conditions' existence; and that the owner failed to exercise reasonable care to protect his or her customers from injury.

For the store owner to prevail in a case involving a fall caused by tracked-in snow

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Supreme Court Issues Two Key Title VII Rulings

Clarifies the Supervisor Liability Rule and the Retaliation Causation Standard

This morning, the Supreme Court of the United States issued two highly-anticipated decisions. In *Vance v. Ball State University*, the justices considered whether the "supervisor" liability rule established by Supreme Court precedent applies to harassment by employees whom the employer vests with the authority to direct and oversee a harassment victim's daily work or whether the rule is limited to those harassers who have the power to "hire, fire, demote, promote, transfer, or discipline" their victims. With Justice Alito writing for the majority in a 5-to-4 decision, the Supreme Court ruled that an employee is a "supervisor" for purposes of vicarious liability under Title VII of the Civil Rights Act of 1964 only if he or she is empowered by the employer to take tangible employment actions against the victim. *Vance v. Ball State University*, No. 11-556, Supreme Court of the United States (June 24, 2013).

In *University of Texas Southwestern Medical Center v. Nassar*, the Court considered whether the retaliation provision of Title VII, 42 U.S.C. § 2000e-2(a), requires a plaintiff to prove but-for causation (i.e., that an employer would not have taken an adverse employment action but for an improper motive) or instead requires only proof that the employer had a mixed motive (i.e., that an improper motive was one of multiple reasons for the employment action). In *Nassar*, with Justice Kennedy writing the majority in another 5-to-4 decision (with the same distribution of justices on each side of the issue), the Supreme Court ruled that Title VII retaliation claims must be proved according to traditional principles of but-for causation, not the lessened causation test stated in §2000e-2(m). *University of Texas Southwestern Medical Center v. Nassar*, No. 12-484, Supreme Court of the United States (June 24, 2013).

Finally, the Court also agreed to hear arguments in two labor-related cases next term. The Court will consider the president's recess appointment power and whether employers may agree with unions on such issues as remaining neutral on union organizing.

Vance v. Ball State University

This case was brought by Maetta Vance, who alleged that she was the victim of a racially hostile work environment while employed at Ball State University. The Supreme Court decided to hear the case to clarify the "supervisor" liability rule that it had established in 1998 in *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*. According to those cases, an employer may be held vicariously liable for harassment under Title VII if the harasser is the plaintiff's supervisor.

The Court ruled that the *Ellerth/Faragher* framework presupposes a distinction between supervisors and coworkers in which the ability to make tangible employment decisions is the defining characteristic of supervisors. In so finding, the Court rejected the "expansive," "nebulous," and vague definition of "supervisor" found in an Equal Employment Opportunity Commission (EEOC) Enforcement Guidance and ruled that the "ability to direct another employee's tasks is simply not sufficient" to warrant employer liability. As Justice Alito commented several times in the majority opinion, under the EEOC's definition, "supervisor status would very often be murky" whereas the definition of supervisor adopted by the Court today can be "readily applied" and resolved before trial.

According to Elizabeth S. Washko, managing shareholder of the Nashville office of Ogletree Deakins, "The Supreme Court's decision in *Vance* is significant for two key reasons. First, the Supreme Court provided an important clarification of the term

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Estate Tax Legislation Introduced

Roy Littlefield represented SSDA-AT as a Capital Hill press conference on the introduction of the "Death Tax Repeal Act of 2013) S.1183/H.R.2429. SSDA-AT supports the provisions in the American Taxpayer Relief Act of 2012 including a $5 million estate tax exemption, indexed for inflation, permanent lower tax rates and provisions for spousal transfer and stepped-up basis. While these changes represent significant reform to the estate tax rules, SSDA continues to believe that repeal is the best solution to protect all family-owned businesses from the estate tax.

As a result of these very high exemption levels, the death-tax issue has fallen off the political radar screen in Washington. That's a mistake, especially for conservatives who know that the death tax is a redundant, jobs- and growth-killings tax on savings. In an October 2011 study, Regan economist Steve Entin (now at the Tax Foundation) estimated that full death-tax repeal would increase economic output (relative to today's levels) by nearly $1 trillion over the following decade. This extra economic growth would increase net federal tax revenues by nearly $150 billion, even after accounting for the lost death-tax revenue.

SSDA-AT believes the estate tax is hurting family-owned businesses because the cost of the estate tax comes not only from paying the tax, but also from estate planning. The estate tax applies to property transferred at death when the value of the property exceeds the estate tax exemption. Much of the value of family-owned business is tied to illiquid assets such as land, buildings, and equipment. This can force the new owner to sell the businesses' assets to pay the tax.

For many family-owned businesses to keep operation after the death of the owner, they must plan for the estate tax. Planning costs associated with the estate tax are a drain on business resources, taking money away from the day to day operations and business investment. These additional costs make it more difficult for the business owner to expand and crate new jobs. Protecting family business from the estate tax is important in order to keep these businesses operating for future generations.

SSDA-AT stands firm on its belief that it is wrong for the government to tax people twice, once when they earn the money and once when they give it away, if the giving away is done after death, an arbitrary and unpredictable deadline. It's wrong for the government to create a tax that benefits tax lawyers and insurance companies for their creativity in structuring tax havens rather than helping to create jobs and boost the economy.

The bottom line is that death-tax repeal needs to be a top priority for pro-growth, supply-side conservatives in a post-Obama fiscal future. Representative Kevin Brady (R., T.X.) and Senator John Thune (R., S.D.) recently introduced full death-tax-repeal legislation. For the first time in a long time, killing the death tax is within reach. Now is the time to seize this opportunity.

Government Issues Finalized Wellness Rules

The U.S. Department of Health and Human Services issued final rules on employment-based wellness programs. The final regulations support workplace health promotion and prevention as a means to reduce the burden of chronic illness, improve health, and limit growth of health-care costs, while ensuring that individuals are protected from unfair underwriting practices that could otherwise reduce benefits based on health status.

The final rules continue to support “participatory wellness programs,” which generally are available without regard to an individual’s health status. These include programs that reimburse for the cost of membership in a fitness center; that provide a reward to employees for attending a monthly, no-cost health education seminar; or that reward employees who complete a health risk assessment, without requiring them to take further action.

The rules also outline standards for nondiscriminatory “health-contingent wellness programs,” which generally reward individuals who meet a specific standard related to their health. Examples of health-contingent wellness programs include programs that provide a reward to those who do not use, or decrease their use of, tobacco, or programs that reward those who achieve a specified health-related goal such as a specified cholesterol level, weight, or body mass index, as well as those who fail to meet such goals but take certain other healthy actions.

The final rules ensure flexibility for employers by increasing the maximum reward that may be offered under appropriately designed wellness programs, including outcome-based programs. The final rules also protect consumers by requiring that health-contingent wellness programs be reasonably designed, be uniformly available to all similarly situated individuals, and accommodate recommendations made at any time by an individual’s physician based on medical appropriateness.

The final rules will be effective for plan years beginning on or after Jan. 1, 2014.

Official Says DOT "Very Focused" on Funding Crisis...

As the Department of Transportation's Undersecretary for Policy, Polly Trottenberg, testified last week before the Senate Appropriations Subcommittee on Transportation. She said the department is "very focused" on the nation's looming transportation funding crisis and is working on additional ways to do more with less, while at the same time contemplating options for providing future sustainable funding for the nation's surface transportation programs.

Trottenberg, a top DOT executive under Transportation Secretary Ray LaHood, did not offer any specific proposals to secure new revenues. However, she did acknowledge that the Administration is not devoid of funding ideas, but suggested that announcing them publicly at this stage would not serve a useful purpose. "The Administration looks forward," she said, "to seeking a shared solution," thus maintaining the long-held position of the Department that whatever funding fix is decided must be a joint effort made only in consultation and cooperation with the Congress.

In answer to questions, she also suggested that any major transportation funding solution would likely come in the context of a broader discussion with Congress about what to do to address the entire federal budget, including deficit reduction and tax reform.

Here are key excerpts from her prepared testimony:

"At USDOT, we are very focused on the looming funding crisis for our surface transportation programs and on how we can wring more productivity and efficiency out of our existing system and continue to improve its performance...

"By the end of 2014, the Highway Trust Fund will be nearly depleted and Congress will have transferred nearly $54 billion in General taxpayer Funds into the Highway Trust Fund to keep the program afloat. We will need an additional $85 billion in General Funds over the next six years just to keep the program at current levels, let alone grow it. This is clearly fiscally and politically unsustainable.

"Meanwhile the demands on our nation's transportation infrastructure will only increase. By 2050, the U.S. population is expected to grow by 100 million people, with many of them projected to live in already congested metropolitan areas.

"In this time of severe budgetary challenges, ultimately we need to find political consensus on how to sustainably fund surface transportation over the long term. It will not be easy.

"The President has proposed using the savings from the military drawdowns in Iraq and Afghanistan as a source of funding for transportation, and supports programs such asTIFIA, TIGER and an infrastructure bank that would help leverage additional public and private funds for transportation.

"Others may have different proposals, and many States, including Virginia, Maryland, Wyoming, New Hampshire and Pennsylvania have recently achieved political consensus on new funding for critical transportation infrastructure.

"I know this is one of the many important issues that the leaders on this Committee and throughout Congress will be grappling with in the months to come. The Administration looks forward to seeking a shared solution to sustainably fund surface transportation so that we can maintain our economic competitiveness and States and localities can plan for and build long-term projects."

TIGER Applicants Down, But Still Face Daunting Odds...

As the Department of Transportation essentially revealed last week that the fifth round of the TIGER grant program is so oversubscribed that only

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about one in every twelve proposed projects is likely to win funding later this year. In all, the DOT said it received 568 project applications worth over $9 billion in requests, numbers that are down from previous years. In the end in all likelihood assuming past history is any guide, only about 45 projects covering the $474 million in funds available are expected to win funding. Applications were due June 3. Award of grants will most likely be made in the fall.

Thus the program – designed to fund transportation projects of national, regional and metropolitan significance -- as in past years, gives considerable discretionary power to the Department of Transportation, with many closely matched, near equally worthwhile projects competing directly against one another for highly limited available funds.

The TIGER program's fifth round, an outgrowth of the 2009 Obama Stimulus bill, otherwise known as the American Recovery and Reinvestment Act (ARRA), is receiving its funds now through the FY 2013 appropriations act passed at the end of March this year following the increasingly common delays that again occurred in finishing the Continuing Resolution (CR) that funds all government agencies through September 30.

The amount available -- $474 million – also reflects an approximately $25 million haircut from the originally appropriate amount, due to the government-wide sequester imposed earlier this year. The program is not authorized under MAP-21, however a similar program that was authorized at about the same level of funding -- the Projects of National and Regional Significance (PNRS) program -- was not funded in the FY 2013 appropriations act.

The previous four rounds of the TIGER program awarded at total of $3.1 billion to 218 projects between 2009 and 2012, after 4,650 project proposals were made totaling more than $138 billion in requests.

TIGER Program Summary

Year	Available	Grants	Applicants	Requested
2009	$1.5 billion	51	1400	$60 billion
2010	$584 million	75	1700	$54 billion
2011	$511 million	46	848	$14 billion
2012	$500 million	47	703	$10 billion
2013	$474 million	--	568	$9 billion

FAA Seeks Proposals for Unleaded Fuel Options

The Federal Aviation Administration (FAA) is asking world's fuel producers to submit proposals for fuel options that would help the general aviation industry make a transition to an unleaded fuel. The FAA says it is committed to the development of a new unleaded fuel by 2018 that would minimize the impact of replacing 100 octane low-lead fuel for most of the general aviation fleet.

The FAA will assess the viability of candidate fuels in terms of their impact on the existing fleet, their production and distribution infrastructure, their impact on the environment and toxicology, and economic considerations.

The FAA last week requested that fuel producers to submit by July 1, 2014, data packages for candidate replacement unleaded fuel formulations for evaluation by the FAA. By Sept. 1, 2014, the FAA will select up to 10 suppliers to participate in phase one laboratory testing at the FAA's William J. Hughes Technical Center.

The FAA will select as many as two fuels from phase one for phase two engine and aircraft testing. That testing will generate standardized qualification

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and certification data for candidate fuels, along with property and performance data. Over the next five years, the FAA will ask fuel producers to submit 100 gallons of fuel for phase one testing and 10,000 gallons of fuel for phase two testing.

To date FAA has tested over 279 fuel formulations in an attempt to find a "drop-in" solution, which would require no aircraft or engine modifications. This current request responds to the July 2012 Unleaded Avgas Transition Aviation Rulemaking Committee report to the FAA, which noted that a "drop-in" unleaded replacement fuel is unavailable and may not be technically feasible.

According to the FAA statement, that is why an industry-government initiative called the Piston Aviation Fuels Initiative (PAFI) will facilitate the development and deployment of a new unleaded avgas with the least impact on the existing piston-engine aircraft fleet. PAFI is key to the selection and implementation of an unleaded fuel across the existing general aviation fleet. The FAA and industry-group leaders also recently formed the PAFI Steering Group (PSG), to facilitate, coordinate, expedite, promote and oversee the PAFI.

There are approximately 167,000 aircraft in the United States and a total of 230,000 worldwide that rely on 100 low lead avgas for safe operation, the FAA statement said. It is the only remaining transportation fuel in the United States that contains the addition of tetraethyl lead (TEL), a toxic substance, to create the very high octane levels needed for high-performance aircraft engines.

FRA Panel Recommends HSR Crash Standards

The Federal Railroad Administration (FRA) last week announced that its Railroad Safety Advisory Committee (RSAC) voted unanimously to recommend that the Transportation Secretary work to implement new crashworthiness performance standards for next generation high-speed passenger rail equipment that will operate in the United States.

The RSAC is FRA's technical and policy stakeholder body that includes representatives from various rail industry perspectives, including major international rail builders.

The standards, which FRA is developing now before they are published later this year in a Notice of Proposed Rulemaking (NPRM), will provide baseline safety requirements for next generation rail equipment that would travel up to speeds of 220 mph on high-speed rail tracks, while providing the flexibility to operate with existing freight and passenger systems up to speeds of 125 mph. Once finalized through the FRA's rulemaking process, the new standards would be employed along the Northeast Corridor and in California, regions both designated for high-speed rail service.

The proposed standards are intended to provide an alternative approach to existing railcar crashworthiness requirements that have influenced the type of passenger equipment built and used in the U.S. market for nearly a century. The proposed standards would establish performance-based requirements for an interoperable rail network, permitting the use of "service proven" designs and advanced technologies, while ensuring a consistent, systematic approach to safety.

Since 2009, members of the RSAC have undertaken a review of existing crashworthiness requirements in order to identify a new, technology-neutral, performance-based approach that employs modern and advanced design techniques, such as crash energy management. Consensus on the proposed standards was reached by the RSAC Engi-

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neering Task Force, which is made up of a cross section of the domestic and international railcar supply industry, including 12 railcar manufacturers.

FHWA Emergency Relief Helps Six States

The Federal Highway Administration (FHWA) sent funds to six states last week cover the costs of repairing roads and bridges damaged by a variety of natural disasters in the last year. Funds from the FHWA's Emergency Relief Program will reimburse California, Colorado, Florida, Kentucky, Oregon and Washington for repairs made to roads and bridges that were damaged by flooding, hurricanes and other natural disasters.

California will receive $3.8 million for costs associated with repairing roads in and around San Mateo County damaged during the heavy rains in December 2012.

Oregon will receive $2.1 million to address repairs made necessary by severe weather and flooding last November.

Florida will receive nearly $2 million for costs associated with repairs to roads and bridges in Martin, Palm Beach and St. Lucie Counties damaged by Tropical Storm Isaac last August.

Kentucky will receive $1.9 million in the aftermath of flooding in April of this year.

Washington will receive $1.7 million in the aftermath of storms and flooding in November last year and bridge damage in March of this year

Colorado will receive 0.2 million to address an embankment failure in July of last year.

Costs of fixing or replacing highways, bridges and other roadway structures are eligible for reimbursement through FHWA's emergency relief program, as are costs associated with detours, debris removal and other measures needed to restore traffic flow in impacted areas.

In Brief...

Foxx One Step Closer

Charlotte Mayor Anthony Foxx's nomination to be the next Transportation Secretary was approved unanimously in the Senate Commerce committee last week. This sets up a Senate floor vote on the nomination which could take place any time this week or next week at the discretion of the Majority Leader. Foxx continues to have strong support from both sides and is expected to be confirmed easily.

Musical Chairs at House and Senate Transportation Committees

Last week, it was announced that Rep. Mark Sanford (R-SC) has been named to serve on the House Transportation & Infrastructure Committee. Sanford was elected May 7 in a special election to fill the vacant 1st District seat last held by Tim Scott, who was appointed to be U.S. Senator at the beginning of this year following the resignation of Sen. Jim DeMint (R). Meanwhile, it was also announced that Sen. Mark Warner (D-VA) has been named to serve as the new Chairman of the Senate Commerce Committee's Subcommittee on Transportation. The post was previously held by the late Sen. Frank Lautenberg (D-NJ).

Northeast Corridor Commission Has New Chairman

James Redeker, Commissioner of the Connecticut Department of Transportation, took over last week as the new chairman of the Northeast Corridor Commission, succeeding New York Department of Transportation Commissioner Joan McDonald. Redeker said he looks forward to his new role, which helps to lead the busiest passenger rail corridor in the country, serving 750,000 riders every day. The

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LNG Exports = Economic Growth

The Department of Energy (DOE) recently approved a second application to export domestic liquefied natural gas (LNG) to countries that do not have free trade agreements (FTA) with the U.S. This long overdue decision should be followed by quick action to approve the remaining 19 permits, many of which have been languishing for months. A new report from ICF International shows the tremendous economic benefits the U.S. stands to gain from the right LNG export policies:

- 73,100 to 452,300 average net new jobs created between 2016 and 2035
- Net U.S. GDP gains of $15.6 billion a year to $73.6 billion by 2035
- Annual increases in revenue to federal, state and local governments of between $6.4 billion to $9.3 billion in the base scenario to $27.9 billion to $40.4 billion in the high-export scenario by 2035

The range in projections indicates the more we export, the greater the economic and revenue growth. In the two years DOE has been studying the issue, a number of additional studies confirm the multitude of export benefits and address opponents' concerns:

- Studies from the Bipartisan Policy Center, ICF International and Brookings Energy Security Initiative determined that exports will not sharply drive up domestic natural gas prices
- A 2012 study conducted for DOE by NERA Economic Consulting found LNG exports would generate net economic benefits "across all scenarios" -- with even "higher net economic benefits" the more we export
- 71 percent of Americans agree that exporting natural gas will help create U.S. jobs while 66 percent agree exports are good for the U.S. economy and keep energy dollars in the United States, according to a recent Harris Interactive survey

As the world's leading natural gas producer, our vast natural gas reserves are more than sufficient to continue to supply low-cost energy to American manufacturers and consumers while reducing our trade deficit and enhancing our national security. Time is of the essence. More than 60 export projects are currently planned or under construction in nations around the world. To achieve our full export potential and avoid ceding the world market to competitors, DOE must approve additional permits without delay.

Highway Users Alliance Applauds Confirmation of USDOT Secretary Foxx

The American Highway Users Alliance (The Highway Users) congratulates Anthony Foxx on his confirmation as the new U.S. Department of Transportation (DOT) Secretary. The Highway Users applauds the U.S. Senate for its bipartisan review and overwhelming support for the former Mayor of Charlotte, North Carolina.

Highway Users President and CEO Greg Cohen remarked, "The President has nominated a smart, energetic leader to head the Department of Transportation. Foxx's performance was impressive throughout his confirmation hearing and we have no doubt that the new Secretary will be successful in shifting gears to become the Obama Administration's chief transportation policymaker.

As the mayor of the nation's 17th largest city, Foxx has worked to complete a major highway widening and improve a major bridge in Charlotte, which reduced congestion, improved the flow of commerce, and increased public safety. As Secretary of Transportation, he will face the daunting challenge of keeping 4,000,000 miles of public roads safe, and keeping commerce and people moving on the most important 220,000 miles of National Highway System routes.

Cohen continued, "America's economic success and our quality-of-life depend in large part on the performance of this highway network. The American Highway Users Alliance looks forward to working with Secretary Foxx and his team to focus on these big picture issues, for the benefit of the motoring public.

"As Mayor of Charlotte, Secretary Foxx served as the city's chief executive, undoubtedly experiencing the frustration of trying to get projects and programs underway despite fiscal constraints and painful bureaucracy," Cohen said. "We have found that some of the greatest advocates for road and bridge funding and streamlined reviews are mayors and governors, who have directly experienced their constituents' pressure to deliver good projects quickly and within budget.

Cohen concluded, "Although we are facing difficult financial times, we are confident that Secretary Foxx will make funding for highway infrastructure a top national priority. We look forward to working with him to keep America's highways safe and efficient. We also thank Secretary LaHood for his service to our country and wish him the very best in his future endeavors."

Supreme Court Issues Two Key Title VII Rulings

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'supervisor' for purposes of harassment under Title VII and has limited it to those who have the power to take tangible employment actions—such as hiring, firing, demoting, transferring, and disciplining. A best practice for employers in utilizing this clarification is to ensure that their job descriptions and delineations of job duties match—making it easy to identify true supervisors from those who do not qualify."

"Second," Washko continued, "in providing this clarification, the Supreme Court expressly rejected the EEOC's 'nebulous' definition of the term supervisor, which, the Court concluded, injected too much ambiguity into the issue. The Court reinforced the importance—for all parties—of having a clear picture of the field on which they are playing before becoming too entrenched in litigation. This bodes well for future challenges to regulations and opinions issued by the EEOC, the U.S. Department of Labor, and other government agencies, which appear to err against clear standards and in favor of ambiguities that require 'individualized assessments' of nearly every conceivable employment decision."

According to Michael L. Wade, Jr., of counsel, and James B. Spears, Jr., a shareholder in the Charlotte office, who filed an amicus brief on behalf of the National Retail Federation in *Vance* in support of the employer, "Rejecting the arguments for an almost unlimited and unworkable definition of 'supervisor' advanced by the EEOC and the employee, the Supreme Court emphasized the benefits of clarity for employers, courts, and juries in deciding when vicarious liability should or should not be applied in Title VII harassment cases. As a result of this decision, employers now have uniformity and clarity in deciding which of their employees are supervisors in Title VII hostile work environment claims. The Court's standard provides a good opportunity for employers to evaluate which of their employees have the authority to actually create vicarious liability on behalf of the employer, and thus, which particular employees should be targeted for special training and directions regarding not only their conduct, but also their responsibilities for prevention and appropriate action when harassment occurs."

According to Dawn M. Knepper, a shareholder in the Orange County office of Ogletree Deakins, "I regularly rely on the *Ellerth/Faragher* affirmative defense in defending harassment claims and am pleased that the defense has been confirmed for employers. The outcome in this case is favorable, as even the Court states that it should make it easier to address supervisor status and availability of the affirmative defense on summary judgment. The opinion importantly solidifies the need for strong, regular training on a company's anti-discrimination and harassment policies and the mechanisms for an employee to make a complaint. That training will demonstrate that your company is taking reasonable steps to prevent and correct any harassing behavior."

University of Texas Southwestern Medical Center v. Nassar

Dr. Naiel Nassar, who is of Middle Eastern descent, was a faculty member at the University of Texas Southwestern Medical Center (UTSW) and a clinician at UTSW-affiliated Parkland Hospital. Nassar filed a constructive discharge and retaliation suit against UTSW and a jury found in his favor. The Fifth Circuit Court of Appeals affirmed, finding that retaliation claims only require a showing that retaliation was a motivating factor for an adverse employment action. The Supreme Court of the United States disagreed.

According to the Court, an employee who alleges retaliation under Title VII must satisfy the but-for causation test, that is, he or she must show that the causal link between the injury and the wrong is so close that the injury would not have occurred but for the act. The lesser causation standard—the so-

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called mixed-motive standard—that requires employees to show that retaliation was one of the employer's motives, even if the employer had other, lawful motives that contributed to the employer's decision is insufficient, the Court ruled, to show liability for a Title VII retaliation claim.

In arriving at this conclusion, the court found instructive its 2009 decision in *Gross v. FBL Financial Services, Inc.*, in which the Court applied the but-for causation standard to a disparate treatment claim brought under the Age Discrimination in Employment Act (ADEA). The Court found that "the lack of any meaningful textual difference between" Title VII's anti-retaliation provision and the ADEA necessitates the same conclusion in this case, namely that "Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action." Recognizing that "retaliation claims are being made with ever-increasing frequency," the Court noted that a lesser causation standard might "contribute to the filing of frivolous claims, which would siphon resources from efforts by employer[s], administrative agencies, and courts to combat workplace harassment."

According to Michael W. Fox, a shareholder in the Austin office of Ogletree Deakins, "In *Nassar*, the Court holds that retaliation claims brought under Title VII must be evaluated using a 'but for' not 'motivating factor' standard—about which Justice Kennedy, in language that is music to a defendant's ears, bluntly says: 'This, of course, is a lessened causation standard.' Looking beyond this victory, does today's decision (coupled with *Gross*) establish a default standard for all federal employment law statutes? Maybe. Going forward in reviewing other statutes, unless Congress specifically used 'motivating factor' or other similar language, 'but for' is the likely test."

According to John F. Martin, a shareholder in the Washington, D.C. office of Ogletree Deakins, "The immediate impact of *Nassar* is, of course, that Title VII retaliation claims just became a lot harder to prove. The Court expressed alarm at the rising number of retaliation claims, among other things—which Justice Ginsburg's dissent derided as a tone-deaf zeal to reduce claims without regard to the realities of the workplace."

"The decision also could affect retaliation claims beyond Title VII," Martin commented. "The government currently interprets several retaliation statutes as employing the mixed-motive standard, such as the Occupational Safety and Health Act (OSHA) and several environmental statutes. Those statutes contain similar 'because' or 'because of' wording used in the retaliation provision under Title VII. The *Nassar* decision followed the logic of its 2009 decision, *Gross*, and found that the 'because of' language in Title VII essentially provides a 'but for' causation standard for retaliation claims. After *Gross* was decided, the U.S. Department of Labor (DOL) declared that the decision did not apply to OSHA and environmental retaliation claims for several reasons, many of which the Court rejected in *Nassar*. It will be interesting to see how the DOL and other agencies respond to the *Nassar* decision."

Noel Canning and *United Here Local 355*

The Court also agreed to hear two cases in the 2013-2014 term that will impact employers. The Court agreed to hear, *Noel Canning v. NLRB*, to decide a number of issues related to President Obama's recess appointments to the National Labor Relations Board (NLRB) on January 4, 2012.

The Court also granted certiorari in *United Here Local 355 v. Mulhall* to decide—among other issues—whether an employer and union violate Section 302 of the Labor-Management Relations Act by entering into an agreement under which the employer provides a prohibited "thing of value" to a union by promising to remain neutral to union organizing.

Official Says DOT "Very Focused" on Funding Crisis...

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NEC Commission includes representatives from each of the corridor states, Amtrak, and USDOT. Representatives from freight rail and states with connecting corridors are also involved, but have non- voting status. The group was established in 2010 to recognize the challenges of coordinating, financing, and implementing major system improvements that cross multiple jurisdictions. The NEC Commission aims to lead the creation and implementation of a long-term regional investment strategy for the corridor, advance near-term projects to improve corridor performance, coordinate regional planning and communication, and educate stakeholders and the public on the corridor's investment needs and its role in future economic growth and development of the region

Carbon Tax Talk Won't Go Away

Senate Finance Committee Chairman Max Baucus (D-MT) was quoted last week as saying that talk of a possible carbon tax was continuing to gain the interest of members looking to increase federal revenues as part of grand bargain of tax reform and deficit reduction. While still a long way from having enough support to pass in either House of Congress, a carbon tax (which would manifest itself most directly as in increase in the gasoline tax) has appeal because it not only brings in significant revenue, but because it also has the perceived benefit of reducing carbon emissions, something which is an increasingly high priority for the Obama Administrations and many of its supporters in Congress. Meanwhile, Bloomberg reports that in a little-noticed rule on microwave ovens is a change in the U.S. government's accounting of carbon emissions that it says could have "wide ranging implications." With the change, government actions that lead to cuts in emissions –like a carbon tax—will appear more valuable in the government's cost-benefit analyses. Meanwhile, the word is that the Administration is preparing a major announcement climate change and carbon emissions policies for sometime in July.

Quick History of the Federal Gasoline Tax

Recent focus on the status of the Highway Trust Fund, enacted in 1956, draws attention to the history of the to the primary revenue source for the fund—the federal excise tax on gasoline:

Year	Rate Per Gallon
1933	1.0 cent
1941	1.5 cents
1952	2.0 cents
1957	3.0 cents
1960	4.0 cents
1984	9.0 cents
1988	9.1 cents
1991	14.1 cents
1994	18.4 cents
2013	18.4 cents

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current rate is a fixed rate. There is a compromise on the table for a capped variable rate and the congressional Democrats are the odd player out. The Republicans and the President agree, while the congressional Democrats want a lower capped variable rate. I think the congressional Democrats will have to blink on this one.

While it might be called a bipartisan deal, it probably is more accurately portrayed as the product of practical politics. No one wants to be the one to let the rates double at this time.

PENDULUM

One thing we know, periodic rebalancing of the relationship between us taxpayers and the tax collectors is a necessity. SSDA was involved in the enactment of what is considered the original Taxpayer Bill of Rights in the late 1980's. There were two other laws in the 1990's that also carried the moniker of Taxpayer Bill of Rights that made further "adjustments" in the relationship.

There are a lot of existing proposals that are labeled the same way, covering a wide variety of topics, some having little to do with the current situation.

We would not be surprised if a new focused bipartisan Taxpayer Bill of Rights emerges this year.

WOTC

When Congress leaves this week for the July 4th recess, we will be sixty days from a major collision between the Parties on appropriations to fund the government for fiscal year 2014 beginning October 1st. Because this will result in high-level talks between the President and congressional leaders, there's a clear chance taxes will be drawn into the swirl and our Coalition will make every effort to win a permanent authorization for WOTC.

The Budget Control Act of 2011 sets government spending caps for fiscal years 2013-2021 and makes automatic spending cuts called "sequester" if the caps are violated. Republicans in the House, where spending bills begin, want the government to be funded at $968 billion for the coming fiscal year—a level that includes a sequester cut of $109.3 billion—half from Defense and half from non-Defense programs.

Democrats want instead to cancel the sequester. Clearly, the Parties are on a collision course and are preparing for it with eyes on next year's elections.

High-level talks between House, Senate, and White House on avoiding a government shutdown are in their early stages now. More is at stake than simple funding levels. Republicans want a smaller government, balanced budget, and cuts in entitlements which, except for Medicare, are exempt from sequester and haven't been touched so far. Democrats want higher employment by boosting spending or mitigating cuts in programs like national security, infrastructure, research, and education that pump money into the economy; they'll point to a doctors and hospitals revolt against a 7.2 percent cut in funds for Medicare providers that begins October 1st.

Only a month or so beyond the clash on spending lies the need to address the debt ceiling. The two sides remain poles apart—Republicans plan to demand entitlement cuts and possibly their version of immigration and tax reform (corporate and flow-through entity reforms might be on the table, and/or a road map for completing a full overhaul next year). The President has agreed to work for a deal if it includes increased revenues.

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In our view, it's inevitable that the Parties—despite intense negotiations between the President and Congress—won't be able to agree on government funding for fiscal 2014 and will end up passing a Continuing Resolution which keeps current spending levels in place—avoiding a government shutdown. Because it's so important, the leaders will want to draw the public debt into the talks at some point, so there's a good chance a CR will be set to expire around the time the debt ceiling must be increased.

This would bring about another fiscal cliff struggle that may run into December or January, or even longer before it's resolved, because a bill can be carried over to next year. Driving this fiscal cliff will be the need to increase the debt limit, fund the government, and deal with the prospect of a sequester going into effect on January 15th.

What's important to SSDA is that WOTC and other tax extenders will expire at year end if they aren't included in a fiscal cliff bill. Tax extenders are unlikely to be passed except as part of a larger deal because they are figured as adding to the deficit.

With negotiations underway at the highest level and a bill to raise the debt ceiling inevitable at some point, a further WOTC extension— which already has the support of the White House, the Senate Majority and Minority Leaders, and the House Minority Leader—will have a strong claim on being included in any fiscal cliff bill.

We can build on our April success when the President recommended WOTC be made permanent, including the VOW Act veterans provisions. For WOTC, White House negotiators will be more important than ever as spear carriers if we are to win a permanent authorization.

The sentiment among tax writers in Congress, who are looking to complete a tax reform bill next year, will be to grant only a one-year extension. This is unacceptable; we have evidence of WOTC's success in academic studies and in statistics from Treasury and Labor; the President's recommendation means WOTC has passed the test of analysts in OMB and National Economic Council. Our aim is to insist on permanency now.

Coalition members should step up their White House contacts to press the President's negotiators to insist on permanent WOTC in the coming talks on taxes and spending. White House people need especially to be kept informed of our successes in gaining supporters from Republican congressmen and senators. These may be the very people the White House will reach out to for help in getting Speaker Boehner and Minority Leader McConnell to go along with permanent WOTC. We cannot take for granted that White House people know who our committed Hill supporters are.

At present, WOTC has two supporters among Republicans on Ways and Means, Aaron Schock of Illinois and Lynn Jenkins of Kansas. In the Senate, Pat Roberts of Kansas is supporting WOTC, and Minority Leader Mitch McConnell gave a floor statement last year supporting the tax extenders; and we are close to winning support for permanency from Rob Portman of Ohio, Roy Blunt of Missouri, Kelly Ayotte of New Hampshire, Lamar Alexander of Tennessee, Saxby Chambliss of Indiana, Dan Coats of Indiana, Susan Collins of Maine, Mike Enzi of Wyoming, Jeff Flake of Arizona, Dean Heller of Nevada, Jerry Moran of Kansas, Patrick Toomey of Pennsylvania, and several other senators.

GENERAL COUNSEL CORNER

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or rain water, he or she must demonstrate that the store undertook adequate safety precautions, which ordinarily would include more than merely placing mats near the doorway.

In determining whether precautions are sufficient, a court may consider numerous factors including the severity of the weather conditions, the floor space normally used for customer service, the time of day and the nature of the store's operations. The issue will be whether the store owner used "ordinary care" – however that is defined – in employing safety measures.

The bottom line is that the service station or c-store operator owes a significant obligation to his or her customers when bad weather arises, and can face serious liability if he or she fails to take positive steps to protect them from injury.

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To access the latest articles by the Service Station Dealer's legal counsel, please visit the "Service Station Dealers: Legal Issues" section of the Astrachan Gunst Thomas, P.C. website at: http://www.agtlawyers.com/resources/petroleum.html.

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