

WILLCOX & SAVAGE

## EMPLOYMENT LAW O U T L O O K



### DEPARTMENT OF LABOR FINAL RULE FOR WHITE COLLAR EXEMPTIONS EFFECTIVE AUGUST 23, 2004

Timothy M. McConville



On April 23, 2004, the U.S. Department of Labor published its final rule on the white collar exemptions to the Fair Labor Standards Act ("FLSA"). The final rule revises the criteria for determining which employees are exempt from the FLSA's overtime pay provisions under the executive, administrative, professional and outside sales exemptions. The rule took effect on August 23, 2004.

The final rule marks the conclusion of the Department of Labor's ("DOL") rule making process, which began with the issuance of a proposed rule in March 2003. While the proposed rule appeared to be a far-reaching overhaul of the white-collar exemptions, the final rule issued in April 2004 looks more like the current regulations, containing only minor revisions.

#### FLSA Basics

The FLSA requires covered employers to pay covered employees at least the federal minimum wage and overtime premium pay. With regard to overtime pay, the FLSA requires a covered employer to pay, for all hours in excess of 40 in a work week, not less than one and one-half times the regular rate at which an employee is employed.

The statute, however, provides a number of exemptions from the minimum wage and overtime requirements. In addition to other exemptions, the FLSA exempts any employee employed in a bona fide executive, administrative, or professional capacity, or in an outside sales capacity. The DOL has developed several tests to define the executive, administrative, professional, and outside sales exemptions, and the final rule on white-collar exemptions modifies these tests in an effort to update them and make them less confusing.

CONTINUED ON PAGE 2

### U.S. SUPREME COURT RULES THAT TITLE VII APPLIES TO CONSTRUCTIVE DISCHARGE CLAIMS

William M. Furr



On June 14, 2004 the U.S. Supreme Court ruled for the first time that Title VII of the Civil Rights Act of 1964 applies to constructive discharge claims. A constructive discharge occurs when a workplace becomes so intolerable for an employee that the employee has no choice but to resign. An employee who can prove a constructive discharge is eligible to receive all damages that the employee would receive if the employee were actually discharged by the employer. In *Pennsylvania State Policy v. Suders*, the Supreme Court held that to establish a constructive discharge, an employee must prove that his or her working conditions were "so intolerable that a reasonable person would have felt compelled to quit."

There is a silver lining in the Supreme Court's ruling. Affirmative defenses that are unavailable in actual discharge cases involving sexual or other types of harassment may be available in constructive discharge cases involving harassment. In harassment cases under Title VII, an employer may be able to prevail on an affirmative defense if the employee failed to complain about the offensive conduct under the employer's written complaint procedure. This affirmative defense is not available in actual discharge cases because the defense is only available if there has not been a tangible adverse employment action. Unlike an actual discharge, which necessarily involves official company action, a constructive discharge may or may not involve official company action. When the constructive discharge does not involve official company action, the employer may assert the affirmative defense that the employee did not complain of the harassment through the employer's written complaint procedure.

The Supreme Court's decision reinforces our previous advice that all employers should have a written complaint procedure in place so that they can take advantage of the affirmative defense when defending harassment lawsuits. ■

## CONTINUED FROM FRONT COVER

In many ways, the update was long overdue. The DOL had not overhauled the white-collar rule since 1954. The last significant change of any kind occurred in 1975 when the DOL increased the salary level for exemptions to \$250 per week. That threshold has been in place for almost three decades.

### **Salary Levels Increased**

Under both the old and new regulations, employees must be paid on a salary basis, as opposed to an hourly basis, to be exempt under the white-collar exemptions. In addition, the employee must earn at least the minimum salary stipulated in the regulations. The current rule sets the minimum salary level at \$250 per week under a “short test,” and \$155 per week under a “long test.” On an annual basis, the current salary levels equate to \$13,000 per year and \$8,060 per year, respectively.

The new rule raises the minimum salary for the executive, administrative, and professional exemptions to \$455 per week, exclusive of board, lodging, or other facilities which equates to \$23,660 per year.

### **Executives Must Now Have Role in Hiring and Firing**

In addition to meeting the salary basis and salary level requirements, an employee must perform stipulated exempt duties consisting primarily of executive, administrative, and professional duties (the “duties test”). The outside sales exemption also has required duties. The new rule modifies the duties tests for the exemptions.

One of the most significant changes relates to the duties required for an employee to be exempt under the executive exemption. Currently, the DOL regulations require that an executive employee customarily and regularly direct the work of two or more employees and have as his or her primary duty the management of the enterprise in which he or she is employed or of a customarily recognized department or subdivision thereof.

The new rule retains the requirement that management be the primary duty of the employee and that the employee customarily and regularly direct the work of two or more other employees, and includes an additional requirement – the employee also must have the authority to hire or fire other employees or have his or her suggestions and recommendations as to the hiring, firing, advancement, promotion, or other change of status of other employees be given particular weight. Generally, an executive’s suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs.

To continue the application of the executive exemption to employees currently exempt, employers should ensure that executive employees have authority to hire and fire other employees or have their suggestions and recommendations on status changes given particular weight.

The new rule also establishes that an employee can qualify under the executive exemption without meeting the standard executive exemption criteria if the employee owns at least a bona fide 20% equity interest in the enterprise in which the employee is employed and is actively engaged in its management.

### **Highly Compensated Exemption Created**

The new regulations create a new exemption for “highly compensated employees.” To qualify for the highly compensated exemption, the employee must:

- Have total annual compensation of at least \$100,000;
- Have compensation paid on a salary or fee basis, including at least \$455 per week;
- Customarily and regularly perform any one or more of the exempt duties or responsibilities of an exempt executive, administrative, or a professional employee; and
- Have primary duty which includes performing office or non manual work.

The total annual compensation may include commissions, non-discretionary bonuses, and other non-discretionary compensation earned during a 52-week period. Such compensation does not include board, lodging, payments for medical insurance, or life insurance, contributions to retirement plans, and the cost of other fringe benefits. If an employee’s total annual compensation does not amount to at least \$100,000 by the last pay period of the 52-week period, the employer may, during the last pay period, or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required compensation level.

An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year, or ends the employment before the end of the year, may qualify for the highly compensated exemption if the employee receives a pro rata portion of the required compensation amount based upon the number of weeks that the employee will be or has been employed. The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year in advance, the calendar year will apply.

### **Outside Sales Exemption to be Easier to Satisfy**

The new exemption for outside sales employees eliminates a requirement that the outside sales employee not spend more than 20% of hours worked on activities unrelated to the employee’s own sales or solicitations. Instead of the 20% requirement, the new rule requires that the outside sales

employee be only “customarily and regularly engaged away from the employer’s place or places of business” in performing the primary duty of making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer.

Under the new rule, an employee’s “primary duty” is the principal, main, major or most important duty that the employee performs. Factors to be considered when considering the primary duty of an employee include, but are not limited to:

- The relative importance of the exempt duties as compared with other types of duties;
- The amount of time spent performing exempt work;
- The employee’s relative freedom from direct supervision; and
- The relationship between the employee’s salary and the wages paid to other employees for the kind of non-exempt work performed by the employee.

The phrase “customarily and regularly” means a frequency that must be greater than occasional, but which, of course, may be less than constant. Tasks or work performed “customarily and regularly” includes work normally and recurrently performed every work week; it does not include isolated or one-time tasks. Because the outside sales employee is no longer required to refrain from spending more than 20% of hours worked on activities unrelated to the employee’s own sales or solicitation and instead is required only to be customarily and regularly engaged away from the employer’s place of business, the outside sales exemption is expected to be easier to satisfy.

### **Pay Docking for Disciplinary Suspensions Allowed**

The salary basis principle limits an employer’s ability to withhold pay from exempt employees for disciplinary reasons, including suspensions. The current regulations allow disciplinary deductions from an exempt employee’s salary only for infractions of safety rules of major significance.

The new rule allows an employer to make deductions from the pay of exempt employees for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. The regulations require that the suspensions be imposed pursuant to a written policy applicable to all employees. The regulations suggest sexual harassment and workplace violence as two examples of conduct for which exempt employees’ pay may be docked under the new regulations. Making such disciplinary deductions will not jeopardize the employee’s exempt status.

The DOL’s guidance on the new white collar exemptions indi-

cates that it does not intend that the term “workplace conduct” be construed expansively. According to the DOL, “workplace conduct” refers to conduct, not performance or attendance, issues.

Employers wanting to include a disciplinary pay deduction as a corrective action option for exempt employees should adopt a written policy for disciplinary suspensions of one or more full days for conduct issues. The policy should put employees on notice that they could be subject to an unpaid disciplinary suspension, and the employer should apply the policy uniformly to all employees.

### **“Safe Harbor” Established for Improper Deductions**

Making improper deductions from an exempt employee’s salary can result in the employer losing not just the employee’s exemption, but also the exempt status of all of the employer’s employees in the particular job classification. The new regulations, however, include a “safe harbor” to minimize the effect of improper deductions. An employer will not lose the exemption for any employee if the employer:

- Has a clearly communicated policy that prohibits improper pay deductions and includes a complaint mechanism;
- Reimburses employees for any improper deductions; and
- Makes a good faith commitment to comply in the future.

In addition, under the new rule, if an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions.

The regulations provide that the best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer’s Intranet.

### **State Law May Afford Greater Rights to Employees**

The new rules also now expressly make clear that the FLSA provides minimum standards that may be exceeded at the state or municipal level, but may not be waived or reduced. The DOL pronouncement on this issue in reality reflects the fact that states have always been free to legislate in the area of wages and hours. Accordingly, employers should be attentive to state and local law, particularly with regard to whether such law allows more expansive rights for employees. Virginia law does not currently provide more expansive rights to employ-

ees with regard to the overtime exemptions.

### **“First Responders” and Others Exempt**

In part in response to litigation arising from state and local governments’ pay practices, the DOL included in the new rule provisions relating to public safety and other public employees. The regulations expressly state that the executive, administrative, and professional exemptions do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, firefighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers, and similar employees who perform functions typically associated with such positions.

The regulations state that such employees do not qualify as exempt under the executive, administrative, and professional exemptions because they do not meet the primary duty tests associated with such exemptions. Public employees should evaluate the exemption issues in light of the DOL’s pronouncement regarding the particular job classifications and the applicable tests.

### **Employer Checklist**

The new white-collar exemptions will have an effect on virtually all employers. Here is a checklist for employers:

- Identify employees who earn less than \$455 per week (\$23,660 annually).
- Identify employees who earn \$100,000 or more.
- Analyze jobs and job descriptions, including borderline classifications of highly paid and outside sales employees.
- Ensure that executive employees have authority to hire and fire other employees or have their suggestions/recommendations on status changes given particular weight.
- Ensure payroll system reflects exempt/non-exempt status accurately.
- Consider revising written disciplinary policies to provide for unpaid disciplinary suspensions.
- Adopt policy prohibiting improper pay deductions and providing complaint mechanism.
- Plan to explain changes to affected individuals to ensure smooth transition.
- Consider consulting an attorney to confirm proper application of exemptions. ■

## **NLRB FLIPS: NON-UNION EMPLOYEES NOT ENTITLED TO HAVE CO-WORKER PRESENT IN INVESTIGATORY INTERVIEW**

**Wm. E. Rachels, Jr.**



In June, the National Labor Relations Board held that employees in a non-union workplace do not have the right to have a co-worker present at an investigatory interview that the employee reasonably believes might result in discipline. The NLRB ruling in *IBM Corp.* overruled a 2000 NLRB decision that extended a right traditionally afforded only to employees in a unionized setting.

In 1975 in the *Weingarten* case, the Supreme Court held that, where there is union representation, the NLRA gives an employee the right to request a union representative during an interview by the employer if the interview might result in disciplinary action against the employee. In 2000, in the *Ohio Epilepsy Foundation* case, the NLRB extended such right to allow a co-employee to be present in non-union settings. The *IBM Corp.* decision in June overruled *Ohio Epilepsy Foundation*.

*IBM*, whose subject employees are not represented by a union, denied three employees’ requests to have a co-worker present during investigatory interviews about a former employee’s allegations that they had engaged in harassment. The employees’ manager interviewed each of them individually after denying their requests to have a co-worker present.

Relying on *Epilepsy Foundation*, the employees filed an unfair labor practice charge at the NLRB. In the 3-2 decision, the majority observed that in the years after the establishment in the union setting of the right to have a union representative present in an investigatory interview, new statutes governing the workplace have been enacted and new security concerns have arisen. As a result, the need for investigatory interviews has steadily risen. Employers, the majority maintained, face ever-increasing requirements to conduct workplace investigations pursuant to federal, state, and local laws, particularly laws addressing workplace discrimination and sexual harassment.

Such was the majority’s stated rationale. Some observers might opine that the underlying reasons for the change is that the majority had shifted from Clinton appointees to Bush appointees with the resulting lessening focus on individual employee rights and increased focus on employer rights. However we got there or why, at this time non-union employers do not have to grant an employee’s request for a witness to be present at an investigatory interview. ■

## GENETIC TESTING - RISKY BUSINESS

Samuel J. Webster



Genetic or DNA testing has received notoriety from criminal and employment law cases. While genetic testing has value in health care and in criminal and paternity cases, it poses a major risk to the unwary employer.

Genetic testing may be used to determine whether a person has a genetic condition or predisposition for developing a genetic condition or disease. It has obvious health benefits, such as identifying individuals who carry a disease gene. Genetic testing also proves valuable in criminal forensics and in domestic relations (establishing paternity/maternity). Employers face serious problems, however, if they enter the genetic testing field; genetic testing raises problematic legal issues: insurance, disability discrimination, racial or ethnic discrimination, and privacy rights.

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) prohibits health plans from using genetic information as a basis for limiting coverage or imposing extra charges. The Americans with Disabilities Act (ADA) prohibits medical examinations prior to job offers and restricts the use of post-offer medical examinations. The EEOC has stated that employers who make job decisions about individuals based upon genetic information violate the ADA by "regarding" those individuals as having impairments.

Genetic testing also raises racial and ethnic discrimination issues. Science has established that certain races or ethnic groups are more susceptible to certain diseases. Performing genetic tests to determine the presence or absence of such diseases may be regarded as racial or ethnic discrimination.

Genetic testing also involves serious privacy concerns. Under HIPAA and applicable state privacy laws, the employer risks inadvertently disclosing potentially defamatory information. The Federal government, through Executive Order 13145, prohibits "discrimination [by federal employers] against employees based on protected genetic information, or information about a request for the receipt of genetic services." However, no comprehensive Federal law exists prohibiting discrimination based upon genetic information.

State lawmakers have been active in prohibiting genetic testing discrimination. In 2002, Virginia enacted a statute prohibiting genetic testing as a condition of employment or as a basis for any decision adversely affecting the terms and conditions of employment. Va. Code § 40.1-28.7:1. An affected employee may seek injunctive relief and recover actual and punitive damages and back pay with interest. Virginia also has a statute pro-

hibiting the use of genetic information to determine whether to issue accident and sickness insurance. Va. Code § 38.2-508.4.

Based upon Virginia's policy (and that of other states), as well as federal discrimination laws, we recommend that employers not engage in any genetic testing or the use of any genetic information obtained from another source in making job-related decisions. ■

## NEW COBRA REGULATIONS ISSUED

David A. Snouffer



The U.S. Department of Labor has issued new regulations on employers' disclosure obligations as to continuation health coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). The new disclosure rules will become effective for plan years beginning after November, 2004. We will describe the new COBRA rules more fully in the next issue of Outlook. ■

WILLCOX & SAVAGE

### LABOR AND EMPLOYMENT LAW

Wm. E. Rachels, Jr.	wrachels@wilsav.com	757/628-5568
William M. Furr	wfurr@wilsav.com	757/628-5651
Samuel J. Webster	swebster@wilsav.com	757/628-5518
Susan R. Blackman	sblackman@wilsav.com	757/628-5646
Timothy M. McConville	tmconville@wilsav.com	757/628-5581
John T. McDonald	jmcDonald@wilsav.com	757/628-5502
Gillian W. Field (Legal Asst.)	gfield@wilsav.com	757/628-5645
Leslie M. Rockwell (Legal Asst.)	lrockwell@wilsav.com	757/628-5621

### EMPLOYEE BENEFITS

James R. Warner, Jr.	jwarner@wilsav.com	757/628-5570
David A. Snouffer	dsnouffer@wilsav.com	757/628-5678

### WORKERS' COMPENSATION

Stephen R. Jackson	sjackson@wilsav.com	757/628-5642
--------------------	---------------------	--------------

We hope you find our quarterly newsletter informative and useful. If there is a topic you would like covered, or would like to receive this newsletter via e-mail, please contact Michelle Shearon at 757-628-5631 or e-mail mshearon@wilsav.com. This publication is provided for general purpose information. It is not and should not be used as a substitute for legal advice. Copyright 2004 Willcox & Savage

# From conference room to courtroom.

*Our lawyers remain committed to the needs of Hampton Roads' businesses and professionals.*

---

WILLCOX & SAVAGE

One Commercial Place, Suite 1800  
Norfolk, Virginia 23510

Return Service Requested