The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed.

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EEOC ISSUES FINAL REGS IMPLEMENTING ADAAA

By Randi Klein Hyatt

On March 24, 2011, nearly two and one-half years after the Americans With Disabilities Act ("ADAAA") was enacted, the Equal Employment Opportunity Commission (EEOC) issued its Final Regulations that implement the ADAAA. The ADAAA was enacted on September 25, 2008, and became effective on January 1, 2009. These regulations, which will become effective on May 24, 2011, will make it significantly easier for individuals to obtain protection and relief under the Americans with Disabilities Act (ADA).

The ADAAA made paramount that the primary focus in ADA cases should no longer be whether an individual is disabled and entitled to protection under the ADA, but rather, whether an employer had complied with its obligations under the law, whether reasonable accommodations were provided, and whether discrimination occurred. The presumption now is that an individual is entitled to ADA protection, and the Final Regulations underscore and reinforce that presumption in significant and unexpected ways.

The ADAAA maintains the original definition of disability: a physical or mental impairment is a disability only if it "substantially limits" an individual's ability to perform one or more major life activities (MLAs). The definition continues to include those with a "record of" such impairment or being "regarded as" having such an impairment. The Final Regulations define physical or mental impairment as "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine [the physical]; or any mental or psychological disorder, such as an intellectual disability, organic brain syndrome, emotion or mental illness, and specific learning disabilities [the mental].

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MARYLAND ADOPTS "MOTIVATING FACTOR" TEST FOR RETALIATORY DISCHARGE

By Adam Simons

On March 21, 2011 the Court of Appeals of Maryland issued one of its first decisions under the three-and-a-half year old private right of action for state law anti-discrimination claims. The Court held that it was error for a Circuit Court judge to instruct a jury that it must find that the plaintiff's sexual harassment complaints were the "determining factor" in her discharge. Guided by Supreme Court precedent interpreting Title VII, the Court held that the employee needed to demonstrate only that her protected activity was a "motivating factor."

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FINAL DOL RULE ADDRESSES TIP CREDIT AND TIP POOLING

By Cliff Geiger

The Fair Labor Standards (FLSA) Act requires employers to pay a minimum hourly wage of $7.25. Employers, however, are permitted to pay a tipped employee less than the minimum wage under certain circumstances by taking advantage of the tip credit available under Section 3(m) of the FLSA. Under federal law, employers can pay a tipped employee a wage as low as $2.13 per hour, provided the employee's direct hourly wage and tips combine to equal at least the minimum wage. The difference between the mandatory minimum wage and the employee's direct hourly wage is called the tip credit. The maximum tip credit is currently $5.12 per hour ($7.25 per hour minimum wage minus $2.13 per hour minimum tipped employee wage). Employers must be careful, however, because tip credit rules vary widely by state. In Maryland, for example, the tip credit is limited to fifty percent (50%) of the minimum wage.

The tip credit is available only for employees who meet the FLSA's definition of a tipped employee. A tipped employee is any employee engaged in an occupation in which he or she customarily and regularly receives at least $30 a month in tips. Therefore, tipped employees typically include wait staff, bellhops, service bartenders, and others who interact with customers and customarily and regularly receive tips. The U.S. Department of Labor (DOL) recently issued a final rule updating and clarifying several aspects of paying tipped employees. The new rule will be effective May 5, 2011.

In recent years the DOL, as well as state wage and hour agencies, have stressed that employers must meet certain notice requirements before claiming the tip credit. The new rule confirms this requirement and specifies the information that must be provided to tipped employees. Going forward, notice to tipped employees must include the following: (i) the amount of the direct cash wage the employer will pay the employee, which must be at least $2.13 per hour; and (ii) the additional amount of the employee's wage that the employer will credit against tips received; which cannot exceed the difference between the FLSA's minimum wage and the direct cash wage paid to the employee. Additionally, tipped employees must be notified that: (i) the amount claimed by the employer as a tip credit will not exceed the amount of tips the employee actually receives; (ii) the tip credit will not apply to an employee unless the employee has been informed of the tip credit provisions of the FLSA; and (iii) except for valid tip pooling arrangements, all tips received by an employee must be retained by the employee.

Written notice is not required. In fact, the DOL specifically rejected a written notice requirement, but it noted that employers may wish to provide written notice, because a physical document would, if the notice is adequate, enable employers to document that they have satisfied the regulatory notice requirements. Therefore, employers should provide the required notice in writing or include it on a workplace poster.

The DOL also clarified that tips received by employees are the property of the employees, regardless of whether the employer takes the tip credit. This interpretation rejects the Ninth Circuit's decision in *Cumbie v. Woody Woo, Inc.,* 596 F.3d 577 (9th Cir. 2010). *Woody Woo* held that if all employees are paid the federal minimum wage, tips can be collected and redistributed to the employer's entire work force, or used for other purposes, without violating the FLSA. Woody Woo permitted a restaurant-employer to forgo the tip credit, pay $7.25 per hour to tipped employees, and then keep all of the tips received by wait staff as profit, or to subsidize the wages of its other staff. The DOL called this result absurd. Therefore, under the final rule, all tips received by tipped employees must be paid out to tipped employees, and any agreement allowing an employer to retain tips for any other purpose is illegal.

Tip pools among employees who customarily and regularly receive tips remain valid, and employers may require employees to participate in a tip pool. In the past, the DOL took the position that an employer could not require employees to contribute more than 15% of their tips to a tip pool. The DOL removed this limitation on the maximum permissible contribution percentage. An employer, however, must notify its employees of the amount of any required tip pool contribution, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose.

ORAL COMPLAINTS PROTECTED UNDER WAGE AND HOUR LAW

By Darrell VanDeusen

In *Kasten v. Saint-Gobain Plastics Corp.*, 2011 U.S. LEXIS 2417 (March 22, 2011), the Supreme Court held that the term "filed a complaint" under the Fair Labor Standards Act (FLSA) includes oral as well as written complaints. This decision is consistent with the Court's holdings that have expanded the scope of protection from retaliation under federal anti-discrimination laws.

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THE COST OF GOVERNMENT UNIONS

By Pete Saucier

The media is hot for any news about government attempts to curb public sector union authority. The swirl of rhetoric and pejorative exchanges in the newspapers and on television do not permit the calm consideration of examples that illustrate the need for reform. Simple lessons about the problems that public sector unions bring upon government coffers are plentiful. Often those examples arise from arbitration decisions, the keystone of protections that unions claim to offer their members.

Recently, one branch of the United States Department of Justice implemented a program that allowed for bonuses upon exemplary performance. For obvious budgetary reasons, the number of bonuses was limited. That is, the branch used discretion to ensure that bonuses were awarded for exceptional performance, and only within the budget created for the bonuses.

Dutifully, the union that represents the employees filed a grievance asserting that every employee who receives an above average performance rating should get a bonus, not just the few highest rated as budgeted and planned. The dispute was processed to arbitration where the union won. The increased costs of removing management standards promised to be high. The arbitrator did not care, writing that the award might "result in a large number of employees entitled to remuneration by the Agency in [a] substantial dollar award . . . ." Still, he continued, the union process "demands nothing less."

That arbitration decision, mandating special acknowledgment for everyone who is a good performer, not only cheapens the award, it bankrupts the fund established for the purpose. Efforts to stem the tide of public sector union excess in the face of growing budget overruns are not motivated by evil designs.

ORAL WAGE COMPLAINTS PROTECTED

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In this case, employees at the company were required to punch a time clock at the start and end of the workday, and when taking a lunch break. The time clock Kevin Kasten used was located inside the area where the employees changed in and out of protective gear. Kasten complained that, as a result, employees were not being paid for "donning and doffing" time, and that this was a FLSA violation. (Note: In *IBP Inc. v. Alvarez*, 126 S. Ct. 514 (2005), the Supreme Court held that in most circumstances employees are to be paid for such activities).

Kasten alleged that he made a number of oral complaints to Saint-Gobain management, including his supervisor and HR representatives. Those complaints, said Kasten, were that the location of the time clocks were illegal and, that he was thinking of filing a lawsuit about them, and that he'd win if he did sue. But Kasten never reduced those complaints to writing or went to the DOL. After Kasten was fired (for, Saint-Gobain said, repeated time keeping violations that occurred before his complaints), he sued for retaliation.

The district court and the Seventh Circuit both found for the company, holding that Kasten had not engaged in protected activity. The FLSA provides that an individual cannot be retaliated against for, among other things, having "filed a complaint" related to the FLSA. These courts said that an oral complaint may have "raised a concern" about an FLSA violation, but did not constitute a "filing."

The Supreme Court's 6-2 decision by Justice Breyer (with Justices Scalia and Thomas dissenting and Justice Kagan recusing herself), held that oral complaints do indeed fall within the FLSA's protection.. To be protected, however, such complaints must be "sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the statute and a call for their protection." Of particular interest, the Court refused to consider the question of whether a complaint could be "filed" with an employer rather than with the DOL.

Kasten is yet another pro-employee decision from a Court that is repeatedly criticized for being too "employer friendly." In the area of protection from retaliation, however, every decision from the Court since 2005 has favored expanding the rights of employee protection when civil rights laws are invoked. Retaliation allegations now are almost routinely included in every EEOC charge of discrimination.

Employers should make a point of training supervisors to be sensitive when employee concerns of any sort are raised, and to notify Human Resources personnel immediately if an employee raises any concern that suggests discrimination or another possible violation of employment laws. Moreover, a policy clearly prohibiting employees from being retaliated against for raising good faith complaints of perceived discrimination, harassment or other civil rights violations is essential. When such a concern is raised, the employer must have an effective investigative strategy and ensure that any subsequent adverse employment taken against an employee who has complained is 100% unrelated to the protected activity - and that there is documentation to prove it.

MARYLAND EASES BURDEN ON RETALIATION PLAINTIFFS

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Kathleen Gaspar was an Assistant General Manager at a hotel in Gaithersburg, Maryland that was owned and operated by Ruffin Hotel Corporation of Maryland, Inc. According to her Complaint, she was sexually harassed, she notified her supervisors, and, thereafter, she was subjected to a hostile work environment by her immediate supervisor. Shortly after she persisted in her complaints, she was terminated. She claimed that the termination was the result of her complaints about sexual harassment; however, the hotel claimed that she was terminated "because of her attitude which created a hostile working environment, her insubordination towards [her supervisor], and complaints . . . received from [the hotel's] staff. . . ." Specifically, the hotel claimed that employees had complained that Gaspar treated them like dogs, treated employees rudely, and sent hostile emails to her supervisor.

Gaspar filed a complaint in the in the Circuit Court for Montgomery County alleging employment discrimination, sexual harassment, retaliatory discharge, negligent hiring, and other related counts, all under state and local discrimination laws. Prior to trial, the Circuit Court dismissed her claims of negligent hiring and retention. A jury trial followed on the remaining counts, and the jury found for the hotel on all counts.

Gaspar appealed to Court of Special Appeals and argued that the Circuit Court erred when it instructed the jury, on the retaliatory discharge count, that Gasper must prove that her opposition to harassing conduct was a "determining factor" in the decision to fire her. Instead, she asserted, the jury should have been instructed that her opposition to the sexual harassment was only a "motivating factor," the standard adopted by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). Gaspar requested that the Court of Special Appeals vacate the Circuit Court's decision.

Ruffin argued that the cases cited by Gaspar dealt with "mixed motive" cases, whereas here, Gaspar alleged a single motive, i.e., that she was fired solely for her complaints about sexual harassment. Based on this distinction, Ruffin argued in favor of a "but for" standard, which it asserted was consistent with precedent from the Maryland appellate courts.

The Court of Special Appeals agreed with Gaspar, stating Maryland law is "settled that a plaintiff's burden is to prove that the exercise of his or her protected activity was a 'motivating' factor in the discharge" and, therefore, the burden shifts to the defendant. A motivating factor is different than a determining factor, because motivating requires that it "provides the motive for doing something" while determining requires that it "be the decisive factor."

Ruffin appealed to the Maryland's court of last resort, the Court of Appeals, which framed the issue as follows:

"In retaliatory discharge claims brought under Maryland Law, should juries be instructed that the plaintiff must prove that retaliation was a "determining factor," as opposed to a "motivating factor," in her termination?"

Ruffin maintained that because this is a "single motive" case, the instruction was not in accord with prior Court of Appeals precedent, which requires "but for" causation. The Court responded: "we are persuaded that the theoretical distinction between "single motive" and "mixed motive" cases is of no consequence whatsoever when . . . the jurors . . . could reasonably find that the employer's decision to terminate was based on both the employee's deficient performance and the employee's opposition to unlawful harassing conduct . . . ." With regard to Ruffin's second assertion, the Court noted that precedent does not hold that "but for" causation is required in retaliation cases. Instead, it explained, "the employee is entitled to a verdict in his or her favor if the jurors are persuaded that the employee's opposition to unlawfully harassing conduct played a motivating part in the employer's decision to terminate…."

At the risk of sounding like Chicken Little, retaliation claims now will be very challenging to get dismissed on summary judgment. Further, employers should expect retaliation claims to be included in nearly every lawsuit arising under Md. Code Ann. State Gov't § 20-1013. Making patently clear that protected activity need only be a motivating factor, and not the factor, in successful retaliation case, employers will have to be even more diligent and vigilant in their documentation of employment actions taken against employees, particularly those who engage in protected activity.

MARYLAND ENACTS NEW LAW LIMITING USE OF CREDIT CHECKS

By Eric Paltell

The most significant piece of employment legislation passed by the Maryland General Assembly this year is the Job Applicant Fairness Act (JAFA). This law (HB 87) prohibits most employers from using an applicant's or employee's credit report or credit history in determining whether to deny employment to the applicant, discharge the employee, or determine compensation or the terms, conditions, or privileges of employment. It authorizes an employer to request or consider an applicant's credit report or credit history

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ADAAA REGULATIONS

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Further, within the ADAAA, Congress identified specific impairments that had routinely not been recognized as disabilities because the individual with the impairment was unable to meet the definition of disabled. The EEOC has followed Congress's lead, and within the Final Regulations has included a list of impairments, that given their inherent nature, will "virtually always" be considered a disability. Those impairments include autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, intellectual disabilities (formerly called mental retardation), major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.

The EEOC also rejected the notion that temporary impairments are not substantially limiting, and therefore, not disabilities. With respect to the duration of an impairment, the Final Regulations specifically rejected a six-month minimum floor for establishing a disability. Indeed, the Final Regulations do not set any minimum period of time that an impairment (and/or its effects) must last for the impairment to be "substantially limiting" and state instead that "the effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning" of the ADA. Therefore, impairments that last a short period of time may be covered if sufficiently serious.

The Final Regulations also provide that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active. The everyday examples of such chronic impairments include epilepsy, asthma, multiple sclerosis, diabetes, cancer, and psychiatric conditions. This means an individual who has had cancer in remission for 10 years, without any episodes of activity, is now presently disabled.

With respect to pregnancy-related conditions, the Final Regulations confirm that while pregnancy is not an impairment within the meaning of the ADA, a pregnancy-related impairment that substantially limits a major life activity could be a covered disability.

The Final Regulations also change the definition of major life activity established in the Supreme Court decision, *Toyota Motor Manufacturing, Ky., Inc. v. Williams*, 534 U.S. 184 (2002). Now, "major life activity" means virtually any life activity. MLAs are also set forth in the Final Regulations, and include: caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and to remove any doubt on the issue, working. The Final Regulations also add a list of major bodily functions that are MLAs for purposes of a disability analysis, which include functions of the immune system, special sense organs and skin, normal cell growth; digestive; genitourinary; bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions.

In case there was any doubt that the ADAAA is to favor employees, the term "substantially limits" also must be construed broadly in favor of expansive coverage, "to the maximum extent permitted by the terms of the ADA." "Substantially limits" is not to be a demanding standard, and an impairment need not prevent or significantly or severely restrict the individual from performing the MLA in order to be considered a disability. The impairment need only limit the ability of the individual to perform the MLA as compared to most people in the general population, and this analysis does not require scientific, medical or statistical evidence.

Mitigating measures (other than routine corrective lenses) are no longer to be included in the calculus of whether an impairment is substantially limiting, and therefore, whether an individual is disabled. Mitigating measures include medication, medical equipment and devices, prosthetic limbs, hearing aids, mobility devices, oxygen therapy equipment, use of assistive technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications. Newly added into the Final Regulations' non-exhaustive list of mitigating measures that cannot be considered: psychotherapy, behavioral therapy, and physical therapy.

The new regulations implementing the "regarded as" prong proves troubling for employers. The ADAAA expanded the "regarded as" analysis by prohibiting discrimination based on the employer's alleged perception that an individual had an impairment, even if the employer did not perceive that impairment to be an actual disability. Now, the Final Regulations go even further, and an individual can successfully claim he or she was "regarded as" disabled if they can prove they were subjected to an adverse employment action because the employer took action based on a real or perceived impairment, regardless of whether the impairment substantially limits, or is perceived to substantially limit, a MLA. Therefore, if an employer denies employment to an applicant with a slight lifting restriction (that would not be considered an "actual disability"), that decision could be challenged as a "regarded as" claim. Even worse, if no impairment exists, but the employer

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ADAAA REGULATIONS

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thought one did, regardless of the nature of the impairment imagined, the employer can be liable under this expansive regarded as analysis.

In some good news for employers, the Final Regulations confirm there is no duty to provide reasonable accommodation to those "regarded as" disabled. The regulations do, however, state that employers must reasonably accommodate those with a record of disability, absent undue hardship. I have not yet figured out how an employer can accommodate an employee who does not have a present actual disability to address.

The Final Regulations parrot the ADAAA's language, and remind employers that the statute is to be broadly construed; that employers should be focusing on what accommodations can be provided, and not whether an individual is disabled. Employers must now truly focus on their reasonable accommodation obligations. Job descriptions must be updated to accurately reflect what is required of each position. Employers will not win on summary judgment by arguing that the individual is not disabled. Now the strategy will need to be the employer made the accommodation, the employee failed to request accommodation, the employee failed to participate meaningfully in the interactive process, and the like.

Documentation will, of course, be critical to establish these points. Supervisors must be trained to understand what their obligations now are under the ADAAA, particularly as they relate to the interactive process. ADA charges of discrimination will undoubtedly become the charge "de jour".

NLRB APPROVES "PRISONER" GARB FOR EMPLOYEES

By Mike Severino

Imagine that you call AT&T to request that a service technician come to your home to inspect your phone lines. The doorbell rings and, upon answering, you see a man in a mostly plain white t-shirt, with "Inmate #" in small print on the upper left front of the shirt. As he enters your home and walks past you, on the back of the shirt you see two sets of vertical stripes with "Prisoner of AT$T" between them. A reasonable person would likely think this was some sort of joke and tell that AT&T "prisoner" to get off his or her property. The NLRB, however, has no problem with AT&T's employees going to customers' homes in this attire.

In this case, *AT&T Connecticut and Communication Workers of America*, 190 LRRM 1205, 34-CA-12451 (NLRB March 24, 2011), the union alleged that AT&T violated employee rights under the National Labor Relations Act when AT&T prohibited employees from wearing such shirts on service calls. AT&T argued that wearing such attire would cause fear or alarm among AT&T's customers, and thus "special circumstances" existed sufficient to override the employees' right to make known their union grievances by wearing the clothes.

The NLRB agreed with the union and ruled that the shirt would not cause fear or alarm among customers. In doing so, the NLRB noted that additional factors mitigated against any special circumstances. Among these were that AT&T's employees went to customers' homes in response to appointments initiated by the customers, the employees called before arriving at the customers' homes, an AT&T truck would be parked nearby and that the employees wore lanyards identifying them as AT&T employees. According to the NLRB, these facts were sufficient to offset any risk of confusion on the part of customers.

MARYLAND LIMITS CREDIT CHECKS

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under specified circumstances.

The new law does provide some exemptions. Use of credit history is permitted when the employment sought involves: (1) a position that is managerial and that has access to personal information (as defined in the Commercial Law Article) of a customer, employee or employer, except for information customarily provided in a retail transaction; (2) a position with fiduciary responsibility to the employer, including the authority to issue payment, collect debts, transfer money or enter into contracts; or (3) a position that is provided an expense account or a corporate debit or credit card or has access to confidential business information. Notably, the law does not exempt a position in which an employee will have access to cash or valuables.

The Commissioner of Labor may investigate a complaint of violation of the law and determine if the violation has occurred. If the Commissioner determines that a violation has occurred, the Commissioner may attempt to resolve the matter informally. If the Commissioner is unable to resolve the matter informally, the Commissioner may access a civil penalty of up to $500 for the initial violation and up to $2,500 for a repeat violation. An employer has 30 days to request an administrative hearing to contest the penalty. If the request is not made within 30 days, the penalty becomes a final order. Fortunately, there is no private right of action available.

The law takes effect October 1st. 2011.

SUPREME COURT DODGES EXEMPT STATUS OF SALES REPS

By Kelly Hoelzer

One of the most hotly contested issues in FLSA litigation is whether pharmaceutical sales representatives are exempt from the statute's overtime requirements. In the pharmaceutical industry, sales representatives customarily are treated as exempt from overtime as outside salespersons or because they fall within the administrative exemption. Due to the highly regulated nature of the industry, however, these salespeople cannot sell directly to doctors or patients. So, the question has arisen whether they "sell" for the purposes of the outside salesperson exemption. If they do not "sell," the question then becomes whether the sales representatives exercise sufficient discretion and independent judgment to be considered exempt as administrative employees.

So far, several district courts have answered "yes," finding pharmaceutical representatives to be exempt from the FLSA as outside salespeople, as administrative employees, or both. As these cases move through the circuit courts, however, the picture has become far less clear.

As reported in our September/ October 2010 newsletter, in July 2010, the Second Circuit held in *In re Novartis Wage and Hour Litigation* that the salespeople employed by 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 position taken in its amicus curiae brief that sales representatives 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 were not exempt. Both employers took their cases to the U.S. Supreme Court, which declined to consider either case on appeal.

To add to the confusion, just two weeks before the Supreme Court declined to hear the two Second Circuit cases, the Ninth Circuit issued an opinion in *Christopher v. SmithKline Beecham Corp., DBA GlaxoSmithKline,* No. 10-15257 (9th Cir. Feb. 14, 2011), denouncing the DOL's restricted interpretation of the outside salesman regulations. That court held that, as had been the case for the past seventy years, pharmaceutical sales representatives acted as outside salespeople and, therefore, were exempt from the FLSA's overtime requirements.

Like Novartis, Glaxo develops, produces, markets, and sells pharmaceuticals, including "Rx only" drugs that require a physician's prescription for consumer purchase. Glaxo employs approximately 9,000 sales representatives to call on physicians with the ultimate goal of obtaining their commitment to prescribe Glaxo products to their patients. Unlike its colleagues in the Second Circuit, however, the Ninth Circuit concluded that it owed no deference to the Secretary's interpretation of the outside salesman exemption because the interpretation merely "parroted" the language of the FLSA.

The Ninth Circuit also criticized the DOL's argument that the sales representatives do not "sell" to physicians, given the realities of the heavily regulated industry which had not changed in decades. The court questioned why pharmaceutical companies employ 90,000 sales representatives to make daily calls on doctors "for the purpose of driving greater sales" if they were not, in fact, salespeople.

The court also noted that industry sales practice for the past 70 years had never been challenged by the DOL until its appearance in the Novartis case. Given the DOL's acquiescence of this practice for more than seven decades, the court rejected the agency's new "about-face" interpretation, holding that the sales representatives were exempt outside salespeople.

What does this conflict in the circuit courts mean for the thousands of pharmaceutical sales representatives around the country? For now, the Supreme Court's refusal to hear the Novartis case means that the pharmaceutical industry will have to wait as the issue plays out in the other circuits. The Third Circuit has held that Johnson & Johnson sales representatives are exempt from the FLSA as administrative employees. *Smith v. Johnson & Johnson,* 593 F.3d 280 (3d Cir. 2010). The Fifth and Seventh Circuits should weigh in on the issue later this year in the cases of *Schaefer-LaRose v. Eli Lilly & Co.*, 663 F. Supp.2d 674 (S.D. Ind. 2009), and *Harris v. Auxilium Pharmaceuticals, Inc.*, 664 F. Supp.2d 711 (S.D. Tex. 2009). After considering the DOL's brief submitted in the Novartis case, the Schaefer-LaRose trial court found that, in the absence of any guidance from the Seventh Circuit, Eli Lilly's sales representatives were exempt as outside salespeople. The Harris court, however, deferred to the DOL's rationale and denied summary judgment for the employer.

No doubt the challenges to the pharmaceutical industry's pay practices will continues. Given the billions of dollars at stake, there is little question that the Supreme Court will have another opportunity to resolve the issue.