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Employer ALERTS!

Do Vacation Policies Jeopardize Exempt Status?

By Charles H. Fleischer, Esq.

The overtime requirements of the Fair Labor Standards Act (FLSA) apply only to non-exempt employees. Employees who qualify as executives, administrators and professionals – so-called "white collar" exemptions – are exempt from the FLSA's overtime requirements.

To qualify as exempt, an employee must not only satisfy the *duties* test (that is, his or her duties must meet the definition of executive, administrator, etc.), but in most cases, the employee must satisfy the *salary basis* test as well. Under the salary basis test, an employee must in general be paid a salary of $455 per week ($23,660 per year) to be exempt.

Hourly workers do not satisfy the salary basis test and they are non-exempt, even if they otherwise qualify as executives, administrators or professionals. In addition, a salaried employee who is treated as if he or she were an hourly worker will be considered non-exempt. If, for example, an employer adopts a policy of docking the salary of otherwise exempt managers for being late, the managers will be deemed non-exempt and entitled to time and a half for all the extra hours they have been putting in.

But what if instead of docking the salary of tardy managers, the employer charges the time against their paid leave? Does that amount to treating the managers as hourly employees and converting them from exempt to non-exempt?

The U.S. Department of Labor (DOL) takes the position that the FLSA regulates wages and hours of employment, not fringe benefits such as vacation time. Under this view, an employer is allowed to adopt whatever leave policies it wishes without violating the FLSA. (Of course, other laws, such as the Family and Medical Leave Act or the Uniformed Services Employment and Reemployment Rights Act, may apply.) For example, in a 1987 opinion letter, DOL said:

> Generally, deductions for absences of less than a day are not permitted under the [DOL's] regulations for any reason. However, *an employer can require an employee to substitute paid leave for such absences without losing the exemption for that week.*

DOL reaffirmed its position in a 1994 opinion letter, saying that where an employer has a bona fide benefit plan, the employer may "substitute or reduce accrued leave ... for the time an employee is absent from work even if it is less than a full day without affecting the salary basis of payment." In the same opinion letter DOL went on to caution, however, that

> practices with hourly attributes, such as payment of additional compensation for time worked over 40 hours in a week, *requiring the use of personal or sick leave by the hour,* and others have been declared inconsistent with the 'salary basis' requirement.

In a subsequent opinion letter, DOL refined its view, saying that an employer's practice of docking an employee's leave bank in hourly increments is permitted for *absences occasioned by the employee*. However, if the employee is available for work but is *required* to use leave to accommodate the employer's operating requirements, then the practice is inconsistent with the salary basis requirement.

To illustrate this distinction, according to DOL an employer would be permitted to charge an hour's leave against an exempt manager who showed up at work an hour late. In contrast, if the employer closed its offices for a half-day due to lack of work or because a blizzard made commuting hazardous, the employer could not require its exempt employees to take a half-day of leave without jeopardizing their exempt status.

References: 29 U.S.C. § 201; 29 C.F.R. § 541; U.S. Dept. of Labor Wage & Hour opinion letters dated July 17, 1987, Apr. 15, 1994, Apr. 6, 1995 and Jan. 26, 1998; *Conley v. Pacific Gas & Elec. Co.*, 2005 WL 1693801 (Cal.App. 2005); *Barner v. City of Novato*, 17 F.3d 1256 (9th Cir. 1994); *Drinkwitz v. Alliant Techsystems, Inc.*, 996 P.2d 582 (Wash. 2000); *McDonnell v. City of Omaha*, 999 F.2d 293 (8th Cir. 1993).

New Duties Under Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) has long regulated the obtaining and use by employers of credit and investigative reports (which the statute refers to as *consumer reports*) prepared by consumer reporting agencies. The FCRA defines a *consumer reporting agency* (CRA) as a person or entity which, for a fee, assembles or evaluates credit information or other information on consumers for the purpose of regularly furnishing consumer reports to third parties (such as employers).

Employers may obtain consumer reports from CRAs, including investigative reports as to character and general reputation, for purposes of evaluating a candidate for employment. In doing so, however, employers must comply with the procedures specified in the FCRA. When an employer intends to obtain a consumer report, the employer must inform the candidate in writing that such a report is being requested and must obtain the candidate's written authorization to obtain the report. The authorization should be a separate, stand-alone document and not be imbedded in the employment application or some other form. The candidate may in turn make a written request to be informed of the full nature and scope of the report being requested, and the employer must then furnish that information.

If the employer intends to make an adverse employment decision based wholly or partly on the consumer report, the employer must first inform the candidate of its intention to do so. The employer must also furnish the candidate with the name and address of the CRA that made the report, a copy of the report, and a statement explaining the candidate's rights under federal law to challenge the accuracy of the report.

A recent amendment to the FCRA requires employers and others who for business purposes possess consumer reports or information derived from consumer reports to properly dispose of such reports and information. Regulations adopted by the Federal Trade Commission to implement the amendment state that "reasonable measures" must be taken to protect against unauthorized access to or use of the information in connection with disposal, so that the information cannot practicably be read or reconstructed. For example, according to the FTC, paper versions of such information may be burned, pulverized or shredded, and electronic versions may be electronically erased. Those regulations – called the Disposal Rule – became effective June 1, 2005.

The amendment also resolved a concern raised several years ago by the FTC. In a 1999 opinion letter, the FTC took the position that when an employer hires an outside organization, such as a law firm, to investigate a sexual harassment complaint or other suspected employee misconduct, that outside organization is a consumer reporting agency and the results of its investigation constitute a consumer report. The new law now states that reports of such investigations are not consumer reports so long as the purpose was not to investigate the employee's credit. But the new law does not free such reports from all regulation. Under the new law, if the employer takes adverse action based on the report, the employer must disclose to the employee a summary of the report.

Additional information is available at the FTC's website, www.ftc.gov.

References: 15 U.S.C. § 1681a; 16 C.F.R. § 682.

What Is a Medical Exam Under the ADA?

An article in the last issue of EMPLOYER ALERTS! pointed out that an employer can do a pre-employment medical exam only when the employer has made an offer of employment conditioned on passing the exam. See "Medical Exams and Conditional Offers of Employment," Spring 2005, p. 2. But what is a medical exam, and how are medical exams distinguished from other types of tests the employer may want to give to job applicants?

The Americans with Disabilities Act (ADA) itself offers little guidance. The ADA says only that a test for illegal drugs is not a medical exam and may be performed without regard to the ADA. To fill this gap, the Equal Employment Opportunity Commission has adopted helpful guidelines. The EEOC defines "medical examination" as "a procedure or test that seeks information about an individual's physical or mental impairments or health." In determining whether a test is medical or non-medical, the EEOC looks to the following factors:

- Is it administered by a health care professional or someone trained by a health care professional?
- Are the results interpreted by a health care professional or someone trained by a health care professional?
- Is it designed to reveal an impairment or physical or mental health?

- Is the employer trying to determine the candidate's physical or mental health or impairments?
- Is it invasive (for example, does it require the drawing of blood, urine or breath)?
- Does it measure a candidate's performance of a task (permitted), or does it measure the candidate's physiological responses to performing the task (not permitted)?
- Is it normally given in a medical setting (for example, a health care professional's office)?
- Is medical equipment used?

According to the EEOC, a psychological test that is designed to identify a mental disorder or impairment is medical, whereas a psychological test that measures only personality traits such as honesty, preferences and habits is not. The EEOC has also provided examples of tests it considers medical and those it considers non-medical. See www.eeoc.gov/policy/docs/preemp.html.

A recent case illustrates the problem.

An Illinois chain store known as Rent-A-Center had a policy requiring employees who sought promotions to submit to a battery of tests designed to measure math and language skills, interests and personality traits. The battery included 502 questions from the Minnesota Multiphasic Personality Inventory (MMPI). Although Rent-A-Center claimed it used the MMPI only to determine personality traits, the test also measures conditions such as depression, hypochondriasis, hysteria, paranoia and mania.

The Karraker brothers – Steven, Michael and Christopher – were denied promotions bases on the results of the test battery. They then sued, claiming that inclusion of the MMPI violated the ADA.

Citing EEOC guidelines, the Court said that since the MMPI was designed to reveal mental impairments, it qualified as a medical exam. Therefore, its use is restricted by the ADA. In reaching its conclusion, the Court pointed out that the ADA's prohibition of pre-employment medical exams includes exams given to existing employees in connection with promotion opportunities.

References: 42 U.S.C. § 12~~10~~1; EEOC's ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, Oct. 10, 1995; *Karraker v. Rent-A-Center, Inc.*, 411 F.3d 831 (7th Cir. 2005).

Enforcing Non-Disparagement Clauses in Settlement Agreements

Employer-employee disputes often engender strong emotions, particularly if the employee has been fired. Even after the dispute is resolved, lingering bitterness sometimes prompts one of the parties to bad-mouth the other. So settlement agreements typically contain a non-disparagement clause, such as:

> Former Employee agrees that he will not make any disparaging, critical or negative statements, in writing or orally, about the Company or any of its owners, directors, officers, employees, agents, customers or clients.

The problem with such clauses is that they are difficult to enforce. A disgruntled former employee may say things about the company that, though critical, do not rise to the level of defamation. Even if the comments are defamatory, it may be hard for the company to prove it was actually damaged in a particular dollar amount. And getting an injunction against a former employee in these circumstances would be both burdensome and expensive.

One solution to this enforcement problem is to include a *liquidated damages* provision in the non-disparagement clause. For example, the clause might say that the former employee will pay the company $5,000 for each violation. The problem with a liquidated damages provision, however, is that the company must be able to show that the liquidated amount – in this example, $5,000 – is reasonably related to the actual damages the company would expect to suffer for each violation. If the company cannot make that showing, the courts will view the provision as an unenforceable *penalty*.

A Baltimore company may have found a way around these problems.

James Harrell had been a truck driver for a subsidiary of SYSCO, Inc., for 13 years when he filed discrimination, whistleblower and workers' compensation claims against the company. The parties eventually reached a global settlement of all claims, pursuant to which Harrell resigned and the company paid him $185,000.

The parties' settlement agreement stated that Harrell would not disparage SYSCO and would not voluntarily aid or assist any third parties in making or pursuing claims against the company. The agreement went on to recite that the non-disparagement clause was "a substantial and material provision" of the agreement and that if Harrell breached the provision, SYSCO could recover back whatever it paid him under the agreement, plus any actual damages it could prove.

Shortly after the settlement agreement was signed and Harrell had received his $185,000, he wrote a letter on behalf of another SYSCO employee, claiming that a white, female supervisor had harassed him and had tried to set him up to be fired because of his race. The letter concluded, "If I can be of any more help let me know." The next day, the employee filed race discrimination charges against SYSCO, supported in part by Harrell's letter.

SYSCO promptly sued Harrell for breach of the settlement agreement, seeking refund of the $185,000 it had paid him. The Circuit Court for Howard County agreed that Harrell had breached the agreement. However, the Court took the view that the refund arrangement was intended to be a liquidated damage provision but instead was a penalty, because there was no reasonable connection between the amount and SYSCO's anticipated damages. Therefore, the provision was unenforceable and SYSCO would have to prove its actual damages. SYSCO's inability to prove actual damages resulted in an award of only $1.00 in nominal damages.

The Maryland Court of Special Appeals reversed. It said the provision was not a liquidated damages clause at all, since SYSCO was free to try and prove actual damages over and above the payments it made to Harrell. The provision was therefore an unliquidated damages clause not subject to the usual rules involving liquidated damages and penalties. Furthermore, said the appeals court, the clause was reasonable and enforceable and SYSCO was entitled to a refund of its $185,000.

Reference: *Smelkinson SYSCO, Inc. v. Harrell*, 875 A.2d 188 (Md.App. 2005).

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FMLA's "Care For" Provision

The Family and Medical Leave Act (FMLA) requires covered employers to grant eligible employees up to 12 weeks of unpaid leave, including intermittent leave as needed, within a 12-month period, for a serious health condition, to care for a spouse, child or parent with a serious health condition, or to care for a newborn or newly adopted child.

A recent decision by the Ninth Circuit Court of Appeals in California explains the care-for provision.

Charles Tellis, a mechanic for Alaska Airlines in Seattle, took leave in connection with difficulties his wife was having with her pregnancy. On the second day of leave, his car broke down, so he flew to Atlanta, where he owned another car, and drove it back to Seattle. In the meantime, his sister-in-law stayed with his wife. Tellis stayed in touch with his wife by cell phone while he was away.

Alaska Airlines treated Tellis's leave as unexcused and it terminated him. Tellis then filed a grievance, claiming the leave qualified under FMLA because he took it to care for his pregnant wife. The Airlines eventually agreed to reinstate Tellis provided he agree to placement of a disciplinary letter in his personnel file. Tellis refused this compromise and sued.

The Ninth Circuit rejected Tellis's claim. Relying on U.S. Department of Labor regulations, the Court said that caring for a family member with a serious health condition involves some level of participation in ongoing treatment of that condition. This in turn means that the employee be in close and continuing proximity to the ill family member.

Here, Tellis's activities could not be considered caring for his wife, since he left her for some four days. While retrieving a replacement family car and the telephone calls may have provided psychological reassurance, that was merely an indirect benefit of otherwise unprotected activity – traveling away from a person needing care.

References: 29 U.S.C. § 2601; 29 C.F.R. § 825.101; *Tellis v. Alaska Airlines, Inc.*, 2005 WL 1620311 (9th Cir. 2005);

Medicare Pursues Employer for its Own Mistake

Medicare, enacted in 1965, provides health insurance for the elderly. Congress has since amended the Medicare law to say that when a beneficiary is covered by both Medicare and a group health insurance plan, Medicare would be the secondary payer, meaning that the group health plan would be primarily liable for the beneficiary's medical expenses, with any unpaid balance subject to Medicare reimbursement.

Despite being the secondary payer, Medicare sometimes mistakenly covers claims as if it were the primary payer. In such circumstances, Medicare has the right to seek reimbursement. This reimbursement right is not, however, limited just to the group plan that should have paid the claim. Instead, by statute Medicare may seek reimbursement from

> any or all entities that are or were required or responsible (directly, as an insurer or self-insurer, as a third-party administrator, *as an employer that sponsors or contributes to a group health plan, or large group health plan,* or otherwise) to make payment with respect to the same items or service (or any portion thereof) under a primary plan.

The statute goes on to authorize the Government to bring suit for reimbursement, and it says the Government may collect "double damages."

This reimbursement provision was the subject of a recent, troubling case.

Telecare Corp. provides a prepaid healthcare plan to its employees through the Kaiser Foundation Health Plan and it pays a premium to Kaiser for that coverage. Some of Telecare's employees are also covered by Medicare. One such employee incurred medical expenses which Medicare paid. Medicare then demanded reimbursement from Telecare, without bothering to seek payment from Kaiser. Telecare paid the amount ($1,470.96) under protest, and then sued Medicare in federal court to recover the payment.

The Court of Appeals for the Federal Circuit rejected Telecare's claim, saying that under the plain language of the statute, Medicare was within its right to look to the employer for reimbursement. Answering Telecare's argument that the statute was unfair as applied to employers, the Court said it is up to Congress to determine what is fair or unfair.

References: 42 U.S.C. § 1395y; *Telecare Corp. v. Leavitt,* 409 F.3d 1345 (Fed. Cir. 2005).

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Do You Have a Disaster Relief Leave Policy?

By Charles H. Fleischer, Esq.

Disasters such as Hurricane Katrina trigger an upsurge in volunteers willing to lend their labor and expertise. Health care workers, fire fighters, rescue personnel, law enforcement officers and others may ask for leave from their current employment in order to help out on the front lines. And their employers may be glad to contribute to the effort by granting time off.

If you are one of those employers, it is important to have a written disaster relief leave policy in place. Listed below are some of the questions your policy should answer.

- What qualifies as a disaster? Is a declaration by the U.S. President required? by the State Governor? Is a request for help by a local official sufficient?
- Who qualifies for leave? Is an employee's willingness to volunteer enough, or should only those employees with specialized training, skills and experience be eligible?
- How long will the leave last? Is there an established maximum, or will that be determined on a case-by-case basis? Can leave once granted by extended? cut short?
- Is leave with or without pay?
- Must the employee be a volunteer, or may he receive compensation for relief work?
- Will you be paying any of the employee's expenses, such as travel to the disaster site and meals and lodging while there?
- What benefits continue while the employee is on leave? For example, will vacation and sick leave continue to accrue? If the employee is injured or becomes sick while on disaster relief leave, will he or she be entitled to sick leave with pay?
- Will disaster relief leave be charged against any other accrued leave – vacation, for example? or is disaster relief leave in addition to all other forms of leave?

You may want to state in your policy that you retain the right to grant or deny leave on a case-by-case basis, depending on the nature and extent of the disaster, the skills and training of the employee requesting leave, the employee's position in the company, and the company's workload. (You will not, of course, grant or deny leave on a discriminatory basis such as age or gender.)

You should also be aware that employers have separate obligations under the Uniformed Services Employment and Reemployment Rights Act with respect to employees called for military duty. See "Job Rights of Employees Called to Active Duty," Employer *Alerts,* Nov. 2001, p. 1. Similarly, your disaster relief policy has no effect on your obligation to grant Family and Medical Leave Act leave if you are covered by FMLA.

While on disaster relief leave, your employee is likely to be doing dangerous work, which may result in his being injured. This could raise a question whether, despite being on leave, the employee is considered to be working for you and therefore covered under your workers' compensation policy. Of equal concern, the employee could injure someone else, who may then claim that you, as his employer, are liable for the injury.

These risks are increased if you are paying the employee or covering his expenses, or if you become actively involved in organizing the relief effort, assigning duties, or otherwise coordinating or supervising the relief work. It is fine if you are willing to take on these risks, but if not, your policy should clearly state that while on disaster relief leave the employee is not working for you, he is not being compensated by you, and he is not covered by your workers' compensation policy. To the extent you want to make a cash contribution to the effort, make it to the relief organization for which your employee will be working, rather than in the form of direct salary or expense payments to the employee.

In any event, you may want to discuss liability and coverage questions regarding disaster relief leave with your workers' comp and liability insurance carriers.

Hiring on the Basis of Place of Residence

Some employers may believe that candidates living in certain areas or living beyond a specified distance from the workplace will be less reliable. For example, an employer may believe that a candidate from a poor, inner-city neighborhood will be less educated and skilled, or will have more family issues affecting his or her work. Or an employer may believe that a candidate living, say, outside a 30-miles radius from the workplace will have tardiness and absenteeism problems due to the vagaries of weather, traffic and public transportation.

In the Washington DC metropolitan area, an employer may hold "Potomac River prejudice" – the view that anyone living in Maryland cannot reliably find his or her way to work in Virginia, and vice versa.

Whether these perceptions are true or not is beside the point. The question addressed here is whether place-of-residence discrimination is legal.

At the federal level, anti-discrimination laws prohibit discrimination based on race, color, religion, sex (including pregnancy, childbirth and related medical conditions), national origin, citizenship status, age and disability, but no federal law explicitly prohibits discrimination based on place of residence. Absent specific mention of place-of-residence discrimination, the handful of cases considering the question have all ruled that federal law simply doesn't cover that form of discrimination.

In a Michigan case, for example, employees of Ford Motor Company who lived in Canada complained that the company discriminated against them by paying them in Canadian dollars. In contrast, Ford paid both its U.S. and Canadian citizens who lived in the U.S. in U.S. dollars. The Court ruled that Ford was discriminating not on the basis of citizenship – a prohibited criterion – but on the basis of residency, which is not protected by the civil rights laws.

None of the three local jurisdictions – Maryland, Virginia and the District – prohibit *employment* discrimination based on place of residence. However, under the District's Human Rights Act, place of residence is a prohibited criterion with regard to *public accommodations*, such as stores and other facilities that serve the public.

In a recent case, Diamond Cab Company was sued for allegedly discriminating against Anacostia residents. The plaintiffs' case included statistical evidence that the pickup rate per call was significantly less when the caller lived in Anacostia than when the caller lived elsewhere in the District. Based on this evidence, Judge Richard Roberts of the U.S. District Court in D.C. ruled that Diamond had violated the D.C. Human Rights Act's prohibition on place-of-residence discrimination.

The Diamond Cab Company ruling would not apply to employment, however, since place of residence is not mentioned in the employment discrimination section of the D.C. Human Rights Act.

While federal and state employment discrimination laws do not expressly prohibit employment discrimination based on residence, in a given situation it is possible that residence discrimination could be used to accomplish race or national origin discrimination. For example, if certain neighborhoods are predominantly African-American (as in the Diamond Cab Company case), Hispanic, or Asian, an employer who red-lined those neighborhoods would have a difficult time avoiding charges of race or national origin discrimination, which certainly is prohibited under federal and state law.

On the other hand, a policy of refusing to consider candidates who live beyond a specified distance from the workplace would in most instances probably not be a substitute for race or national origin discrimination, and therefore not an illegal hiring requirement.

References: 42 U.S.C. § 2000e (Title VII); Md. Code, Art. 49B, § 14; Va. Code, § 2.2-3900; D.C. Code § 2-1401; *Isley v. Ford Motor Co.*, 371 F.Supp.2d 912 (E.D.Mich. 2005); *Lloyd v. Hovensa LLC*, 243 F.Supp.2d 346 (D.V.I. 2003); *Minnis v. Much Shelist Freed Denenberg & Ament, P.C.*, 3 F.Supp.2d 877 (N.D.Ill. 1997); Mitchell v. DCX, Inc., 274 F.Supp.2d 33 (D.D.C. 2003).

Taking Care of Grandma May Qualify for FMLA Leave

The Family and Medical Leave Act (FMLA) requires covered employers to grant eligible employees up to 12 weeks of unpaid leave within a 12-month period for a serious health condition, to care for a spouse, child or parent with a serious health condition, or to care for a newborn or newly adopted child.

A recent article dealt with the meaning of "care for" – whether the leave was really to care for a sick family member, or was for some other reason. See "FMLA's 'Care For' Provision," Employer *Alerts*, Summer 2005 p. 4. This article addresses the meaning of "parent."

FMLA itself defines "parent" as "the biological parent of an employee or any individual who stood in loco parentis [in a parent's place] to an employee when the employee was a son or daughter." Department of Labor regulations go on to say:

> Persons who are 'in loco parentis' include those with day-to-day responsibilities to care for and financially support a child, or, in the case of an employee, who had such responsibility for the employee when the employee was a child. A biological or legal relationship is not necessary.

It's clear from the statute and regulations that persons other than biological (or adoptive) parents can qualify, depending on the facts in each case.

Therefore, an employer who is subject to FMLA should be careful not to automatically deny FMLA leave just because the seriously ill family member is not the employee's spouse, child or parent. Instead, the employer must explore the relationship further to determine whether the family member stood in loco parentis to the employee.

A recent case shows how this works.

Cynthia Dillon had worked for the Maryland-National Capital Park and Planning Commission (Commission) since 1989. In 2002 she requested three weeks' leave from December 12, 2002 to January 3, 2003, to take a vacation in Jamaica, where several of her relatives lived. Dillon had already purchased non-refundable airline tickets before she made the leave request. Dillon's second-level supervisor told her that a leave of three weeks during that particular time period would not be possible. Dillon renewed her request and her third-level supervisor also turned her down, but said that if Dillon would limit her request to under two weeks, from December 12 through December 20, the request would be approved.

Dillon replied to this second denial that she would have to pay a penalty on her airline tickets if she made any changes, and that one of the reasons for her request was that her grandmother was "not in the best of health." In a meeting with another Commission official, Dillon stated that she would take the requested leave regardless of whether it was approved. The official then told her that if she did so she would be absent without approved leave and subject to termination. Eventually, Dillon modified her leave request, limiting it to the December 12-20 period.

When Dillon arrived in Jamaica, she immediately visited her grandmother and learned that her grandmother had suffered a small stroke. Dillon also concluded that her grandmother's living conditions were unacceptable. On December 19 (one day before she was scheduled to return), Dillon e-mailed the Commission requesting an extension of her leave to care for her grandmother. The Commission denied the request and threatened termination.

Dillon remained in Jamaica per her original leave request, failing to return to work as instructed. On January 3, the Commission sent a letter by courier and first-class mail to Dillon's home notifying Dillon of its intent to terminate her for being absent without approved leave. In that letter the Commission informed Dillon that if she believed her absence was covered by FMLA she should submit a request for FMLA leave within five days. The letter went on: "You should explain in reasonable detail whether, and if so, when and how your grandmother actually stood in the role of your parent during childhood."

Dillon responded by claiming FMLA leave, explaining that during childhood her grandmother was instrumental in her life, that her grandmother fed her, combed her hair, took her to church, and they even slept together. A Commission supervisor later met with Dillon to explore further Dillon's relationship with her grandmother during childhood, but Dillon added nothing more of substance. On the basis of the information submitted, the Commission concluded that the grandmother had not stood in loco parentis, and it terminated Dillon.

Dillon's subsequent lawsuit came before Judge Deborah Chasanow of the U.S. District Court for Maryland. The Commission moved to dismiss Dillon's complaint, arguing that Dillon's evidence was legally insufficient to qualify the grandmother as a parent. Judge Chasanow disagreed, ruling this past August that Dillon had presented enough evidence to entitle her to a trial and that the lawsuit should go forward.

References: 29 U.S.C. § 2601 (FMLA); 29 C.F.R. § 25.100; *Dillon v. Maryland-National Capital Park & Planning Comm.*, 2005 WL 1992325 (D.Md. 2005).

Title VII as a Workplace Civility Code

In Gilbert and Sullivan's *HMS Pinafore*, Sir Joseph, First Lord of the Admiralty, counsels the captain of the Pinafore against bullying his crew and using strong language. Sir Joseph also insists that the Captain include an "if you please" in orders to his seamen.

Gilbert and Sullivan were, of course, poking fun at the genteel admirals who had never been to sea and who had no idea how to command a ship. A panel of judges on the Ninth Circuit Court of Appeals, which sits in California, seems to have missed the irony. Sounding much like Sir Joseph, the panel has now ruled that lack of workplace civility can violate Title VII's anti-discrimination provisions. One wonders whether the judges, like Sir Joseph, have stuck too close to their desks and spent precious little time at sea.

Conditions of Employment

By way of background, Title VII – the centerpiece of federal civil rights law – prohibits employers from discriminating with respect to *compensation, terms, conditions, or privileges* of employment because of race, color, religion, sex, or national origin. (Other federal laws expand the list of prohibited criteria to include age, disability and citizenship, and state and local laws expand the list even further.) To illustrate, an employer cannot refuse to hire candidates of a particular race, color, etc., and cannot offer higher wages, better benefits, or more favorable shift assignments based on these prohibited criteria.

But the phrase "compensation, terms, conditions or privileges" of employment applies to far more than just hiring, wages, benefits and shift assignments. The Equal Employment Opportunity Commission (EEOC) has long taken the view that an employee suffers discrimination when he or she is subjected to an intimidating, hostile or offensive work *environment* because of race, color, sex, etc. In its 1986 *Meritor Savings Bank v. Vinson* decision, the Supreme Court agreed that an employee who suffers harassment on account of sex has a good claim of discrimination, provided that the harassment is sufficiently severe or pervasive as to alter the conditions of the victim's employment and create an abusive workplace.

Twelve years later, in *Oncale v. Sundowner Offshore Services*, the Supreme Court considered the case of a male roustabout on an off-shore oil platform, who was sexually harassed, and even threatened with rape, by his male co-workers. The Court seemed anxious to rule that same-sex harassment is just as much a violation of Title VII as the opposite-sex harassment involved in *Meritor*. The problem with the case, however, was that there were no women employees in the workplace, and hence no evidence that the co-workers treated males differently from females. Nevertheless, the Court ruled that the roustabout had a good claim. While it assuredly makes sense to treat same-sex and opposite-sex harassment the same (so long as the harassment is *because of sex*), the Court seems to have picked the wrong case to announce that view.

Distinguishing Meritor and Oncale

Other courts have tried to restrict the breadth of these cases. In 2002 the District of Columbia Circuit ruled that a security guard who had been repeatedly harassed by two male co-workers suffered only from a workplace grudge, not discrimination. The fact that the co-workers used sexual vulgarities as part of their harassment did not convert their conduct to sex discrimination. As the Court observed, expressions that employ obscene language are commonplace in certain circles, and more often than not, when these expressions are used (particularly when uttered by men speaking to other men), their use has no connection whatsoever with the sexual acts to which they make reference.

Similarly, when a supervisor solicited sex from both a male subordinate and a female subordinate (who happened to be husband and wife), the Seventh Circuit ruled the subordinates had no Title VII claim. The Court reasoned that Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discrimination because of sex. To hold that such "equal opportunity" harassment amounts to sex discrimination would, in the Court's view, convert Title VII into a code of workplace civility.

Clearly, these judges have spent a bit of time at sea.

Ninth Circuit Decision

It's probably too late in the day to question the wisdom of treating the workplace environment as a term, condition or privilege of employment. But as the Ninth Circuit's decision shows, it's not too late to point out the conceptual anomalies, even absurdities, that can result.

Thomas Harvey was a senior official with an office of the National Education Association (NEA) in Alaska. According to some of the employees he supervised, Harvey was rude, overbearing, obnoxious, loud, vulgar and generally unpleasant. A number of female subordinates testified, for example, that he often shouted at them without provocation and publicly berated them with profanity.

While male subordinates also testified about Harvey's shouting, they generally felt they had a comfortable relationship with Harvey. Only one incident was described in which Harvey frightened a male employee by shouting at him while inches from his face.

Significantly, none of Harvey's conduct was of a sexual nature and at no time did Harvey seek to have sex with any of his subordinates, male or female.

On these facts, the Alaska district court dismissed a suit for sex discrimination brought by the EEOC on behalf of female employees of NEA, ruling that Harvey's conduct was not discriminatory. On appeal, the Ninth Circuit reversed and sent the case back for trial. The Ninth Circuit ruled that the female employees should have a chance to prove that Harvey actually did treat female employees differently from male employees. But, said the Court, even if male and female employees were being treated the same, a reasonable woman may well have a more negative reaction than her male counterpart to Harvey's conduct. In the Court's words:

> We now hold that evidence of *differences in subjective effects* ... is relevant to determining whether or not men and women are treated differently, even where the conduct is not facially sex- or gender-specific [emphasis added].

In other words, according to the Court, because women by nature may feel more intimidated or threatened than men by a supervisor's obnoxious behavior, even when that behavior is directed equally at all employees, women enjoy less desirable working conditions and they therefore suffer sex discrimination. By focusing on supposedly different sensibilities in men and women, the Court seems to have grounded its decision on one of the stereotypes Title VII was designed to overcome.

The Court did not explain how the NEA might have avoided liability in the case. What is clear, however, is that if the Ninth Circuit's view prevails, employers will be policing the workplace not only for discrimination, but also for bullying and rough language. In the process, they will undoubtedly be lacing their directives with an "if you please." Sir Joseph would be proud.

References: 42 U.S.C. § 2000e (Title VII); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998); *Davis v. Coastal Int'l Security, Inc.*, 275 F.3d 1119 (D.C.Cir. 2002); *Holman v. Indiana*, 211 F.3d 399 (7th Cir. 2000), cert. denied, 531 U.S. 880 (2000); *EEOC v. National Edu. Ass'n*, 2005 WL 2106164 (9th Cir. 2005).

Illegal Aliens Entitled to Maryland Workers' Comp Benefits

Maryland has now joined with a number of other states in allowing an undocumented alien to recover workers' compensation benefits, even though his injury occurred while he was working illegally in the U.S. The Maryland Court of Appeals (Maryland's highest court) was unpersuaded by the employer's argument that a 2002 Supreme Court decision controlled the outcome. In the 2002 case, the Supreme Court ruled that an undocumented worker who was fired for protected union activity could not recover back pay, since an award of back pay would undercut the purposes of the Immigration Reform and Control Act (IRCA).

In the Maryland case, Diego Lagos, an employee of Design Kitchen & Baths, was injured while using a saw. He applied for workers' comp benefits and, during the course of those proceedings, he admitted that he did not have a social security number. Since the IRCA requires aliens to possess valid social security cards in order to work, Lagos's employment was illegal.

The employer contested awarding benefits. The employer argued that Maryland's workers' comp statute only covers individuals who are working "under an express or implied contract of hire," but here, any contract between Lagos and Design Kitchen & Baths would violate the IRCA and would therefore be illegal and void. The Court of Appeals never really answered that argument, simply concluding that the statutory language was unambiguous and that Lagos clearly qualified under the statute.

Several years ago the Virginia Supreme Court concluded that an illegal alien was not entitled to workers' compensation benefits in that state. But the Virginia legislature overruled the court, amending the statute to allow recovery by undocumented workers.

The District of Columbia courts have apparently not had occasion to rule on the question.

References: Md. Code, L&E § 9-101(Workers' Compensation Act); 8 U.S.C. § 1324 (Immigration Reform and Control Act); *Design Kitchen & Baths v. Lagos*, 2005 WL 2179187 (Md. 2005); *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002); *Granados v. Windson Devel. Co.*, 509 S.E.2d 290 (Va. 1999); *Rios v. Ryan*, 542 S.E.2d 790 (Va.App. 2001).

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OPPENHEIMER, FLEISCHER & QUIGGLE, P.C.

BY CHARLES H. FLEISCHER, ESQ.

Surveillance of Employee on FMLA Leave Upheld

Retaliating against an employee for taking leave under the Family and Medical Leave Act is, of course, illegal. But FMLA does not prohibit an employer from taking action it would have taken anyway, regardless of FMLA leave. For example, an employer may discipline an employee who is on FMLA leave for misconduct committed prior to the leave. See "Disciplinary Action Against Employee on FMLA Leave," EMPLOYER ALERTS, May 2001, p. 4. And an employer may fire an employee who, while on FMLA leave, violates company policy by working another job. See "Firing for Misconduct Upheld Despite FMLA Leave," EMPLOYER ALERTS, May 2003, p. 2.

In other words, FMLA does not offer a protective shield against employer actions unrelated to FMLA. A recent case in Maine illustrates this point.

After almost three years of satisfactory work, Brian Colburn began experiencing severe migraines, necessitating intermittent leave under FLMA. At one point he filed an application for short-term disability benefits, stating that he was unable to perform any activities, including driving.

Colburn's employer became suspicious when Colburn failed to follow through on his disability application by submitting necessary medical records. Suspicion deepened when Colburn was supposedly on sick leave but could not be reached at home. So the company hired an investigator to tail him.

On a day Colburn called in sick, the investigator videotaped him driving from his home to a gym in workout clothes and later going shopping. On another occasion when Colburn was supposedly out sick, the he again visited his gym and ran a variety of errands.

Upon getting the investigator's report, the company fired Colburn. At the time, Colburn had not exhausted his FMLA leave.

Colburn sued, claiming that his termination was in retaliation for taking FMLA leave. His employer countered that the firing was for falsifying his reason for being absent. The issue before the Court was whether Colburn could show the employer's stated reason was merely a pretext and that the real reason was tied to Colburn's taking FMLA leave. In attempting to show pretext, Colburn argued that placing him under surveillance was an extraordinary step for an employer to take.

The Court rejected Colburn's argument. The Court ruled that the employer had legitimate reason to be suspicious, and when those suspicions proved well-founded, it certainly had a basis to fire him.

References: 29 U.S.C. § 2601; *Colburn v. Parker Hannifin Corp.*, 429 F.3d 325 (1st Cir. 2005).

Exempt Employees and Weather-Related Absences

Weather-related absences pose a number of problems for employers, particularly in the Washington area where snow, or even just the threat of snow, seems to paralyze the entire region. When a few inches have fallen during the night and more is predicted, should the employer close the office? Or insist that employees try to make it in? If the office remains open, and some employees make it in, how should the absent employees be treated? Should they be paid? Charged with annual leave? Or simply docked?

The pay question is particularly pertinent for exempt employees, where improper pay policies could result in loss of the exemption. (Non-exempt, hourly workers do not present the same problem, since they normally are paid only for time actually worked).

Under the Fair Labor Standards Act and U.S. Department of Labor regulations, employers need not pay overtime to exempt employees. In order for an employee to qualify as an exempt executive, administrator or professional – the so-called white collar exemptions – the employee in most instances must be salaried. An employee is generally not considered salaried if his or her pay is docked for absences of less than one full week. However, an employer may dock the pay of an exempt employee for full-day absences for *personal reasons* without jeopardizing the employee's exempt status.

A recent Department of Labor opinion concludes that absences for weather-related or other emergencies are for personal reasons *if* the employer is otherwise open for business. The employer may therefore dock the pay of exempt employees who cannot or will not risk snowy roads for the sake of work.

DOL cautions that if the employer decides to close because of the emergency, then the employee's absence is not for personal reasons but is for the employer's convenience. In that case, docking an exempt employee's pay risks loss of the exemption. DOL also cautions that pay can only be docked in full-day increments. For example, if an exempt employee takes off 1½ days because of an ice storm, only one full day of pay may be withheld.

References: 29 U.S.C. § 201; 29 C.F.R. § 541.0; DOL Opinion Letter No. FLSA2005-46 (Oct. 28, 2005).

Confidentiality Clause May Violate Federal Labor Law

The National Labor Relations Board has ruled that confidentiality clauses, such as provisions in employee handbooks and employment contracts that prohibit employees from disclosing internal business information and trade secrets, may violate federal labor law. The Board based its decision on provisions of the National Labor Relations Act, which gives employees – even non-union employees and employees in non-union shops – the right to engage in concerted activity. This includes the right to negotiate wages, hours and other terms and conditions of employment free from interference or restraint by the employer. See "Labor Law Protections in Non-Union Shops," Employer Alerts, Feb. 2002, p. 6, and "Unfair Labor Practice Update," Employer Alerts, Aug. 2002, p. 4.

Employer's Business Judgment Trumps Workplace Claims

Claiming their rights were being chilled by provisions in Cintas Corporation's employee handbook, employees of Cintas filed charges against the company. The provision at issue was relatively innocuous. It stated:

> We [Cintas] honor confidentiality. We recognize and protect the confidentiality of information concerning the company, its business plans, its partners [Cintas's term for employees], new business efforts, customers, accounting and financial matters.

The handbook went on to say that disciplinary action could result from violating a confidence or the unauthorized release of confidential information.

Concluding that Cintas employees could reasonably construe the provision as restricting their right to discuss their wages and terms and conditions of employment, the Board found Cintas guilty of an unfair labor practice.

As a result of this decision, employers now need to take a careful look at their handbooks and employment contracts to be sure their confidentiality provisions are consistent with the Board's ruling. It would also be a good idea to add a disclaimer along the following lines:

> Nothing in this handbook is intended to interfere with or restrain any employee's rights under the federal labor laws, including the right to engage in concerted activity and the right to discuss wages, hours, and other terms and conditions of employment with other employees and non-employees.

Needless to say, a handbook provision that explicitly prohibits employees from discussing wages or other terms or conditions of employment violates federal labor law.

References: 29 U.S.C. § 151; *Cintas Corp.*, 344 NLRB No. 118 (2005).

In a refreshing pair of cases, the U.S. Court of Appeals for the Eighth Circuit, headquartered in St. Louis, has upheld the employer's right to make reasonable business decisions concerning its employees without interference from the courts.

Grabovac v. Allstate

In 1999 Allstate Insurance Company developed Allstate Financial Services, or AFS, to sell variable life and annuity products. Because these products are considered securities, AFS had to register as a broker-dealer with the National Association of Securities Dealers (NASD), and comply with NASD rules applicable to broker-dealers. Under one NASD rule, any employee of a broker-dealer who sells variable products, or who manages or supervises persons who sell such products, must also register with NASD.

Patricia Grabovac worked for AFS. Since her job involved managing other employees who sold variable products, she had to register with NASD. To do that, she had to pass certain NASD examinations. Allstate gave Grabovac and others in similar positions until October 31, 2001 to pass the exams and get registered.

As of January 2001, most employees holding positions similar to Grabovac's had passed the exams, but Grabovac and a few others had not. Allstate sent out reminder letters on January 30, which included the warning that those who had not met the October 31 deadline "may be offered another position for which they are qualified, if available. Otherwise, their employment will be terminated."

On April 13, an Allstate human resources manager sent Grabovac an e-mail, again reminding her about the deadline. The e-mail pointed out that Grabovac had failed one of the exams twice and that if she retook the exam after April and failed it a third time, NASD would not allow her to take it again until after October 31. Additional written reminders were sent to Grabovac on September 27 and October 1, which included the further warning that failure to meet the deadline would result in termination of employment.

Grabovac passed one of the required exams before the deadline, but she failed another exam on October 30. She was terminated in November and was replaced by a male.

Grabovac sued Allstate, claiming sex discrimination. She lost at trial and she lost again on appeal. The appellate court ruled that Allstate was entitled to choose a deadline for compliance and to enforce it by termination, if necessary. It is well-established, said the Court, that

> the employment discrimination laws have not vested in the federal courts the authority to sit as super-personnel departments reviewing the wisdom or fairness of the business judgments made by employers, except to the extent those judgments involve intentional discrimination.

Johnson v. U.S. Bancorp

U.S. Bancorp was involved in merger negotiations with another company. In an effort to retain valued employees in the face of uncertainty caused by the possible merger, U.S. Bancorp adopted a severance plan. The plan provided that employees who were terminated without cause within 24 months of the merger would be eligible for up to 104 weeks of salary. Employees who were terminated for cause would not receive any severance under the plan. The plan was administered by a company committee, which had full discretionary authority to decide all questions concerning eligibility for benefits.

Nancy Johnson, a long-time employee of U.S. Bancorp, was fired in April 2002 after viewing computer files in a folder maintained by her supervisor. Johnson admitted that she had no business reason for accessing the particular files. In firing her, the company cited its policies on computer security, including a policy directing employees to "ensure that all of your computer access is on a need-to-know basis and is limited to information required to perform your job."

The company also gave her a notice citing unethical conduct, and stating that her termination was for cause within the meaning of the severance pay plan, thereby making her ineligible for severance pay.

Despite receiving the notice, Johnson applied for benefits under the plan. When her application was rejected, she brought suit under the Employee Retirement Income Security Act.

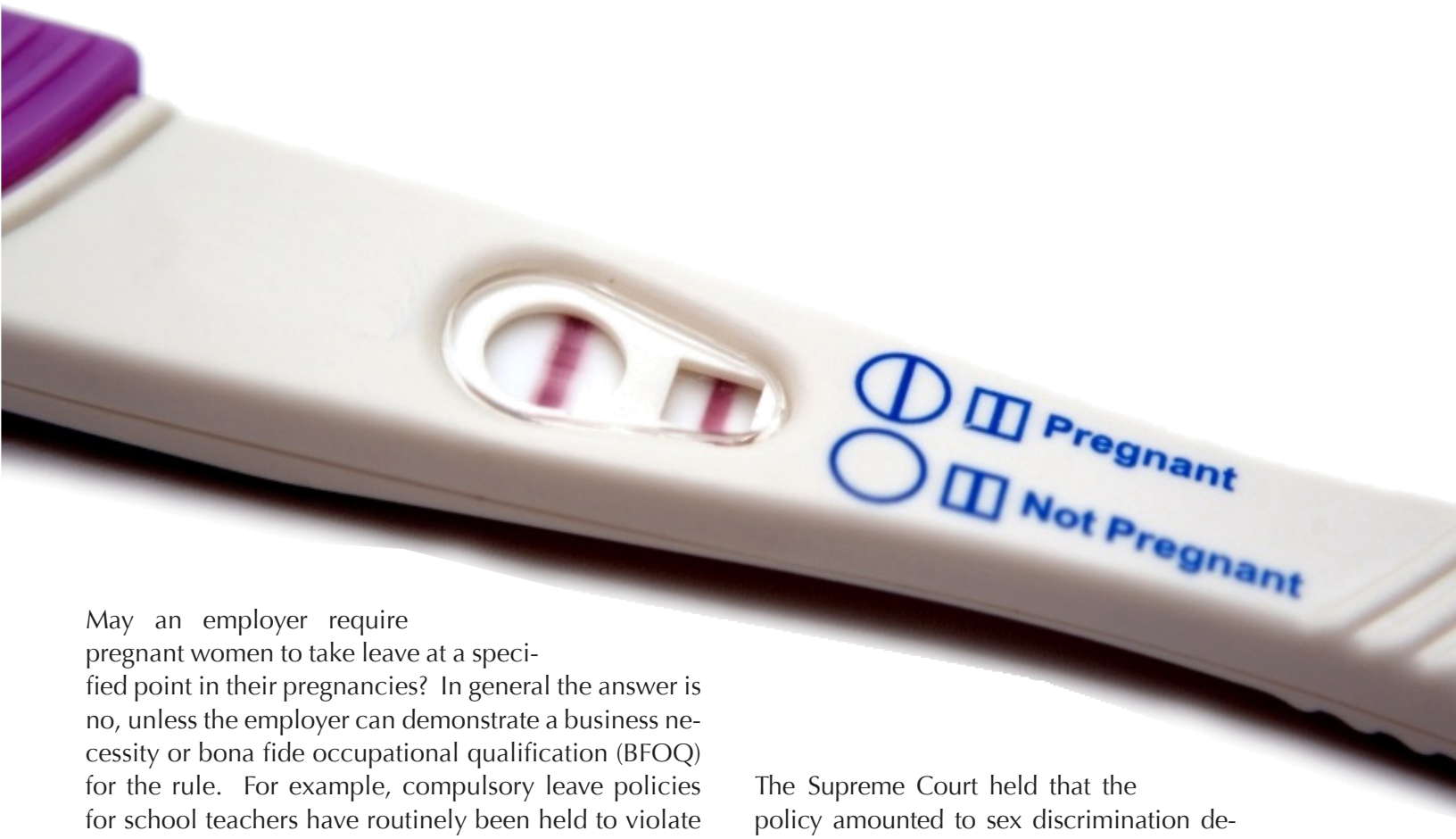
The Court of Appeals ruled that the plan committee could grant or deny benefits so long as it acted reasonably and not arbitrarily. Here, said the Court, the committee did just that in concluding that Johnson was terminated for cause. As a result, Johnson was not entitled to severance.

References: *Grabovac v. Allstate Ins. Co.*, 426 F.3d 951 (8th Cir. 2005); *Johnson v. U.S. Bancorp*, 424 F.3d 734 (8th Cir. 2005).

Pregnancy Discrimination

Title VII of the federal Civil Rights Act, enacted in 1964, prohibits (among other things) discrimination because of sex. In 1978 Congress amended Title VII by passing the Pregnancy Discrimination Act (PDA), which expands the definition of the term "because of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions." The PDA goes on to require that women affected by pregnancy, childbirth or related medical conditions be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.

Under the PDA, an employer cannot refuse to hire a pregnant woman or a woman of child-bearing age because of her pregnancy status. Nor may an employer have special rules for pregnant women. For example, sick leave must be available to pregnant women on the same basis as it is to others. Similarly, employers who have health or disability insurance plans must cover pregnancy-related expenses and disabilities the same as other medical expenses and disabilities.



May an employer require pregnant women to take leave at a specified point in their pregnancies? In general the answer is no, unless the employer can demonstrate a business necessity or bona fide occupational qualification (BFOQ) for the rule. For example, compulsory leave policies for school teachers have routinely been held to violate Title VII. On the other hand, cases involving the airline industry have held that mandatory maternity leave for flight attendants was justified by passenger safety considerations. A police department in California was also permitted to place a pregnant policewoman on sick leave despite her request for light duty, the court saying that the city's denial of light duty for her was no different from its treatment of temporarily disabled male officers.

An important Supreme Court case, known as Johnson Controls, involved the use of lead in battery manufacturing. Lead poses substantial health risks, including risks to fetuses carried by pregnant women who are exposed to the substance. When the manufacturing company discovered high lead levels in the blood of a number of its pregnant employees, the company adopted a policy barring all women of child-bearing age from jobs involving exposure to lead unless they could document that they were incapable of having children.

The Supreme Court held that the policy amounted to sex discrimination despite the company's benign motives. The Court said that the policy could not be justified as a BFOQ, since there was no evidence that pregnant women were less able than others to manufacture batteries. The Court concluded that the question of fetal safety should be for the mother, not the company, to decide, and it dismissed as only a remote possibility the company's fear of suit by children with birth defects attributed to fetal lead exposure.

What if an employer refuses to grant special leave to a pregnant woman and fires her when she becomes temporarily unable to perform her job? The Equal Employment Opportunity Commission takes the position that since pregnancy and childbirth are conditions unique to women, termination of a pregnant employee may amount to sex discrimination:

> Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act [Title VII] if it has a disparate impact on employees of one sex and is not justified by business necessity.

Suppose that an employer, in an effort to comply with EEOC Guidelines, adopts a maternity leave policy which allows a maximum of two months' leave. Is that policy acceptable? No, according to at least one federal court. In that case the court observed that the employer had two leave policies applicable to temporary disabilities – one policy applied only to pregnant women, requiring them to return to work within a fixed time period, while the other policy applied to everyone else, requiring a return to work only upon recovery from the disability. A rigid disability leave policy for pregnancy or childbirth, but a flexible policy for all other temporary disabilities, is discriminatory.

To summarize, follow these basic rules to avoid claims of pregnancy discrimination:

- Do not discriminate against women because they are pregnant or may become pregnant, with respect to hiring, firing, pay, job assignments, or other terms, conditions or privileges of employment;

- Treat pregnancy, childbirth and related medical conditions the same as any other short-term disability; and

- Be flexible, consistent with business necessity, in allowing time off or assigning light duty in connection with pregnancy, childbirth, and related medical conditions.

This last point deserves more discussion. If a pregnant employee or new mother needs time off for medical reasons and the employee has exhausted all available leave, the employer needs to consider leave without pay. And if the employee's work simply cannot go undone during her absence, the employer needs to consider hiring a temporary replacement or spreading the workload among other employees. Only when no other option is reasonably available should the employer consider hiring a permanent replacement.

The PDA is not, of course, the only law affecting a pregnant employee's rights or an employer's duties. The Family and Medical Leave Act requires covered employers (employers with 50 or more employees) to grant up to 12 weeks of unpaid leave to eligible employees (employees who have worked at least 1250 hours during the past year and who have not otherwise exhausted their FMLA leave) to care for a newborn and for a serious health condition. While pregnancy itself is generally not considered a serious health condition, complications of pregnancy and being incapacitated from pregnancy may qualify for FMLA leave.

References: 42 U.S.C. § 2000e; 29 C.F.R. § 1604.10; *Levin v. Delta Air Lines, Inc.*, 730 F.2d 994 (5th Cir. 1984); *Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Wetzel v. Liberty Mut. Ins. Co.*, 511 F.2d 199 (1975).

DOL Issues Final USERRA Regs

The Uniformed Services Employment and Reemployment Rights Act (USERRA) provides that while an individual is performing military service, he or she is deemed to be on a furlough or leave of absence and is entitled to be re-employed on return from service. The law also includes a so-called escalator principle requiring re-employment in the job the service member would have had had the service member not been absent for military service. If the service member is not qualified for the escalated position, the employer must make reasonable efforts to help him or her qualify for the position. See "Job Rights of Employees Called to Active Duty," Employer Alerts, Nov. 2001, p. 1.

The U.S. Department of Labor has now issued final regulations under USERRA, available at the Department's website, along with additional explanatory information. Go to:

http://www.dol.gov/vets/programs/userra

References: 38 U.S.C. § 4301; 20 C.F.R. § 1002; 70 F.R. 242 (Dec. 19, 2005).

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OPPENHEIMER, FLEISCHER & QUIGGLE, P.C.
BY CHARLES H. FLEISCHER, ESQ.

Employer Liability for Intentional Employee Misconduct

As a matter of social policy, the law has long held employers liable to pay damages suffered by third parties due to an employee's *unintentional* but careless conduct that occurs within the scope of the employee's employment. (The term "third party" as used here means someone outside the employment relationship, such as a customer or innocent bystander.) This type of indirect or vicarious liability to third parties is based on the legal doctrine known as *respondeat superior*, or "let the employer respond" (by paying damages). It doesn't matter that employer itself is guiltless or even that the employee was acting contrary to the express instructions of his employer when the careless conduct occurred.

A careless employee is, of course, *directly* liable for the injuries he causes. But the employee will often lack the financial resources to fully compensate the victim. So the law concludes that, as between the employer and the innocent victim, the employer should bear the loss. This policy also has the effect of encouraging employers – who, after all, have the right to control their employees' workplace conduct – to make and enforce safety standards and to assess whatever risks are involved in the particular business and carry appropriate insurance.

An essential requirement to the imposition of vicarious liability is that the employee be acting within the *scope of his employment*. The acting-within-the-scope requirement depends on a number of factors, such as:

- Was the conduct that caused the injury the kind of conduct the employee was hired to perform?
- Did the conduct occur during a period and in a locality reasonably connected with the employee's duties?
- Was the conduct motivated, at least in part, by a purpose to serve the employer?

Examples of vicarious employer liability abound – from the trucking company whose driver runs a red light and strikes a pedestrian, to the supermarket whose produce manager fails to mop a wet floor resulting in a shopper's slip-and-fall injury, to the restaurant whose waiter spills hot coffee on a diner.

These examples presumably involve accidental, unintentional mistakes. However, when an employee *intentionally* causes injury to a third party, the employee is usually acting for his own purposes and not in furtherance of the employer's business. In that case, the social policy behind the imposition of vicarious liability would seem to have no place.

Most courts reach just that result, as shown by two recent cases involving road rage and theft. However, a third case reaches a troubling result in holding an employer potentially liable for failing to curb its employee's pursuit of child porn.

Road Rage – *Kephart v. Genuity, Inc.*

Witness accounts differ, but in general it appears that Duncan Graham was tailgating the five-member Kephart family on Interstate 205 in California. Each time the Kepharts changed lanes in an effort to avoid Graham, Graham changed lanes as well and continued to tailgate in an aggressive manner. Eventually, Graham pulled along side the Kepharts' automobile, forcing it off the road. The Kepharts' auto rolled, injuring the family and leaving Mrs. Kephart a quadriplegic.

Graham pled guilty to a felony of failing to stop after being involved in an accident resulting in injury. Graham also reached a financial settlement with the Kepharts and was dismissed from their civil law suit. But the Kepharts were not satisfied and sued Graham's employer, Genuity, Inc., for whom Graham worked as an internet systems engineer.

Among Graham's job duties was attending training sessions at Genuity's headquarters in Boston. At the time of the accident, Graham had his suitcase, briefcase and laptop computer in his car and he was running errands – going to the bank and picking up bottled water – in preparation for a red-eye flight that night from San Francisco to Boston.

The Kepharts' suit against Genuity was heard by a jury, which returned a verdict in favor of Genuity. The Kepharts argued to the trial court that the facts clearly favored vicarious liability and that the judge should have ruled in their favor without submitting the case to the jury.

An intermediate appellate court in California upheld the jury verdict in favor of Genuity. The appeals court said that nothing in the evidence suggests Graham's attack was somehow motivated by an intent to serve Genuity's interests. Rather, the evidence supports the jury's finding that Graham was motivated entirely by personal malice or compulsion.

Theft – *Schecter v. Merchants Home Delivery, Inc.*

A similar result was reached by the District of Columbia Court of Appeals in *Schecter v. Merchants Home Delivery*. In that case, Molly Schecter bought a washing machine from Circuit City. Circuit City contracted out delivery of the machine to Merchants Home Delivery (MHD), which in turn engaged Alan Young and Jason Brown to make the actual delivery.

After Young and Brown had installed the new machine and removed Schecter's old one, Schecter discovered that her dresser drawer had been disturbed and various pieces of jewelry and cash were missing. The police were called and they confronted Young and Brown, who admitted to the theft. Unfortunately, Schecter was able to recover only a portion of the missing items from Young and Brown. So she sued MHD on a theory of vicarious liability for the value of the unrecovered pieces.

In considering the case, the appeals court first set out the principle that conduct is within the scope of employment only if the employee is actuated to some extent by an intent to serve his employer. Therefore, an employer will not be held liable for an employee's willful actions if they are intended only to further the employee's own interests and not done for the employer at all.

Applying this principle, the appeals court ruled for MHD and against Schecter. Young's and Brown's theft was, said the court, effected solely for their personal benefit and not at all for the benefit of MHD.

Child Porn – *Doe v. XYC Corp.*

In contrast to the *Gephart and Schecter* cases, a recent decision by an intermediate appellate court in New Jersey ruled that an employer could be held liable for injuries suffered by the employee's minor step-daughter, based on the employer's knowledge that the employee surfed child porn sites on his office computer.

"Employee" worked for XYC Corp. as an accountant. (The court's opinion does not name the individuals involved, referring to them as "Employee," "Jane Doe" and "Jill Doe." Jane was Employee's wife and Jill was Employee's 10-year-old step-daughter.)

The company had an announced policy that all e-mail sent or received via company computers belonged to the company. The company also had the capacity to electronically monitor all internet and e-mail activity, although it did not actually do so. Instead, the company became aware from reports of co-workers that Employee regularly visited pornography sites from his office computer, including sites featuring bestiality and necrophilia and a site that appeared to involve children. Despite being asked by the company to cease his surfing practice, Employee continued to visit porn sites, yet management took no further action. Management was also aware of Employee's family relationships as a result of Employee's attendance with Jane and Jill at company functions.

Employee was eventually arrested on child pornography charges, although the court's opinion does not indicate what prompted the arrest. Evidence developed in connection with Employee's arrest showed that, in addition to surfing porn websites at work, Employee had been secretly videotaping Jill in nude and semi-nude positions at home. Employee transmitted some of these photographs via company e-mail to a child porn site.

Jane sued the company on behalf of herself and Jill, claiming that the company had a duty to monitor and report Employee's illegal web-surfing activities and that its failure to do so resulted in harm to Jane and Jill. The court agreed. The court pointed out that it is a crime, both state and federal, to possess or view child pornography.

From that observation, the court made an extraordinary leap to the conclusion that the employer had a duty to report Employee's activities to the proper authority and to take effective internal action to stop the activities.

The Court said:

> We hold that an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and to take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third-parties.

In other words, since the employer in this case had the *capacity* to police Employee's illegal conduct, it therefore had the *duty* to do so.

References: *Kephart v. Genuity, Inc.*, 38 Cal.Rptr. 3d 845 (Cal.App. 2006); *Schecter v. Merchants Home Delivery, Inc.*, 2006 WL 300433 (D.C. 2006); *Doe v. XYC Corp.*, 887 A.2d 1156 (N.J.App.Div. 2005).

Md. District Court Upholds Leave Cash-Out Policy

On December 13, 2005, Judge Hassan A. El-Amin of the Prince George's County District Court ruled that an employer policy of not cashing out accrued leave on termination does not violate the Maryland Wage Payment and Collection Law.

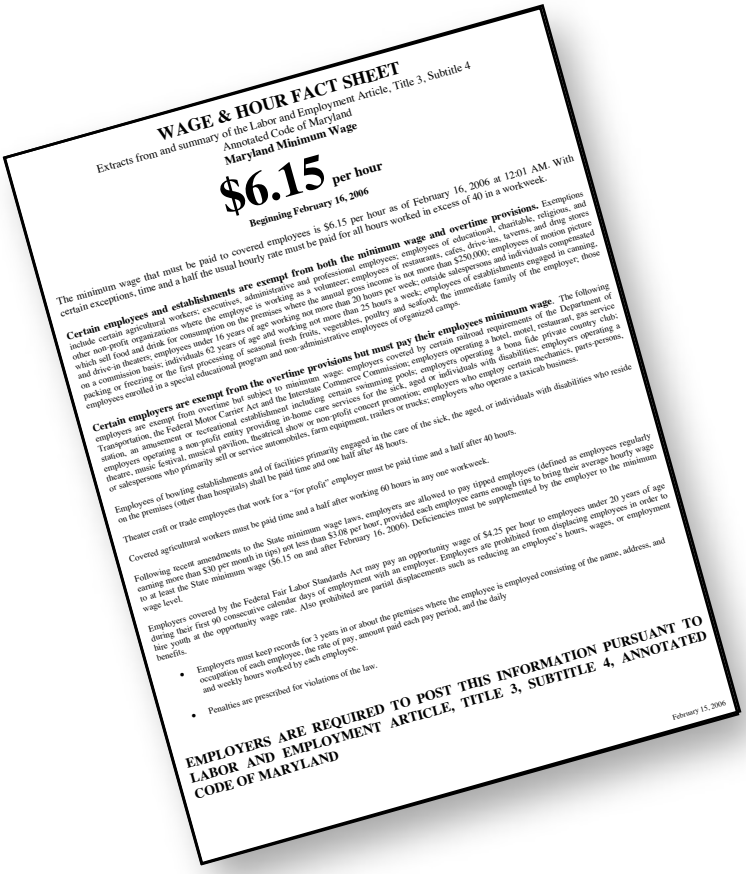
The employer in the case had a general policy of cashing out accrued leave. However, the policy required employees to give advance notice of termination (four weeks for exempt employees and two weeks for non-exempt employees), and it provided that accrued leave would be forfeited on failure to give the requisite notice. The policy was contained in the employer's personnel handbook, which the employer distributed to all employees.

The employee in the case quit without giving notice and therefore did not receive cash for her accrued leave. The employee sued under the Maryland Wage Payment and Collection Law, claiming treble damages and attorneys fees. On stipulated facts, the Court upheld the employer's policy and ruled against the employee. The Court based its decision in part on the statutory definition of "wages" which, said the Court, does not include vacation. The Court also relied on a 1997 decision by the U.S. District Court in Maryland of *Rhodes v. Federal Deposit Ins. Corp.*

The ruling is consistent with the views of the Division of Labor and Industry of the Maryland Department of Labor, Licensing and Regulation. See *http://www.dllr.state.md.us/labor/wagepay.*

In a 1981 decision of *National Rifle Assn. v. Ailes*, the District of Columbia Court of Appeals reached the same conclusion in interpreting the District's wage and hour laws.

References: Md. Code, L&E § 3-501, et seq.; *Miller v. Ardmore Enterprises, Inc.*, Dist. Ct. Pr. Geo. Cnty. Md. No. 31515-2005 (Dec. 13, 2005); *Rhodes v. Federal Deposit Ins. Corp.*, 956 F.Supp. 1239 (D.Md. 1997); *National Rifle Assn. v. Ailes*, 428 A.2d 816 (D.C. 1981).



WAGE & HOUR FACT SHEET

Extracts from and summary of the Labor and Employment Article, Title 3, Subtitle 4 Annotated Code of Maryland

Maryland Minimum Wage

$6.15 per hour

Beginning February 16, 2006

The minimum wage that must be paid to covered employees is $6.15 per hour as of February 16, 2006 at 12:01 AM. With certain exceptions, time and a half the usual hourly rate must be paid for all hours worked in excess of 40 in a workweek.

Certain employees and establishments are exempt from both the minimum wage and overtime provisions. Exemptions include certain agricultural workers; executives, administrative and professional employees; employees of educational, charitable, religious, and other non-profit organizations where the employee is working as a volunteer; employees of restaurants, cafes, drive-ins, taverns, and drug stores which sell food and drink for consumption on the premises where the annual gross income is not more than $250,000; employees of motion picture and drive-in theaters; employees under 16 years of age working not more than 25 hours a week; outside salespersons and individuals compensated on a commission basis; individuals 62 years of age and working not more than 20 hours per week; employees of establishments engaged in canning, packing or freezing or the first processing of seasonal fresh fruits, vegetables, poultry and seafood; the immediate family of the employer; those employees enrolled in a special educational program and non-administrative employees of organized camps.

Certain employers are exempt from the overtime provisions but must pay their employees minimum wage. The following employers are exempt from overtime but subject to minimum wage: employers covered by certain railroad requirements of the Department of Transportation, the Federal Motor Carrier Act and the Interstate Commerce Commission; employers operating a hotel, motel, restaurant, gas service station, an amusement or recreational establishment including certain swimming pools; employers operating a bona fide private country club; employers operating a non-profit entity providing in-home care services for the sick, aged or individuals with disabilities; employers operating a theatre, music festival, musical pavilion, theatrical show or non-profit concert promotion; employers operating a boat; bona fide employers operating a farm equipment, trailers or trucks; employers who operate certain mechanics, parts-persons, or salespersons who primarily sell or service automobiles, farm equipment, trailers or trucks; employers who operate a taxicab business.

Employees of bowling establishments and of facilities primarily engaged in the care of the sick, the aged, or individuals with disabilities who reside on the premises (other than hospitals) shall be paid time and one half after 48 hours.

Theater craft or trade employees that work for a "for profit" employer must be paid time and a half after working 60 hours in any one workweek.

Covered agricultural workers must be paid time and a half after working 60 hours in any one workweek.

Following recent amendments to the State minimum wage laws, employers are allowed to pay tipped employees (defined as employees regularly earning more than $30 per month in tips) not less than $3.08 per hour, provided each employee earns enough tips to bring their average hourly wage to at least the State minimum wage ($6.15 on and after February 16, 2006). Deficiencies must be supplemented by the employer to the minimum wage level.

Employers covered by the Federal Fair Labor Standards Act may pay an opportunity wage of $4.25 per hour to employees under 20 years of age during their first 90 consecutive calendar days of employment with an employer. Employers are prohibited from displacing employees in order to hire youth at the opportunity wage rate. Also prohibited are partial displacements such as reducing an employee's hours, wages, or employment benefits.

- Employers must keep records for 3 years in or about the premises where the employee is employed consisting of the name, address, and occupation of each employee, the rate of pay, amount paid each pay period, and the daily and weekly hours worked by each employee.
- Penalties are prescribed for violations of the law.

EMPLOYERS ARE REQUIRED TO POST THIS INFORMATION PURSUANT TO LABOR AND EMPLOYMENT ARTICLE, TITLE 3, SUBTITLE 4, ANNOTATED CODE OF MARYLAND

February 15, 2006

Md. Legislature Approves $6.15 Minimum Wage

Overriding Governor Erlich's veto, the Maryland General Assembly has increased the state's minimum wage to $6.15 per hour. The new measure went into effect on February 16, 2006. At the same time, the General Assembly increased to $3.07 the amount of tips an employer may credit against its minimum wage obligation for tipped employees such as restaurant wait staff.

The new Maryland minimum is $1.00 higher than the federal minimum, which has been fixed at $5.15 since 1997.

For Maryland employers, this also means that their required workplace posters are out of date. The new poster is available from the Department of Labor, Licensing and Regulation at:

http://www.dllr.state.md.us/forms/mdminwage2006.pdf

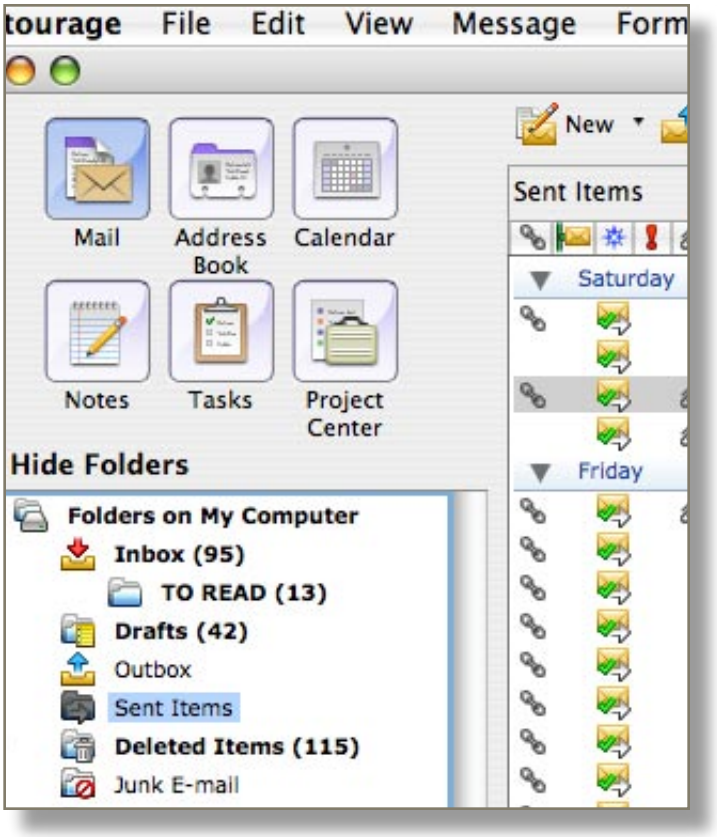
In his May 2005 veto message, the Governor said:

> Given our close proximity to Pennsylvania, Virginia, and West Virginia, all of which still follow the federal wage rate, the State of Maryland would be at a competitive disadvantage when competing to attract and retain businesses. Likewise, Maryland employers would have higher labor costs than in neighboring states and would be at a significant competitive disadvantage when competing for new business.

The January 2006 veto override vote was 91 to 48 in the House of Delegates and 30 to 17 in the Senate.

The District of Columbia's minimum wage is $7.00, effective January 1, 2006. Virginia law requires employers to pay only the federal rate of $5.15.

Reference: Md. HB 391 (2005 Sess.), amending Md. Code, L&E §§ 3-413 and 3-419; Va. Code § 40.1-28.8; D.C. Code § 32-1001.



Court Sanctions Employer for Failure to Preserve Evidence

With the explosion of employment-related law suits, just about every organization can expect to get sued, sooner or later, by a disgruntled employee. Once a suit is pending, a process known as discovery begins, during which the employee's attorney can require the employer to answer written questions under oath, to furnish personnel files and a variety of other documents, and to attend depositions at which the attorney takes testimony for use at trial.

It goes without saying that when an employer receives a formal request for documents from opposing counsel, the employer cannot simply destroy the documents and then claim they do not exist. (Whether or not the employer actually has to produce all the requested documents is another issue, but destruction is not an option.)

The duty to preserve evidence begins, however, long before receipt of a formal request. The courts have generally taken the view that a party has a duty to preserve evidence when the party is on notice that the evidence is relevant to *pending litigation* or when the party should have known that the evidence may be relevant to *future litigation*. Destruction of evidence in these circumstances, known as *spoliation*, can expose the party to significant court-ordered sanctions, as illustrated in a recent decision by Judge Andre Davis of the Maryland federal district court in Greenbelt.

Dino Broccoli, who worked for Echostar Communications, claimed that Echostar's human resources administrator, Stacie Andersen, had sexually harassed him. He testified that he repeatedly complained about this to his supervisors and his supervisors in turn testified that they forwarded those complaints to their superiors, both orally and by e-mail.

Broccoli was eventually fired. On the day of his termination, he handed a written statement to Andersen accusing her of arranging his termination in retaliation for rebuffing her advances and in retaliation for his complaints. Andersen admitted receiving the statement, saying she forwarded it to upper management.

Given all this testimony, one would expect that Echostar would have a considerable file on Broccoli, his complaints, the handling of his complaints, and his termination. Not so. Under Echostar's "document retention" policy, the e-mail system automatically transferred all items in a user's "Sent Items" folder over seven days old to the user's "Deleted Items" folder; all items in a user's "Deleted Items" folder over 14 days older were in turn automatically purged from the system. Further, all electronic files of a former employee were automatically deleted 30 days after the employee's departure. No backups of any kind were kept.

The Court commented that Echostar's policy was "extraordinary" but might be defensible under normal business circumstances. Here, however, Echostar should have anticipated possible litigation when Broccoli first complained to his supervisors about Andersen's harassment. At that point, said the Court, Echostar should have issued a company-wide instruction suspending its policy in order to preserve evidence likely to be relevant to foreseeable litigation.

As a sanction against Echostar's spoilation, the Court awarded Broccoli more than $16,000 in attorneys' fees.

Just last year, the Supreme Court reviewed Arthur Andersen LLP's criminal conviction for obstruction of justice based on Andersen's instruction to its employees to destroy Enron documents in accordance with Andersen's document retention policy. Although the Supreme Court reversed Andersen's conviction, it did so on the narrow ground that the prosecutor had not proved a corrupt intent. (No such proof of corrupt intent is required in a civil case in which spoliation sanctions are sought.) Unfortunately, by the time of the Supreme Court's ruling Andersen had been largely disbanded.

Reference: *Broccoli v. Echostar Communications Corp.*, 229 F.R.D. 506 (D.Md. 2005); *Arthur Andersen LLP v. U.S.*, 125 S.Ct. 2129 (2005).

DOL Issues Guidance on Non-Exempt Employees' Civic Activities

Many employers, particularly those who value having a community presence, encourage their employees to get involved as volunteers in civic and charitable activities. As worthwhile as volunteer activities may be, however, they can give rise to troublesome legal issues. See, for example, "Do You Have a Disaster Relief Leave Policy," Employer Alerts, Fall 2005, p. 1.

A U.S. Department of Labor opinion letter recently addressed one such legal issue, involving the question whether non-exempt employees (that is, hourly workers or workers who are otherwise subject to the minimum wage and overtime requirements of the Fair Labor Standards Act) are entitled to compensation while engaged in volunteer activities.

DOL first pointed out that truly voluntary activities, performed after working hours, are not compensable. On the other hand, volunteer work performed during normal working hours and with approval of the employer is compensable. And even if the volunteer work is after hours, if it is done at the employer's specific *request* or *direction*, or if the employer *coerces* or *pressures* the employee into "volunteering," the employee's time is compensable.

A more difficult question is whether volunteer work performed outside normal working hours at the *encouragement* of the employer is compensable. In general, said DOL, an employer may encourage such volunteer work "so long as participation is optional and non-participation will not adversely affect working conditions or employment prospects."

In the particular fact pattern under DOL consideration, not only did the employer encourage volunteer work, it actually provided financial incentives. Specifically, the employer utilized a "rewards matrix" to award bonuses to work groups within the company. The rewards matrix included a variety of activities and performance standards, one of which – volunteer work – accounted for approximately 10% of the overall matrix. However, the matrix was designed so that an individual employee could still receive the maximum bonus even if he performed no volunteer activities. Nor did an employee's decision not to volunteer have any effect on continued employment.

The DOL concluded that, despite inclusion of volunteer work in the rewards matrix, the company still had no obligation to compensate employees for after-hours volunteer work.

In its opinion letter the DOL cautioned that if an employer is closely associated with a particular charity through regular sponsorship of the charity's activities or if there are other significant connections between the employer and the charity, the two entities could be found to be a single enterprise for Fair Labor Standards Act purposes. In that case, hours worked for the charity would have to be combined with hours worked for the employer for compensation purposes.

Reference: Fair Labor Standards Act, 29 U.S.C. § 201; 29 C.F.R. Part 500; DOL Admin. Op. Ltr. No. FLSA 2006-4 (*Jan.* 27, 2006).

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In this issue of EMPLOYER*ALERTS* . . .

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