

# Employment Law Outlook

W I N T E R 2 0 0 3

A NEWSLETTER COMPILED BY THE ATTORNEYS AT WILLCOX & SAVAGE

## Proposed Overtime Regulations Face Opposition in U.S. Senate

By William M. Furr, Esq.

**O**n March 27, 2003, the U.S. Department of Labor proposed updated regulations to the Fair Labor Standards Act that modify the test for determining which workers are exempt from the Act's overtime provisions. For years, employers have struggled to understand and comply with the DOL's complicated regulations. Many employers have misclassified employees as exempt, subjecting themselves to liability for back wages and liquidated damages. These revised regulations attempt to simplify the existing exemptions and to add a new exemption for "highly-compensated" employees. The revisions change the criteria for "white-collar" exemptions. The Department of Labor estimates that these exemptions could affect over 22 million Americans and could result in \$1.5 billion in costs to employers.

In September, the United States Senate voted to stop the Department of Labor from implementing the proposed overtime regulations. The 54 to 45 Senate vote conflicts with the House of Representatives hotly contested vote in July to uphold the regulations. President Bush has threatened to veto the entire appropriations bill if Congress does not approve the regulations. The future of the proposed overtime regulations remains uncertain.

The FLSA requires covered employers to pay nonexempt employees a minimum wage (currently \$5.15 per hour) and to pay overtime at a rate of time and one-half the employee's regular rate for hours

worked in excess of 40 hours per work week. The Act sets forth "white-collar" exemptions for executive employees, administrative employees, professional employees and outside sales employees.

The Act requires the Department of Labor to issue regulations explaining when employees will qualify for the four white-collar exemptions. The DOL has not revised its regulations dealing with the duties of white-collar workers since 1949.

The existing regulations set forth a long test and a short test for determining eligibility for the white-collar exemptions. The proposed regulations eliminate these two tests and establish a standard test for each exemption.

### *A. Executive Employees*

In order for an employee to be exempt as an executive employee under the proposed regulations, the employer must establish: 1) that the employee is paid at least \$425 per week on a salaried basis; 2) that the employee's primary duty is to manage an enterprise, a subdivision of an enterprise or a department; 3) that the employee customarily and regularly directs the work of two or more employees; and 4) that the employee has the authority to hire or fire other employees (or whose recommendations regarding hiring or firing will be given "particular weight"). The new test eliminates the need to determine whether the employee devotes more than 20% of his or her time to non-exempt activities. The proposed regulations add an

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## New State Department Procedures Impact Foreign Workers and Business Visitors

By Susan R. Blackman, Esq.

**T**he Department of State has announced two procedural changes that will impact foreign workers and business visitors who seek to enter the United States. Effective August 1, 2003, the Department of State began requiring all U.S. consulate offices worldwide to conduct in-person interviews for virtually all applicants for U.S. visas. This change is causing substantial processing delays in many consulate offices that previously relied on mail-in application procedures for most visa applications.

Another security-oriented procedural change will go into effect on October 26, 2004. Starting on that day, foreign visitors will be not be able to utilize the Visa Waiver Program unless they have a passport that is "machine-readable." The Visa Waiver Program currently allows short-term visitors from certain nations to enter the United States for up to ninety days without a visa, if the visitor is coming for business or pleasure. Instead of applying for a visa at a U.S. consulate office, a qualifying visitor may go directly to an international airport and complete a Visa Waiver Form while en route to the United States. After October 26, 2004, such visitors must have passports that satisfy the new machine-readable format requirements, otherwise, they will be required to apply for a visitor visa at a U.S. consulate office.

For more information about these changes or other immigration matters, please contact Susan Blackman at 757-628-5646. ■

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exemption for any employee who owns at least 20% of the employer's business.

### ***B. Administrative Employees***

In order for an employee to be exempt as an administrative employee under the proposed regulations, the employer must establish: 1) that the employee is paid at least \$425 per week on a salaried basis; 2) that the employee has a primary duty of office or non-manual work relating to management or general business operations; and 3) that the employee holds a "position of responsibility" with the employer.

In order to hold a "position of responsibility," the employee must either customarily and regularly perform "work of substantial importance" or perform work requiring a high level of skill or training. The phrase "work of substantial importance" means work that, by its nature or consequence, affects the employer's general business operations or finances to a significant degree. The proposed regulations eliminate the requirement that the employer show that an administrative employee routinely exercises discretion and independent judgment.

### ***C. Professional Employees***

1. **Learned Professionals:** In order to qualify as a learned professional under the proposed regulations, the employee's primary duty must be performing office or non-manual work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by an equivalent combination of intellectual instruction and work experience.

The salary requirement for professionals is \$425 per week, except that there is no salary requirement for teachers, lawyers or physicians.

2. **Creative Professionals:** Creative professionals must have a primary duty of performing office or non-manual work requiring invention, imagination,

originality or talent in a recognized field of artistic or creative endeavor. They must earn at least \$425 in salary per week.

3. **Computer Professionals:** Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption if they are: 1) paid a salary of at least \$425 per week; 2) have a primary duty consisting of the application of systems analysis procedures or the design, development, documentation, analysis, creation, testing or modification of computer systems or programs.

### ***D. Outside Sales Employees:***

In order to qualify as an exempt outside sales employee, the employee must make sales or obtain orders or contracts for services and the employee must regularly work away from the employer's place of business. The proposed regulations eliminate the requirement prohibiting outside sales employees from performing more than 20% of non-exempt work.

### ***E. Highly Compensated Employees***

Under the proposed regulations an employee who makes at least \$65,000 per year will be exempt from the overtime regulations if he or she has an identifiable executive, administrative or professional function.

### ***F. Salary Basis***

The proposed regulations allow employers to dock the pay of exempt employees in full-day increments for disciplinary suspensions. An employer who makes improper deductions from an employee's salary will not lose the exemption for an isolated incident. The exemption will only be lost if there is a pattern or practice of improper deductions.

Although the Department of Labor initially indicated that it would issue its final regulations this year, the Senate's vote to stop the implementation of the rules creates uncertainty. Many commentators believe that President Bush has enough clout to push through the regulations. Stay tuned for future developments. ■

## **Changes Proposed For EEO-1 Forms**

**By Susan R. Blackman, Esq.**

**I**f you are a private employer with one hundred or more employees, or a federal contractor with fifty or more employees, you must submit an EEO-1 form to the Joint Reporting Committee each year. The EEO-1 forms are used by the Equal Employment Opportunity Commission (EEOC) and the Office of Federal Contract Compliance Programs (OFCCP) of the U.S. Department of Labor to gather annual employment data including demographic information about the sex, race, and ethnic categories of employees in specified occupational categories.

The Joint Reporting Committee has proposed changes to the format of the EEO-1 survey form. The changes would increase the number of specified occupational categories from nine to eleven and restructure the way that employees are classified by ethnicity/race. The revised form asks the employer to first indicate whether an employee falls within the category of "Hispanic or Latino." If yes, the employer would classify the employee as either male or female within the "Hispanic or Latino" ethnic category. If the employee is not Hispanic or Latino, then the employee will be classified in one of the following racial/ethnic categories: White; Black or African-American; Asian; Native Hawaiian or other Pacific Islander; American Indian or Alaska Native; or Two or More Races.

The current category of "Asian or Pacific Islander" will be split into two categories: "Asian" and "Native Hawaiian or Pacific Islander." The proposed instructions advise that the new category of "Asian" includes persons from Japan, the Philippine Islands, and the Indian Subcontinent.

The new occupational categories are subdivisions of the existing category of "Officials and Managers." In the new  
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form, employers will separate officials and managers into three subcategories: senior level; mid level; and lower level.

The proposed revisions could go into effect in 2004, but some employer groups have asked the Joint Reporting Committee to postpone the implementation. If you have questions about EEO-1 requirements, please contact Susan Blackman at 757-628-5646 or visit [www.eeoc.gov/eo1survey/](http://www.eeoc.gov/eo1survey/). ■

## McConville Elected President of National Institute for Labor Relations Research



**T**imothy M. McConville, an associate in the firm's Employment and Labor Law Section, was recently elected President of the Board of Directors of the National Institute for Labor Relations Research. The Institute's primary function is to act as a research facility for the general public, scholars, and students. It provides the supplementary analysis and research necessary to expose the inequities of compulsory unionism. The Institute publishes monographs, brochures, and briefing papers designed to stimulate research and discussion with easy-to-read summaries of current events. The Institute also conducts nonpartisan analysis and studies for the benefit of the general public. ■

## Mixed Motive cases Go To Jury Without Direct Evidence

By John T. McDonald, Esq.

**T**he United States Supreme Court recently issued an opinion that may lead to an increase in the number of "mixed motive" discrimination cases filed against employers.

In "mixed motive" cases, the plaintiffs admit that they were fired for a legitimate reason, but claim that a discriminatory reason was also a factor in the decision. In *Desert Palace, Inc. v. Costa*, the plaintiff claimed that she was terminated for a legitimate reason (a physical altercation in the workplace) as well as an illegitimate reason (her gender). The plaintiff had a history of disciplinary problems at her place of employment and the employer terminated her after she was involved in a physical altercation with a male co-worker. The employer only suspended the male co-worker for five days because he had a clean disciplinary record.

The plaintiff filed suit claiming that the employer discharged her because of her gender and the physical altercation. She presented indirect evidence of gender discrimination in the form of evidence that the employer treated her differently

than similarly situated male employees. She had no direct evidence that her discharge was related to her gender. The District Court submitted her case to the jury despite the fact that several circuit courts had held that a plaintiff needed to present direct evidence of discrimination in mixed motive cases.

The Ninth Circuit Court of Appeals affirmed the District Court's decision to send the case to the jury despite the lack of direct evidence of discrimination. The defendant appealed and the United States Supreme Court affirmed the Ninth Circuit's decision. The Supreme Court held that in order to obtain a jury instruction in mixed motive cases, "a plaintiff need only present sufficient evidence for a reasonable jury to conclude, by a preponderance of the evidence, that 'race, color, religion, sex, or national origin was a motivating factor for any employment practice.'" The Court also held that circumstantial evidence alone may be "sufficient" to meet this burden.

Prior to this decision, courts in the Fourth Circuit, the circuit governing cases in Virginia, required mixed motive plaintiffs to present direct evidence of discrimination in order to get to a jury. *Desert Palace* overruled those decisions. Accordingly, employers can expect an increase in the number of mixed motive discrimination cases. ■

## Mitigating Measures Limit ADA Scope

By Samuel J. Webster, Esq.

The Americans with Disabilities Act (ADA) prohibits discrimination against disabled persons. "Disability" is a physical or mental impairment that "substantially limits" one or more major life activities; "substantially limits" means unable to perform or significantly restricted in performing a major life activity compared to the average population. Courts focus on the severity, duration, and relative permanence of the limitation.

In 1999, a Supreme Court trilogy of cases - *Sutton v. United Airlines*, *Murphy v. UPS*, *Albertson's v. Kirkingburg* - stated that mitigating circumstances must be considered in determining whether an ADA claimant is "disabled." In *Sutton*, the Court held in a case challenging the airlines' minimum vision

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requirements that corrective and mitigating measures (glasses) must be considered in determining whether an individual is disabled. In *Murphy*, the Court ruled that high blood pressure, controlled by medication, did not substantially limit any major life activities. In *Kirkingburg*, the Court held that a monocular truck driver was not per se disabled; the body's own adjustment to monocular vision was the mitigating circumstance. Since these decisions, courts have wrestled with what mitigating measures will be considered and under what circumstances. This article examines those cases from the United States Fourth Circuit Court of Appeals, covering Maryland, North Carolina, South Carolina, Virginia, West Virginia.

Most of the cases arise in the context of whether the individual is disabled, *i.e.*, substantially limited in the

major life activity of working. While the Supreme Court requires a case-by-case analysis, the Fourth Circuit has shown a willingness to use the *Sutton* trilogy to limit the ADA's reach. For example, the Fourth Circuit held in *Pollard v. High's* that the likelihood of recovery from a disability (back surgery) must be considered as a mitigating factor. Similarly, without explicitly so stating, the Court held in *EEOC v. Sara Lee Corp.* that a medication-controlled epileptic with only intermittent seizures, disrupted sleep, and minor cognitive problems was not "substantially limited" in the major life activities of working, sleeping, or thinking.

District Courts within the Fourth Circuit have also shown reluctance to extend ADA's coverage in light of mitigating circumstances. The Western District of Virginia, following *Murphy*, held in *Stumbo v. Dyncorp Tech Serv.* that medicated hypertension did not substantially impair a major life activity. In *Washington*

*v. George G. Sharp, Inc.*, Virginia's Eastern District held that a 30-pound lifting restriction for a back injury did not substantially limit the major life activity of working. In extended analysis, the Maryland District Court in *Saunders v. Baltimore County* found that asthma, only partially controlled by medications, injections, and an inhaler, still did not substantially limit the major life activities of working or breathing.

The Fourth Circuit and its District Courts generally provide a favorable venue for employers in ADA cases. Nevertheless, the courts emphasize the need for a particular individualized assessment. Because of this case-by-case analytical framework, we recommend that employers continue to document all matters, have even-handed anti-discrimination policies, procedures, and training, and approach any even remotely related disability determination with great caution. ■

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