KOLLMAN & SAUCIER, P.A. WINTER 2012

THE EMPLOYMENT BRIEF

HELPING YOUR BUSINESS THRIVE

IN THIS ISSUE

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This year marks the fifth anniversary of the publication of *The Employment Brief*. As those of you who have been receiving it since the first issue came out in August 2007 are aware, we have made only modest changes to our format over the years. One of our New Year's resolutions is to revamp *The Employment Brief*. This issue is the first of the new and (hopefully) improved newsletter.

Instead of getting an email from one of our attorneys attaching the newsletter, you will now receive an email from publications@kollmanlaw.com. The body of the email will provide previews of some articles, and will also highlight firm news and events. The appearance of the newsletter itself has also changed, with new colors, a new banner, and a cleaner, easier-to-read format. Additionally, we have changed the publication schedule so that issues will be sent out in January, April, July, and October.

The overhaul of *The Employment Brief* is a work in progress. We will likely be making tweaks and changes to future issues. If there are subjects about which you would like to hear more, or if there are changes in format you would like to see, please let us know by emailing publications@kollmanlaw.com or sending an email to Eric Paltell. Ultimately, our goal is to provide our readers with concise and readily accessible information about important developments in the world of labor and employment law. We look forward to hearing from you.

NLRB Issues New Election Rules Effective April 30, 2012

By Eric Paltell

On December 22, 2011, the National Labor Relations Board (NLRB) published Final Rules implementing major changes to its representation election procedures. Although the NLRB did not adopt all of the procedural reforms it had proposed in June 2011 (*see* the July/August 2011 edition of *The Employment Brief* for more details on the initial proposal), the new changes will speed up the union election process and limit an employer's right to challenge voter eligibility and the composition of the bargaining unit.

After receiving more than 65,000 written comments regarding the proposed changes, on November 30, 2011, the NLRB decided *not* to pursue some of the changes, including:

- a requirement that any pre-election hearing be held seven days after service of a notice of hearing;
- a requirement that the employer file a written statement of position prior to the hearing or else waive any defenses not raised prior to that date;
- a requirement that the employer provide the union with voter lists including employee email addresses and telephone numbers, and do so within two days after the direction of the election (as opposed to the current seven days).

Nevertheless, in the Final Rules set to take effect on April 30, 2012, the NLRB has altered the election process to make it much more favorable to unions. The key changes are:

- Employers cannot litigate issues of voter eligibility (such as whether an employee is a supervisor eligible to vote in the election) prior to the election. This means that an election might be conducted without knowing which employees will ultimately become part of the union (persons deemed supervisors are not allowed to be in a union under the NLRA). It also means that an employer may not know who can participate on behalf of management in the employer's campaign until after the election. This is a radical departure from current law, where an employer can have issues of voter eligibility resolved through NLRB review prior to the election. Under the new rules, pre-election hearings will be limited in scope, likely only addressing whether there is a question of representation and whether the petitioned-for unit is appropriate.
- Filing briefs following pre-election hearings will only be allowed in certain cases, and will be left to the discretion of the hearing officer.

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- An employer will no longer have the right to seek pre-election review by the NLRB of a Regional Director's Decision and Direction of Election (DD&E) following the pre-election hearing. Virtually every appeal, including appeals concerning conduct of the election, will be consolidated into one appeal to be heard *after* the election.

- Because the right to file a pre-election request for review is eliminated, the NLRB will no longer recommend that the election be scheduled 25-30 days following the issuance of the DD&E. *This means that elections could be scheduled as soon as 15-20 days from the date of the petition*, as opposed to the current practice of scheduling elections, on average, 38 days from the filing of the petition.

Even before the Final Rule was published, the United States Chamber of Commerce filed suit to enjoin its implementation in the United States District Court for the District of Columbia. Additionally Wyoming Senator Enzi has announced that he will challenge the validity of the Final Rule under the Congressional Review Act. As a result, it is far from certain as to when or in what form the new rule will take effect. The Final Rule is published at 76 Fed. Reg. 80138 and is available on the NLRB website at https://www.nlrb.gov/sites/default/files/documents/3240/nfrmfinal_0.pdf

In other NLRB news, on December 23, 2011, the NLRB announced that it still plans to go forward with its new Notice Posting Rule. This rule, however, which was originally scheduled to take effect on November 14, 2011, and postponed once until January 31, 2012, has now been delayed until April 30, 2012 to permit several legal challenges to be heard prior to implementation.

The notice posting requirement, which is codified at 29 C.F.R. § 104.202, requires virtually all employers to post a notice informing employees of their rights to form a union, bargain collectively, join with coworkers to raise work related complaints, and strike. The notice also makes employees aware that employers cannot:

- Prohibit them from soliciting for a union during non-work time or from distributing union literature during non-work time and in non-work areas;

- Interrogate employees about support for the union;

- Take adverse action against employees because they support a union;

- Prohibit employees from wearing union buttons or tee shirts;

- Spy on union activities.

The NLRB requires the notice be posted where other employer notices are posted, and also be posted on the intranet or website if that is where the employer normally communicates to employees about personnel policies. Failure to post the notice can be deemed an unfair labor practice in violation of the National Labor Relations Act.

More information about the NLRB's notice posting requirement is available from the NLRB's website at www.nlrb.gov/poster.

PRESIDENT OBAMA ENACTS THE VOW TO HIRE HEROES ACT

By Adam T. Simons

On November 21, 2011, President Obama signed the Veterans Opportunity to Work to Hire Heroes Act (VOW Act). This bipartisan legislation was enacted with the goals of reducing the unemployment rate for veterans of the Iraqi and Afghanistan wars and expanding their education and training opportunities. Prior to the enactment of the VOW Act, the unemployment rate for veterans of those wars was approximately eleven (11%) percent, roughly two percentage points higher than the national average.

The Act contains two important provisions for employers. The first is a tax credit. The VOW Act gives employer tax credits for hiring veterans that are currently unemployed, with a tiered system based on the amount of time the veteran has been unemployed. Employers hiring veterans that are unemployed at least four weeks may receive a tax credit up to $2,400. If the veteran has been unemployed for longer than six months, the employer can receive a tax credit up to $5,600. The greatest tax credit is available to those employers that hire a veteran who is disabled and has been unemployed for longer than six months. For these long-term unemployed veterans, the VOW Act doubles the existing tax credit for hiring veterans with service-related disabilities (currently $4,800 for disabled veterans) to $9,600.

The second provision is an amendment to the Uniformed Services Employment and Reemployment Rights Act (USERRA) to provide veterans with a cause of action against their employers for hostile work environment. USERRA, as most employers are aware, is the federal law that provides job protection for service members during their service and prohibits discrimination against them for their military service or status. Prior to the enactment of the VOW Act, the Fifth Circuit in *Carder v. Cont'l Airlines, Inc.*, 636 F.3d 172 (5th Cir. 2011), held that USERRA did not provide a cause of action for hostile work environment, relying on the absence of the phrase "terms, conditions, or privileges of employment" in the statute. That phrase had been included in other employment discrimination statutes that permit hostile work environment claims (such as Title VII and the ADA). The *Carder* court held that, because it was not present in USERRA, Congress did not intend to permit hostile work environment claims under USERRA. Thus, in order to state a claim under USERRA, the service member had to establish actual discrimination, meaning the loss of a tangible employment benefit.

The VOW Act amended USERRA, in part, by including this missing phrase; and now prohibiting discrimination against veterans and service members with regards to the "terms, conditions, or privileges of unemployment." Under the new provision, a military service member can bring a hostile work environment claim in the same manner as claims are brought under other federal employment discrimination statutes, namely:

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that the employee was subject to unwelcome harassment on the basis of his status as a veteran or service member; that it was pervasive enough to alter a term, condition or privilege of employment; and that there is a basis to impute the conduct to the employer.

With one million veterans expected to enter the workplace in the next five years as our involvement in the Middle East is winding down, the VOW Act presents both a great opportunity for employers, as well as an increased burden. The tax credits for employers are undoubtedly enticing; however, they come with increased risk. Whereas employers were able to obtain dismissals on USERRA cases before on the basis that the employee had not suffered a tangible loss, it appears that now, dismissals will be much harder.

Furthermore, employers should ensure that their policies and procedures are amended to include veterans and service members. To the extent that a discrimination and hostile work environment policy does not include veterans and service members, it should be amended immediately. Finally, employers should take steps to create a procedure for reporting possible harassment in violation of USERRA, or amend their current procedures for reporting harassment to include such complaints. Under the *Faragher-Ellerth* affirmative defense, which will presumptively apply to USERRA hostile work environment claims, where no tangible employment action has been taken against the employee, the employer can assert an affirmative defense that (a) the employer exercised reasonable care to prevent and correct promptly the hostile or harassing behavior, and (b) the employee unreasonably failed to take advantage of the employer's preventive or corrective opportunities.

The importance of employers taking steps to educate employees and insulate themselves from liability cannot be overstated. Employers should ensure that supervisors and managers are aware of the new VOW Act provisions to USERRA and their obligations under the Act. Supervisors and managers should be reminded that they cannot discriminate or otherwise mistreat an employee simply because he or she is a veteran or service member. They should also be reminded that, in accordance with USERRA, these individuals receive some extra job protections.

DOL PROPOSES FLSA COVERAGE FOR HOME HEALTH AIDES

By Cliff Geiger

On December 15, 2011, the U.S. Department of Labor (DOL) released proposed changes to the regulations interpreting the companionship exemption under the Fair Labor Standards Act (FLSA). The proposed rule would extend the FLSA's minimum wage and overtime requirements to nearly 1.8 million home health care workers, including home health care aides and certified nursing assistants. This is an about-face for the DOL, which has consistently taken the position that most home health care workers are exempt from minimum wage and overtime requirements because they provide companionship services.

In 1974, Congress amended the FLSA to include "domestic service" workers not previously subject to its minimum wage and overtime requirements. "Domestic service employment" was defined as "services of a household nature performed by an employee in or about a private home (permanent or temporary) of the person by whom he or she is employed. 29 C.F.R. § 552.3. Congress, however, simultaneously created an exemption that excluded certain domestic service employees from coverage, including babysitters employed on a casual basis and companionship workers. 29 U.S.C. § 213(a)(15). Specifically, "any employee employed in domestic service employment to provide companionship services for individuals who (because of age or infirmity) are unable to care for themselves is exempt from the [FLSA's] minimum wage and overtime requirements." *Id.* Current regulations define companionship services as follows:

> [T]hose services which provide fellowship, care, and protection for a person who, because of advanced age or physical or mental infirmity, cannot care for his or her own needs. Such services may include household work related to the care of the aged or infirm person, such as meal preparation, bed making, washing of clothes, and other similar services. They may also include the performance of general household work. Provided, however, [t]hat such work is incidental, *i.e.*, does not exceed 20 percent of the total weekly hours worked. The term "companionship services" does not include services relating to the care and protection of the aged or infirm which require and are performed by trained personnel, such as a registered or practical nurse.

29 C.F.R. § 552.6.

The DOL's longstanding position has been that the companionship exemption applies to all workers providing companionship services in a private home, even if they are employed by a third-party employer, such as a staffing agency or a home health care company. This position was affirmed by the United States Supreme Court in *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007). Furthermore, courts consistently have found that home health care aides and certified nursing assistants generally qualify for the companionship exemption, regardless of whether they provide what many would consider medical care, because the required training for these positions is not as extensive as the training required to become a licensed nurse. According to the DOL, the 1974 FLSA amendments were to provide minimum wage and overtime coverage for all whose vocation was domestic work, and to provide only a very limited exemption for casual babysitters and companions who were not regular breadwinners or responsible for their families' support.

The home health care industry, and the number of people it employees, has exploded since 1974. With so many people now employed in the home health care industry as their full-time profession and means of support, the DOL has determined that its regulations, as currently written, have expanded the companionship exemption beyond those employees Congress originally intended to exempt.

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The DOL would narrow the exemption by limiting "companionship services" to providing "fellowship" and "protection" to the aged or infirm. "Fellowship" would mean engaging a person in social, physical, and mental activities. Examples include playing cards, watching television together, visiting with friends, taking walks, or engaging in hobbies. "Protection" would mean being present to monitor the person's safety and well-being. According to the DOL, this limited definition would be consistent with the legislative history, which describes "a companion as someone who sits with an infirm parent; provides constant attendance; and renders services similar to a babysitter, *i.e.*, someone to be there and watch an older person, an "elder sitter."

The proposed regulations permit "intimate personal care services" so long as they are provided in conjunction with, and are incidental to, providing companionship services. Intimate personal care services include occasional dressing, grooming, toileting, feeding, laundering, and, in limited circumstances, occasional bathing. "Companionship services" explicitly would not include medical care typically provided by personnel with specialized training, including, but not limited to, catheter and ostomy care, wound care, injections, blood and blood pressure testing, turning and repositioning, determining the need for medication, tube feeding, and assisting with physical therapy.

Furthermore, even if the employee would qualify under the new definition of companionship services, only the individual, family member or household using the services would be entitled to claim the exemption from minimum wage and overtime requirements. Significantly, the exemption would no longer be available to third party employers, even if the employee is jointly employed by the individual, family member or household.

The proposed rule clarifies that providing medical care in or about a private household is domestic service employment subject to the FLSA's minimum wage and overtime provisions. The definition of "domestic service employment" would be amended to remove references to outdated occupations such as governesses and footmen, and would specifically identify those employed as "home health aides" and "personal care aides" as employees entitled to minimum wage and overtime under the FLSA.

Only fourteen states, including Maryland, have statutes imposing minimum wage and overtime requirements for all or most third-party-employed home care workers who may otherwise fall under the federal companion exemption. With the U.S. population aging, home health care will continue to be a growth industry employing large numbers of workers. Proponents of the proposed regulations claim change is necessary to attract and retain qualified workers, as well as to ensure high quality care for those who need in-home care. Critics claim narrowing the companion exemption will lead to reduced hours for workers and higher costs. Time will tell. Once the DOL's proposal is formally published, the public will have sixty days to comment.

MARYLAND'S HIGHEST COURT HOLDS MEDICAL EXAMINATION REQUIREMENT FOR FEMALE TRUCK DRIVER WAS DISCRIMINATORY

By Randi Klein Hyatt

In *Taylor v. Giant of Maryland, LLC*, No. 9 (D. Md. Dec. 6, 2011), the state's highest court decided that Giant Food discriminated against a female truck driver (who suffered from gynecological conditions) by requiring her to undergo an independent medical examination (IME) to continue her employment when it did not require the same for male employees with serious health conditions.

Julia Taylor, a member of the International Brotherhood of Teamsters, began driving for Giant in 1988. In 1995, she was diagnosed with fibroid tumors and menorrhagia, which resulted in Taylor experiencing heavy and protracted menstrual bleeding, and which could cause her to arrive late or be absent. During her employment, she requested, and was approved for, Family and Medical Leave Act leave to cover her absences and late arrivals.

Giant had a policy that required drivers to call in at least 1-1/2 hours prior to a scheduled shift if they were going to be late or absent. Ms. Taylor was disciplined for several call-in policy violations in 2002 due to her condition. Per the collective bargaining agreement governing her employment, Giant was permitted to require drivers who received a Department of Transportation (DOT) exam to be reexamined if there was "reasonable cause" for so doing.

Giant requested that Ms. Taylor undergo an IME, but she refused to be evaluated. During a meeting in February 2003 between Ms. Taylor and Giant officials, Ms. Taylor claimed that Giant told her that she would be removed from duty and not rehired because of safety concerns unless she submitted to an IME and followed "any and all recommendations made by Giant's selected specialist, up to and including hysterectomy." Believing she was fired, Ms. Taylor filed a charge of discrimination and ultimately sued Giant for race and sex bias and retaliation under the Prince George's County and Maryland Code provisions prohibiting employment discrimination.

The procedural history of the case is fairly involved. In simple form, Ms. Taylor claims were removed to federal court, but ultimately remanded to state court. A jury decided in favor of Giant on the race claims, but in favor of Ms. Taylor on the sex and retaliation claims, and awarded her over $1 million in damages and attorneys' fees. Giant appealed on numerous grounds, including federal preemption under the Labor Management Relations Act (LMRA). LMRA federal preemption requires claims that involve interpretation of alleged violations of collective bargaining agreements (CBA) to be decided in federal court applying federal law (which would mean, for Ms. Taylor, that her state law based

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claims of discrimination could not proceed). The Maryland Court of Special Appeals ultimately reversed the ruling in Taylor's favor, held that her claims were preempted by the LMRA and vacated the attorneys' fees award (even though Giant did not appeal that award).

On appeal, the Court of Appeals of Maryland first held that the LMRA did not preempt Ms. Taylor's state law discrimination and retaliation claims because Ms. Taylor never alleged breaches of the applicable collective bargaining agreement. Resolution of whether the required IME was discriminatory did not require interpretation of the applicable CBA provisions. Indeed, said the court, Ms. Taylor was not challenging whether Giant had the right to require the IME; rather the issue was whether Giant's motive in requiring Ms. Taylor under an IME was discriminatory.

"The court held that 'one who alleges discrimination need not identify and reconcile every distinguishing characteristic of the comparators' (meaning clones are not required)."

As for her sex discrimination claim, Giant argued that the male comparators that Ms. Taylor had identified were not similarly situated to her because they had different supervisors, their health conditions could be monitored through the yearly DOT physicals, the male employees had not requested to be exempt from Giant's call-in policy due to their serious health conditions, and each had certifications from their respective doctors that permitted them to work.

Disagreeing with Giant, the Court of Appeals held that Ms. Taylor had presented sufficient comparator evidence to support her claims. The court noted that having the same supervisor (or not) is merely one consideration among many in making the similarly situated decision. The court held that "one who alleges discrimination need not identify and reconcile every distinguishing characteristic of the comparators" (meaning clones are not required). By identifying four male truck drivers who had various serious health conditions [*e.g.*, diabetes, Parkinson's Disease] but were not required to undergo an IME, Ms. Taylor had presented sufficient and appropriate comparator evidence to support her sex discrimination claim.

THE DODD-FRANK ACT: ENHANCED PROTECTIONS FOR WHISTLEBLOWERS

By Bernadette Hunton

In 2010, President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) into law. Dodd-Frank aims to reform the U.S. financial regulatory system by offering substantial monetary rewards to whistleblowers who report securities and consumer finance law violations.

Under Dodd-Frank, whistleblowers who voluntarily report "original information" regarding securities law violations are eligible to receive a significant bounty reward. Information submitted to the Securities Exchange Commission (SEC) before a request, inquiry or demand is made will be deemed voluntary. To be considered "original information," information must be derived from the independent knowledge of the whistleblower, not known to the SEC from any other source, and not exclusively obtained from an allegation made in a judicial or administrative proceeding. If a whistleblower reports such original information leading to the recovery of more than $1 million the SEC may award him 10-30% of the collected sanctions. The SEC has made reporting simple via its newly established whistleblower website: www.sec.gov/whistleblower.

An employee who is retaliated against for reporting or participating in the investigation or prosecution of securities law violations now has a private right of action against his employer, as well as an extended period of time to bring such a claim. Dodd-Frank amends the Securities Exchange Act (SEA) to permit protected employees to bring a claim up to *six years* after the retaliation occurred. The Commodities Exchange Act (CEA) is also amended to permit employees up to two years to bring a claim. Remedies include reinstatement, back pay (two times for SEA violations and straight back pay for CEA violations), litigation costs and attorneys' fees.

Dodd-Frank not only expands protections for employees who report securities law violations, but it also protects those who report consumer finance violations. Under Dodd-Frank, a covered employee now has a private right of action against an employer who retaliates against him for disclosing information about unlawful conduct related to the offering or provision of a consumer financial product or service. Coverage under Dodd-Frank is broad and extends to "any individual performing tasks related to the offering or provision of a consumer financial product or service."

A covered employee will be deemed to have engaged in protected activity if he: (1) provides information that he reasonably believes is a violation to an employer, the Bureau of Consumer Financial Protection (the Bureau), or any government authority or law enforcement agency; (2) testifies or intends to testify in a proceeding related to a violation subject to the Bureau's jurisdiction; (3) files, institutes or causes to be filed or instituted any proceeding under any Federal consumer financial law; or (4) objects or refuses to participate in any activity that he reasonably believes is in violation of the laws subject to the Bureau's jurisdiction. The scope of protected activity is far-reaching.

An employee who believes he is the victim of unlawful retaliation has 180 days from the date of the alleged violation to file a complaint with the U.S. Secretary of Labor. To establish a claim, an employee must show that the protected activity was a "contributing factor" in the adverse action. An employer can defeat such a claim by demonstrating with clear and convincing evidence that it would have taken the same unfavorable personnel action regardless of the protected activity. Remedies for violations may include an order to abate the violation, reinstatement

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(including back pay), compensatory damages, and attorneys' fees and costs. Enforcement of pre-dispute arbitration agreements (except those in a collective bargaining agreement) and pre-dispute agreements to waive these rights or remedies is strictly prohibited.

Given the monetary incentives for external reporting, the length of time employees now have to report claims, and the costly consequences of a violation, businesses in the finance industry have reason to be concerned about the effects of the new regulations. Employers can and should take steps to reduce the risks of a whistleblower claim.

Most importantly, employers should establish an internal reporting system that encourages anonymous reporting of suspected improprieties. The system should be well-publicized, easily-accessible and constantly monitored. Employers should encourage internal reporting, as the time and expense of an external resolution will be far greater than an internal one. Moreover, Dodd-Frank encourages whistleblowers to report internally, making it a "plus-factor" in the determination of a reward.

Employers should also maintain accurate company records and preserve such records for at least six years. As noted, Dodd-Frank extends the time whistleblowers have to bring claims for securities law violations. Preservation of documents can only serve to benefit the unlucky employer forced to defend a whistleblower claim.

FLSA EXEMPTION CASES CONTINUE TO MAKE THE DOCKET

By Kelly C. Hoelzer

During 2011, there were many Fair Labor Standards Act (FLSA) decisions issued, particularly those addressing the ever important overtime exemptions. That trend continues, with two recent FLSA exemption cases, including one to be decided by the Supreme Court.

The Supreme Court Will Consider Whether Pharmaceutical Sales Representatives Are Exempt From Overtime.

On November 28, 2011, the U.S. Supreme Court granted *certiorari* in the case of *Christopher v. SmithKline Beecham Corp.*, 635 F.3d 38 (9th Cir. 2011). With this case, the Supreme Court will tackle the highly publicized issue of whether approximately 90,000 sales representatives in the pharmaceutical industry are entitled to overtime pay under the FLSA.

In the pharmaceutical industry, sales representatives are customarily treated as exempt under the FLSA, either as outside salespersons or because they fall within the administrative exemption to the Act. Due to the highly regulated nature of the industry, these salespeople cannot sell directly to doctors or patients. Courts have grappled with the question of whether they "sell" for the purposes of the outside salesperson exemption, or if they do not, whether they exercise sufficient discretion and independent judgment to be considered administratively exempt.

The federal appellate courts have taken differing views, directly correlated to the level of judicial deference given by the particular court to the Department of Labor (DOL) narrow interpretation of the regulatory exemptions. As reported in our September/October 2010 and April/May 2011 issues of *The Employment Brief*, in July 2010, the Second Circuit held in *In re Novartis Wage and Hour Litigation* that salespeople working for pharmaceutical giant Novartis Pharmaceuticals Corporation were *not exempt* under the FLSA as either outside salespersons or administrative employees. That court agreed with the DOL's restrictive view that the sales representatives did not meet the regulatory requirements for either exemption, and therefore, were entitled to overtime pay. On the same day that it issued the *Novartis* opinion, the Second Circuit also affirmed another district court decision holding that sales representatives working for Schering-Plough Corporation (another pharmaceutical company) were not exempt. Both employers took their cases to the U.S. Supreme Court, which ultimately declined to review either case.

Two weeks before the Supreme Court declined to hear the Second Circuit cases, the Ninth Circuit issued its opinion in *Christopher*, 635 F.3d 38, denouncing the DOL's restricted interpretation of the outside salesman regulations. That court held that, as had been the case for the past 70 years, pharmaceutical sales representatives acted as outside salespeople and, therefore, were exempt from the FLSA's overtime requirements. Unlike their colleagues in the Second Circuit, the Ninth Circuit panel concluded that it did not owe deference to the DOL's interpretation of the outside salesman exemption because the industry sales practice remained unchallenged by the DOL for seven decades, until it made an about face on its stance in the Second Circuit *Novartis* case, filing an amicus brief in support of holding the sales reps as non-exempt. Given acquiescence of the DOL over the past seven decades, the court rejected the agency's new interpretation, holding that the sales representatives were exempt outside salespeople.

"The Ninth Circuit did not give deference to the DOL's new interpretation."

Several challenges to the pharmaceutical industry's pay practices are pending in federal courts around the country. With billions of dollars at stake, the Supreme Court's decision to hear the *Christopher* case will surely provide much-needed guidance to industry employers.

First Circuit Holds Event Sales Managers Are Administratively Exempt Employees.

In the recent case of *Hines v. State Room, Inc.*, No. 10-2298, 2011 U.S. App. LEXIS 23680 (1st Cir. Nov. 28, 2011), the First Circuit considered whether sales managers for event facilities were exempt under the FLSA. Christine Hines, Mary O'Connor, and Jessica Leporacci worked as sales managers at banquet locales owned/operated by the defendants in the Boston area. The plaintiffs were responsible for selling and orchestrating high-end wedding receptions and other social events. The sales managers acted as the primary contact with clients, including selling the facilities and coordinating the setup and execution for events. Although subject to

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management approval, the sales managers negotiated and executed event contracts based on pricing schedules set by the employer. The plaintiffs were paid a salary, based on an approximate 45-hour workweek. None received overtime pay.

In their lawsuit, the sales managers claimed they did not meet the requirements of the administrative exemption to the FLSA, and therefore, were entitled to overtime wages. The district court disagreed, granting summary judgment to the employer on the FLSA claims. On appeal, the First Circuit affirmed the trial court, holding that the sales managers fell within the scope of the administrative exemption.

In addition to a regular weekly salary of $455 or more, employees considered exempt under the administrative exemption must meet the following criteria: (1) their primary duty must be "the performance of office or non-manual work directly related to the management of general business operations of the employer or the employer's customers;" and (2) their primary duty must include "the exercise of discretion and independent judgment with respect to matters of significance." 29 C.F.R. §§ 541.200-.202. The exercise of discretion and independent judgment is described as "the comparison and evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered." *Id.* § 541.202(a). "Matters of significance" relates to the "level of importance or consequence of the work performed." *Id.* FLSA regulations provide that exercising discretion and independent judgment is "more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. . . ." *Id.* § 541.202(e).

The parties in *Hines* agreed that plaintiffs performed non-manual work directly related to defendants' banquet business. The dispute centered over whether the primary job duty of the sales managers required exercise of discretion and independent judgment with respect to matters of significance, as required under 29 C.F.R. § 541.200(a)(3). The plaintiffs argued that they lacked the authority to make any independent decisions of financial significance, had no supervisory authority, and only followed corporate policies dictated by their employer.

The First Circuit disagreed. While noting that whether the sales managers could commit their employer on matters of financial significance was a pertinent factor, the court found that it was not a requirement to show that they exercised independent judgment. Instead, the court found "the fact that, after engaging a potential client and arriving at a proposed agreement for a banquet, the sales managers submitted the proposal to management for approval does not. . . detract from the judgment that was exercised in arriving at the proposal in the first instance." The court pointed out that the sales managers acted as "the face of the businesses to prospective clients" and regularly exercised judgment as to "how best to represent the employers and to develop a proposal that would attract the prospective clients to a contract with the venues." Because the sales managers were exempt from FLSA overtime requirements, the court granted summary judgment for the employers and dismissed the FLSA claims. This decision is significant for reminding employers that employees can be administratively exempt despite not having total control on financial and contractual decisions.

DOCTOR'S WAGE PAYMENT CLAIM DENIED: HE HAD NOT STARTED WORKING

By Darrell VanDeusen

Most Maryland employers know the state's Wage Payment and Collection Law (WPCL) provides that, without a signed authorization, an employer cannot withhold wages from an employee's pay. The law also requires that the employer pay an employee all wages due by the next pay period following the end of employment. If the employer fails to do so, the employee has the right to sue the employer for the unpaid wages. Md. Lab. & Emp. Code Ann. § 3-507.1(a). If there is no *bona fide* dispute that the wages are due, the employee can recover *treble damages* from the employer, which is quite the hammer to ensure that employers do not withhold pay.

This well-established requirement recently came under scrutiny in Maryland's federal trial court when District Judge Ellen Hollander (formerly a judge on Maryland's Court of Special Appeals) dismissed a doctor's claim for unpaid wages because he had not yet started working for the employer. *Horlick v. Capital Women's Care, LLC*, 2011 U.S. Dist. LEXIS 130894 (D. Md. Nov. 14, 2011). While *Horlick* presents a unique situation, it does serve as a good reminder about an employer's general obligations under the law.

The case was before the court on a motion to dismiss, so the facts Horlick alleged were considered true. Horlick was a doctor in D.C. who met with three doctors at Capital Women's Care (CWC) about joining their Hagerstown practice. Following this meeting, Horlick got a call from one of the doctors who told him they were making him an offer of employment. CWC sent Horlick an employment agreement, which he signed and sent back. One section of the agreement provided that Horlick would receive 90 days' notice of termination of employment, or 90 days' pay in lieu of notice. The "effective date" of the agreement was left blank, and CWC told Horlick that his start date was undefined at that point.

At the same time, CWC told Horlick to obtain an EIN and form an LLC because it would be easier for him to get paid by CWC, without "having to wait for credentialing from insurance companies which could take up to 6-9 months." Horlick did so. When he visited CWC, Horlick was introduced to the staff as a new doctor at CWC and a celebratory dinner was held in his honor.

Horlick packed his bags, sold his house in D.C. (for a loss) and rented an apartment in Hagerstown. He attended a three day seminar at CWC's offices in Silver Spring to learn how to use the practice's electronic

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medical records system. He "took himself off the job market" in reliance of his anticipated start at CWC.

Before Horlick started doing any work for CWC, however, one of the CWC doctors called and told Horlick "the agreement was cancelled." Horlick then demanded 90 days' pay in lieu of notice, as provided in the agreement. CWC refused to pay. Horlick sued CWC (and the three doctors individually) for: (1) violation of the WPCL, (2) breach of contract, and (3) promissory estoppel. The defendants moved to dismiss the complaint.

Judge Hollander dismissed the WPCL claim, but permitted the breach of contract and promissory estoppel claims to proceed to discovery. As to the WPCL claim, the judge noted that there were many interesting issues percolating. For example, was Horlick an employee or an independent contractor at the time the relationship ended? He had obtained an EIN and created an LLC, not something an employee does. Remember, the WPCL applies to employees but not to independent contractors.

The judge found it unnecessary to resolve this issue, however, because the first question to resolve under the WPCL was whether the amount sought by Horlick, the 90 days' pay in lieu of notice, constituted a "wage" as it is defined under the Act. She concluded that it did not.

"In order to constitute wages then, said Judge Hollander, a sum must be due in exchange for some work actually performed by the employee."

"Wages" are defined under Section 3-501(c) of the Act as "all compensation that is due to an employee for employment," including bonuses, commissions, fringe benefits, and "any other remuneration promised for service." Significantly, said the court, "[i]t is the exchange of remuneration for the employee's work that is crucial . . . ." *Provident Bank of Maryland v. McCarthy,* 383 F. Supp. 2d 858, 860 (D. Md. 2005). The Maryland Court of Special Appeals has said that "severance pay" may be a "wage" when it represents payment for work an employee performed prior to the termination of employment. But, in *Stevenson v. BB&T*, 159 Md. App. 620, 644 (2004), the court also made clear that that severance pay amounts to wages only when it "represents deferred compensation for work performed during the employment."

In order to constitute wages then, said Judge Hollander, a sum must be due in exchange for some work actually performed by the employee. Here, even considering the facts in the light most favorable to Horlick, he had not performed work for CWC. He was told that the agreement "was cancelled" before his start date. Therefore, the 90 days' pay in lieu of notice was not wages owed under the WPCL.

While the court also dismissed claims against the individual doctors, CWC did not fare as well on the breach contract claim or the promissory estoppel claim at this stage of the litigation. Judge Hollander noted ambiguity as to whether the agreement was unenforceable until its effective date or whether that phrase simply referred to Horlick's "start date" with CWC. If the agreement was breached, the 90 days' pay might still be owed.

As to the promissory estoppel claim, CWC claimed that Horlick had not alleged a sufficient amount in damages ($75,000) to remain in federal court. The court found that, when the amounts were tallied, "it does not appear, to a legal certainty, that plaintiff's claim is for less than the jurisdictional amount." Moreover, given the allegations of the promises made by and actions of the CWC doctors, the judge granted Horlick leave to amend the complaint to see if he could provide a sufficient legal basis to include them as individual defendants.

So, what is the "take away" for employers here? First, while the contractual payment was not deemed a "wage," that conclusion was made because Horlick had not yet started working for CWC. Had he worked for only one day, a different result would likely obtain. While dismissal saved CWC from the prospect of treble damages, a finding of a breach of the agreement would trigger entitlement to the 90 days' pay. Second, employers need to be particularly careful with the promises or enticements made when recruiting prospective employees. To say "never mind" after a prospective employee has relied upon those promises not only causes ill-will, it invites a lawsuit. Even if the employer ultimately prevails, the legal costs associated with doing so will be significant.

Around the Horn

By Michael Severino

While many people were busy planning and celebrating their holiday festivities, several important decisions were announced in neighboring states. Among these was a case from Virginia that addressed the breadth of non-competition clauses and a new law in Massachusetts that outlaws transgender bias.

In November 2011, the Virginia Supreme Court decided *Home Paramount Pest Control Companies, Inc. v. Shaffer*, 2011 Va. Lexis 222 (Va. 2011). This case involved an employee who executed a covenant not to compete and left his job and thereafter began to compete with his former employer. The restrictive covenant in question barred the employee from engaging in, among other things, the business of pest control *in any manner* or from being an officer or stockholder in a competing business. The Virginia Court ruled that the restrictive covenant was overbroad and unenforceable. The Court explained that in order to pass muster, a restrictive covenant must be narrowly drawn to protect the employer's legitimate business interest, cannot be unduly burdensome on the employee's ability to earn a living, and cannot run afoul of public policy. Perhaps most disconcerting to employers, the Virginia Court reversed a previous decision involving Home Paramount's predecessor in which it held the exact same language to be enforceable (*Paramount Termite Control Co. v. Rector*, 238 Va. 171 (1989)).

Up north, Massachusetts governor Deval Patrick signed into law a prohibition against discrimination based on gender identity. While the Massachusetts' Commission Against Discrimination had previously taken

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the position that transgender discrimination in employment was a subset of sex discrimination and, thus, impermissible, the new law makes gender identity a protected class entitled to protection in employment, housing and schools. The new law also makes crimes targeting transgendered individuals a hate crime under the Commonwealth's criminal code. While the new law will not significantly change an employer's obligations toward transgendered individuals, it does make clear that those individuals are entitled to the same protections as members of other protected classes. The law also makes it much easier for transgendered individuals to pursue their rights if they feel they have been discriminated against.

On the east coast, the New Jersey Department of Labor and Workforce Development now requires New Jersey employers to post a notice concerning their obligations to maintain and report various wage and employment records. Furthermore, employers are required to provide each employee hired *before* November 7, 2011 a written copy of the notice no later than December 7, 2011, and provide each employee hired *after* November 7, 2011 a copy of the notice at the time of hiring. The regulations come as a result of a state law that went into effect on July 30, 2010.

Out on the west coast, California recently enacted a new law requiring that all compensation agreements based on commissions be in writing and set forth the method for calculating the commission. In the event that the written agreement expires but the employee continues working, the expired agreement continues until the parties enter into a new contract. The employer is also required to obtain and retain a signed receipt from the employee acknowledging the written arrangement. Employers are required to comply with the new law by January 1, 2013. Under the new law, commissions do not include short term productivity bonuses or other bonus plans unless the employer has offered to pay a fixed percentage of sales or profits for work to be performed. The new law will undoubtedly affect overtime claims and factor into exclusions to overtime and wage laws.

Circling back to the northeast, Connecticut enacted perhaps one of the most significant new laws by now requiring employers with 50 or more employees to provide service workers paid sick leave. It is estimated that between 200,000 and 300,000 workers will be affected. The law, which goes into effect January 1, 2012, requires that employers provide service workers, as defined by the statute, up to 40 hours of paid sick leave per year to be used by the worker to care for himself/herself or the worker's spouse or child. Additionally, the paid leave can be used when the service worker is the victim of sexual assault or family violence. An employer is required to provide the worker one hour of paid leave for every 40 hours actually worked with a maximum of 40 hours per year. Workers can carry over up to 40 hours of unused leave per year, or employers may offer to pay out the unused time.

The law does provide employers a safe harbor. An employer complies with the law if it offers other forms of paid leave (such as personal time) that accrues at a rate at least equal to the new law and provides the worker the same right to take time off as found in the new law. Finally, the statute contains an anti-retaliation provision.

Finishing up, in New York, required notices under the state's Wage Theft Prevention Act (which became effective in April 2011) to be provided to employees before February 1, 2012. The Act requires employers to provide employees certain wage rate information at the time they are hired *and* on or before February 1st of each subsequent year the employee is employed. The wage rate notice must contain the employee's (a) rate of pay, (b) the basis for pay (i.e. hourly, by shift, salary, etc.), (c) whether the employer will claim any allowances, and (d) the regular pay day. The Act also contains records maintenance requirements, an anti-retaliation provision, and posting provisions. The notices must be provided to employees in English and in the employee's primary language.

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The Employment Brief is published by Kollman & Saucier, P.A., The Business Law Building, 1823 York Road, Timonium, MD 21093, 410.727.4300, http://www.kollmanlaw.com. To subscribe to *The Employment Brief*, please email publications@kollmanlaw.com. A complete list of our publications can be found at http://www.kollmanlaw.com/newsletters.html.

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