

*MARYLAND STATE BAR ASSOCIATION*  
*SECTION OF LABOR AND EMPLOYMENT LAW*  
**NEWSLETTER**

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**From The Chair**

**By J. Michael McGuire**

This is my "Opening Statement" as Chair of the Labor and Employment Law Section of the Maryland Bar. I would be remiss not to immediately thank Past Chair Jerry Goldstein and NLRB Regional Attorney Al Palewicz (aka "Newsletter Editor") for their continuing guidance as I take over this position, as well as the Section's Executive Council and Members for their enthusiasm in planning and attending our excellent educational program. As I stated in my "swearing in" remarks in Ocean City in June, this is a great time to be practicing labor and employment law with so many issues rapidly developing in the Courts. The U.S. Supreme Court has taken more labor and employment cases in the past 5 years than any other area of the law. As Chair, I would like to continue our emphasis on educational programs, dinner meetings, and brown bag lunches with Agency and Court representatives to provide more opportunities for our Section Members to stay ahead of the wave on all of these developing areas. Stay tuned for information on our upcoming Fall Dinner Program and Brown Bag lunches.

As Chair I would also like to use my column to pass along an observation or interesting recent case development that may help our Members in their practice. In this Newsletter, I have a particularly good one for attorneys that take many depositions in employment discrimination cases. A case to keep handy is *Burns v. Board of County Commissioners of Jackson County*, 330 F.3d 1275 (10<sup>th</sup> Cir. 2003) which deals with the recurring situation where you obtain a great admission in a deposition – "The case is over! You asked the right question! Victory is yours! Summary Judgment is coming!" — but the signed transcript comes back altered when the deponent signed it, and the answer is changed. There is case law that says this alteration "goes to credibility" of the deponent to be used at trial, but unfortunately I think some parties say "to heck with my credibility, at least I'll get a trial and probably a settlement offer," and proceed with the alteration. It is black letter law that a Plaintiff cannot contradict his sworn deposition testimony by filing a contradictory affidavit in opposing Defendant's Summary Judgment Motion. But what if the signer of the deposition

**EDITOR'S CORNER**

**By Al Palewicz**

Mike McGuire's first article from the Chair is in this issue, and I will keep this part short. First, I would note that the Section's Brown Bag Lunch at EEOC was held on September 22, and it was one of the best we have ever done there. Over 40 people were able to attend, and the information exchanged was of interest to all. Jim Hammerschmidt was present and took good notes. He has graciously agreed to make his reflections part of the newsletter, and you will find his summary of the meeting at the end of the Newsletter, replacing the usual NLRB Report. The Section plans to do several more Brown Bag lunches in the near future. Keep your eyes open for the announcements.

This issue of the Newsletter is drafted by attorneys at Piper Rudnick LLP in Baltimore, with Richard Hafets and Amy Leasure as coordinators of the project. Their topic deals with the recent changes in the Wage and Hour laws governing overtime. After reading their material you will have a much better understanding of these very significant changes in the law.

The next issue will be sponsored by McGuire Woods LLP, with Doug Topolski as coordinator. We look forward to their work.

**From the Chair (continued)**

wants to alter what he said under oath before a Court Reporter? Is that OK? Does it just go to credibility?

Burns says no: when the question and answer were clear we will apply the rule that Plaintiff/Affiant cannot contradict Plaintiff/Deponent. For example, in *Burns*, a national origin discrimination case, Plaintiff testified in his deposition:

Q. Do you think you were terminated because you're part Native American?

A. No.

*(continued on page 2)*

## FROM THE CHAIR (CONTINUED)

In the corrected deposition transcript that answer was changed on the Errata Sheet submitted pursuant to FRCP 30(e) to:

Corrected Answer: "No, I don't think that was the only reason."

The Burns Court did not allow these shenanigans, stating:

[Rule 30(e)] cannot be interpreted to allow one to alter what was said under oath. If that were the case, one could merely answer the questions with no thought at all and then return home and plan artful responses. Depositions differ from interrogatories in that regard. A deposition is not a take-home examination.

Great quote. Hope you can use it in your practice.

### U.S. DEPARTMENT OF LABOR ENACTS NEW OVERTIME REGULATIONS ON AUGUST 23, 2004

By G. Brooks Liswell, Esq.  
*Piper Rudnick LLP*

On Monday August 23, 2004 the final regulations governing overtime eligibility under the Fair Labor Standards Act (FLSA) went into effect.

The new regulations may significantly change companies' exempt/non-exempt classifications, payroll expenses, and management practices. Relatively low-salary earners who have supervisory responsibility or management related responsibilities, and workers with advanced education or specialized training may be penalized.

As a result, companies may face morale problems from those current non-exempt employees who have grown dependent on overtime pay as a regular part of their salary. To those employees, a loss of overtime eligibility could adversely affect their standard of living.

Employers must now determine the impact, if any, of the final regulations on their current compensation policies and practices. This requires employers to analyze the new regulations, conduct a compliance review of present employee classification and pay practices, and revise policies and practices where needed.

#### I. Basic Framework of the FLSA Regulations Remains the Same

The new regulations maintain the same basic framework found in the previous rules. Exempt employees do not receive overtime pay and

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are not covered by the overtime pay provisions of the FLSA. For exempt employees, pay is not based on the amount of time spent at work, but rather is based on getting the job done.

Non-exempt employees are entitled to a mandated minimum wage, as well as overtime pay of not less than one-and-one-half times their regular hourly rate of pay for all hours worked in excess of 40 in their work week. The new regulations continue to apply three primary tests for determining eligibility for overtime pay.

First is the "salary-basis" test. To be exempt from overtime, workers generally must be paid a set salary that is not subject to reduction except in very limited, specified circumstances. The new rules do not alter this requirement.

The second criteria is called the "salary-level" test. Under this test, the employee must receive a required weekly minimum salary. As discussed below, this test has been amended mainly by increasing the required minimum threshold of the weekly salary amount.

Finally, the third test is where the new rules get considerably more complicated. This final test is called the "job duties" test. This test seeks to establish eligibility or exemption from overtime based on the type of work (or duties) an employee performs every day. A worker whose job duties are deemed "executive," "administrative," or "professional" in nature does not qualify for overtime (the "white collar" exemptions). These categories themselves have not changed. However, the new regulations have considerably revised the duties an employee must perform in order to be considered exempt under one of these white collar exemptions. These revisions are discussed below.

#### II. Significant Changes to the FLSA Regulations Affecting Employers

##### A. Renewed Importance of Compensation In Minimum Weekly Salary Requirement

Under the former regulations, executive, administrative, and professional employees must have received a required weekly minimum salary level in order to be exempt. If an employee earned at least \$155 per week (for the executive or administrative exemptions) or at least \$170 per week (for the professional exemption), the so-called "long" test was applied to the employee's job duties. The long test specified in some detail the duties, responsibilities, and obligations that the employee must have had in order to be considered exempt. The more lenient "short" test was applied if an employee earned a salary of at least \$250 per week. The short

test set forth fewer conditions related to the employee's duties, but required a higher minimum salary for the employee to be exempt.

These weekly salaries had not been revised since 1975. The result was that an employee was determined to be exempt based almost solely on the duties he or she performed rather than on his or her salary level.

The new regulations significantly raise the weekly minimum salary threshold required to be considered exempt. For an employee to meet one of the executive, administrative, or professional exemptions, he or she must receive a minimum weekly salary of \$455 — the equivalent of an annual salary of \$23,660. (29 C.F.R. § 541.600). Further, as will be discussed below, the new regulations eliminate the “short” test and “long” test distinction by removing any requirements relating to different weekly minimum salaries and different job duties tests dependant on those salaries.

### ***B. Disciplinary Pay Docking***

The new regulations modify the “no pay docking” rule for exempt employees. The “no pay docking” rule by and large prohibited any reduction in compensation because of variations in the quality or quantity of work performed, and required payment of a full week's salary for any week in which the employee performed any work. An employer who improperly docked pay from an exempt employee ran the risk of causing that employee to lose his or her exempt status.

Under the new regulations, employers still cannot deduct pay from exempt employees for days off, in most situations. While clarifying the exceptions to the “no pay docking” rule, the new regulations now provide employers with the option of docking exempt workers a full day's pay for certain serious disciplinary infractions (such as violation of a sexual harassment policy) without jeopardizing their exempt status, however. (29 C.F.R. § 541.602).

### ***C. Special Rule for “Highly Compensated Employees”***

The new regulations provide an automatic exemption for highly compensated employees. Employees with total compensation packages of at least \$100,000 per year (including base salary, commissions, and non-discretionary bonuses) will be considered exempt if, in addition, they: (a) receive at least \$455 per week; (b) perform “office or non-manual work”; and (c) “customarily and regularly perform” any one or more of the exempt duties of an executive, administrative, or professional employee on a regular and recurring basis. (29 C.F.R. § 541.601).

### ***D. Changes to the Job Duties Test – One Standard Test Within Each Category***

As discussed, under the new regulations, an employee fits into one of the white collar exemptions from overtime pay only if he or she makes a certain minimum weekly salary *and* performs exempt job duties. White

collar exemptions are limited to employees who perform relatively high-level work exercising independent judgment and discretion. Whether a particular job is exempt depends upon the nature of the particular duties performed. Job titles or position descriptions are of limited use; it is the actual job tasks that must be evaluated.

The new regulations create a standard job duties test for each respective white collar category. The short test and the long test distinction is eliminated. Instead, if the employee meets the weekly minimum salary requirement of \$455, only one test – the standard job duties test for that category of exemption – will be used.

A thorough discussion of the new job duties test for each job category is beyond the scope of this article. For more specific information on how the new single-standard tests differ from the former tests, please visit the Department of Labor's website for a side-by-side comparison table – [www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm](http://www.dol.gov/esa/regs/compliance/whd/fairpay/main.htm). However, significant portions of the new tests are highlighted below:

**Executive Duties:** An exempt “executive employee” must be paid a salary of \$455 per week and: (1) have the “primary duty” of the management of the enterprise or a recognized department or subdivision; (2) customarily and regularly direct the work of two or more other employees; and (3) have the authority to perform such duties as hiring, firing, promoting, or to make recommendations in these areas that are given particular weight. (29 C.F.R. § 541.100). To clarify the requisite degree of managerial influence, the new regulation provides clarification of the term “particular weight.” (29 C.F.R. § 541.105). For example, if the employee's suggestions are frequently followed, this may suggest the employee exercises managerial influence.

**Administrative Duties:** An exempt “administrative employee” must be paid on a salary or fee basis at a rate not less than \$455 per week and: (1) have the “primary duty” of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and (2) customarily and regularly exercise discretion and independent judgment. (29 C.F.R. § 541.200-202).

**Professional Duties:** Under the new regulations, professionals are broken down into two groups – learned professionals and creative professionals. An exempt “learned professional” employee must be paid on a salary or fee basis at a rate not less than \$455 per week and have the “primary duty” of performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction, but which can be acquired by alternative means such as an equivalent combination of intellectual instruction and work experience. (29 C.F.R. § 541.301). The focus of this exemption is now on the knowledge of the employee as opposed to the employee's education.

An exempt “creative professional” employee must be paid on a salary or fee basis at a rate not less than \$455 per week and have the

primary duty of performing work requiring invention, imagination, originality, or talent in a recognized field of artistic or creative endeavor. (29 C.F.R. § 541.302).

### ***E. Computer Employee Exemption***

The computer employee exemption applies to any computer employee who is compensated on a salary or fee basis at a rate of not less than \$455 per week (or at a rate not less than \$27.63 per hour). (29 C.F.R. § 541.400). Employees satisfy the duties test for this exemption if they are involved in: 1) the application of systems analysis techniques and procedures, including consulting with users; 2) design, development, documentation, analysis, creation, testing, or modification of computer systems or programs; or 3) a combination of such duties. (29 C.F.R. § 541.400).

### ***F. “Blue Collar” Workers and “First Responders” Guaranteed Overtime***

New sections have been added to the regulations clearly stating that manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy are entitled to overtime. Such non-exempt “blue collar” employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training. (29 C.F.R. § 541.3(a)).

Further, “first responders,” such as police officers, firefighters, paramedics, emergency medical technicians and licensed practical nurses, are entitled to overtime under the new regulations. (29 C.F.R. § 541.3(b)).

## **III. What Employers Should Do**

Attorneys representing employers must consider how their client’s compensation practices, personnel policies, and employee manuals should be amended, if at all. Employers are also likely to be in the need of legal advice as to how to formulate detailed plans to address the needed changes. Components of such a plan should include:

- Examine the salaries of employees and identify those employees who may no longer be exempt due to the \$455 weekly minimum salary threshold;
- Decide whether particular employees should be classified as non-exempt, rather than adjusting their salaries to comply with the definition of exempt under the new regulations;
- Analyze the job duties of those employees who do meet the \$455 weekly minimum salary threshold;
- Assess the job duties of those employees under the new regulations for inclusion in one or more of the white collar exemptions; and

- Anticipate employee reaction – get together with the corporate communications team and coordinate how to convey the new regulations to employees.

### **FEDERAL DISTRICT COURT FINDS EMPLOYERS MAY CONDITION EMPLOYEE BONUSES, COMMISSIONS AND INCENTIVE FEES IF THE CONDITIONS ARE RELATED TO THE JOB TO BE PERFORMED**

By Larry R. Seegull, Esq.<sup>1</sup>  
*Piper Rudnick LLP*

Two years ago, the Maryland Court of Appeals ruled in *Medex v. McCabe*<sup>2</sup> that the Maryland Wage Payment and Collection Law<sup>3</sup> (MWPCCL) prohibits employers from conditioning the receipt of bonuses, commissions or incentive fees on the employment of the employee on the date those items are scheduled to be paid. The decision effectively invalidated a common provision in many employment relationships that included such a requirement as a means to encourage and reward continued employment. Recently, in *McLaughlin v. Murphy*, Judge Catherine Blake, of the United States District Court for the District of Maryland, interpreted, and distinguished, the decision in *Medex*, providing insight into how an employer might draft bonus or commission plans so as not to run afoul of its holding.

#### ***Medex v. McCabe: A Short Review***

A short review of the *Medex* decision is helpful to understanding Judge Blake’s recent ruling. As a sales representative for Medex, Timothy McCabe earned an annual salary, plus incentive fees under Medex’s incentive compensation plan. The plan conditioned the payment of incentive fees on the employee’s achievement of sales targets, his employment at the end of the fiscal year, and his employment at the time of actual payment. McCabe resigned from his position as sales representative four days after the end of the fiscal year and two months before the incentive fees were scheduled to be paid. Pointing to the requirement that the employee must be employed at the time of payment, Medex refused to award McCabe incentive fees earned through the plan and McCabe brought suit under the MWPCCL.

The Maryland Court of Appeals held that the condition was invalid under the MWPCCL and that the employee’s right to bonuses, commissions, and incentive fees vested when the employee did everything required to earn the fees, regardless of an express term in the contract to the contrary. The MWPCCL states that “Each employer shall pay an employee . . . all wages due for work that the employee performed before the termination of employment. . . .”<sup>24</sup> The court’s inquiry turned on whether the incentive fees constituted “wages due” under the Act. On this issue, Medex argued that, according to the terms of the incentive plan, the incentive fees were not due unless the employee was employed on the date the fees were scheduled to be paid. Although the

court acknowledged the incentive plan's language to that effect, the court refused to enforce the provision, finding it inconsistent with the MWPC's legislative purpose. The court stated that MWPC's "mandate was clear": "when an employee earns wages under the Act, the employer must pay them, regardless of the ensuing termination of the employee."<sup>5</sup> As the contract in *Medex* imposed an additional requirement of the employee's continued employment, it conflicted with the legislature's intention. As a result, the court held that under the MWPC, McCabe was due the incentive fees he earned up to the time of his resignation, regardless of the terms of the incentive plan.

### ***McLaughlin v. Murphy: Beyond Simply Remaining An Employee***

Faced with a similar situation, Judge Blake interpreted and distinguished the ruling in *Medex*, in a case involving the unpaid commission of a mortgage broker. In *McLaughlin v. Murphy*, Freedmont Mortgage Corporation employed Michael McLaughlin as a mortgage broker from August 2001 to November 2003.<sup>6</sup> McLaughlin received no regular salary and was paid strictly on a commission basis. In November of 2003, Freedmont terminated McLaughlin and McLaughlin brought claims in federal court under both the Fair Labor Standards Act and the MWPC, arguing that he was entitled to compensation for three loans he was developing and prospecting, but had not settled, at the time of his termination.

On Freedmont's motion for summary judgment, Freedmont pointed to McLaughlin's contract, which specifically conditioned the payment of commission on the settlement of the loans. The contract stated McLaughlin would receive 40–50% of all brokerage fees earned on loans submitted in "complete application form" and "for which the loan is subsequently funded, settled and not rescinded while the employee is still employed."<sup>7</sup> The contract further provided for McLaughlin's precise situation, stipulating that it was "understood . . . that if the loan is not settled before the [E]mployee . . . is terminated . . . the Employee shall not be entitled to receive compensation. . . ."<sup>8</sup> In his response, McLaughlin relied on *Medex* to argue that he was entitled to commissions on the three loans under the MWPC. McLaughlin asserted that he had done considerable work in prospecting and developing the loans before his termination, and that obtaining clients was the most difficult aspect of selling mortgages. McLaughlin further appealed to public policy considerations, claiming that the contract violated public policy because it gave "the employer full discretion whether to compensate employees for work they have already performed."<sup>9</sup>

The district court rejected McLaughlin's argument, distinguishing the *Medex* decision on the grounds that the contract at issue in *Medex* conditioned receipt of the incentive fees on the employee's continued employment, while the contract at issue in the case at hand conditioned payment on the closing of the loan.<sup>10</sup> The court pointed out that McLaughlin's contract specifically stated that the mortgage broker's job "was to prospect, develop and settle loans completely."<sup>11</sup> Thus, closing the loan was a "key element" of his occupation, and McLaughlin's right to compensation

under MWPC did not vest until he had performed all the duties required of him by his contract. "It is not contrary to public policy," the court found, "to decide that commissions will only be paid for those loans that are fully settled."<sup>12</sup> Since the condition of payment in McLaughlin's contract was predicated on a "reasonable job requirement," as opposed to an "arbitrary factor" such as continued employment, the court held that the MWPC did not entitle McLaughlin to receive commission for the loans and granted the motion for summary judgment.

### **The Lesson Of *McLaughlin***

*Medex* held that wages become "due" when the employee does everything required to earn the wage, and that under the MWPC payment of wages may not be conditioned on an unrelated requirement, such as continued employment. *McLaughlin* is instructive on this point because it provides an example of a situation in which the employee had *not* done everything required of him to earn his wage and the condition *was* linked to a reasonable job requirement. As such, the holding in *McLaughlin* indicates that, under the MWPC, employers are permitted to condition the payment of bonuses, commissions and incentive fees, and withhold the payment of those bonuses, commissions and incentives fees if the conditions are not fulfilled, so long as the conditions are related to the job that is being performed. Therefore, the more an employer can relate remuneration conditions to reasonable job requirements, the more likely it is that the condition will be held valid under the MWPC.

### **(Endnotes)**

<sup>1</sup> Emily Wright provided Mr. Seegull with assistance drafting this article.

<sup>2</sup> 811 A.2d 297, 301 (Md. 2002).

<sup>3</sup> MD. CODE ANN., LAB. & EMPL. § 3-501 to -509 (2003).

<sup>4</sup> MD. CODE ANN., LAB. & EMPL. § 3-505.

<sup>5</sup> 811 A.2d at 304.

<sup>6</sup> No. CCB-04-767, 2004 U.S. Dist. LEXIS 12948, at \*1 (D. Md. July 20, 2004).

<sup>7</sup> *Id.* at \*15–\*16.

<sup>8</sup> *Id.* at \*15.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at \*18.

<sup>11</sup> *Id.* at \*19.

<sup>12</sup> *Id.* at \*18.

### **PAYING NON-EXEMPT EMPLOYEES FOR TRAVEL TIME**

By Paul Mallos, Esq.  
*Piper Rudnick LLP*

One of the more challenging and occasionally maddening tasks associated with FLSA compliance is determining when and how much to pay non-exempt employees for work-related travel time. For instance, an employer ordinarily does not have to pay a non-exempt

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worker for time spent commuting from home to work and vice-versa. The same employee, however, is entitled to compensation for time spent traveling from one work site to another or traveling out of town on special assignment during regular work hours. On the other hand, the employee is not entitled to compensation for time spent traveling on overnight trips during non-work hours, unless of course the employee drives or performs actual work en route. Confused?

In the absence of a contractual agreement or past practice dictating otherwise, whether travel time is compensable working time under the FLSA depends on when the travel takes place and what kind of travel is involved. This article attempts to clarify what constitutes compensable working time under various travel scenarios.

#### • **Commuting and Ordinary Travel During the Workday**

Ordinary home to work travel is not considered compensable working time. 29 C.F.R. § 785.35. This is the case no matter how long the commute or even if the employee works at different job sites. *Id.* For example, if an employer reassigns a Baltimore-based employee to a worksite in Hagerstown, the employer is not obligated to pay for the time it takes the employee to make such a lengthy daily commute.<sup>1</sup> If, however, the employer orders the employee to stop on his way to the Hagerstown worksite to pick up materials, equipment or other employees, or receive additional instructions or perform other work, the time spent traveling to Hagerstown after making such a stop is compensable. 29 C.F.R. § 785.38. In short, time spent traveling from home to work is not compensable, but if the employee performs work of consequence on behalf of the employer on the way to work, the travel time incurred thereafter is compensable. If, on the other hand, the travel time is not for the employer's benefit or part of the employee's principal activity, the employer is not obligated to compensate the employee for the time.

#### • **Same-Day, Out-of-Town Travel**

All time spent traveling on one-day, out-of-town work assignments must be counted as hours worked and compensated accordingly, even if some of the travel takes place outside the employee's normal work hours. *See* 29 C.F.R. § 785.37. For example, if an employer requires a non-exempt employee located in Maryland to visit a customer in New York, and the employee travels three hours to meet the customer, spends a total of five hours with the customer, and then makes the three hour journey home, the employer would owe the employee a total of 11 hours — five hours representing the time the employee actually spent with the customer as well as the six hours of travel time. Because all of the travel took place in one day, federal regulations consider the trip a particular and unusual employer assignment (compared to the ongoing Hagerstown assignment mentioned above), and as such, the additional travel time, regardless of the method of travel, is compensable working time. In such instances, however, the employer may deduct from the total working time the

employee's normal commute time from home to work, as well as any meal period not spent performing work on behalf of the employer. *Id.*

#### • **Overnight, Out-of-Town Travel**

The Department of Labor does not count as working time overnight travel that occurs outside of regular working hours when the employee travels as a passenger via airplane, train, boat, bus, or car. *See* 29 C.F.R. § 785.39. For example, if a 9 to 5 non-exempt employee travels from 9 a.m. until 6 p.m., the employer does not have to pay for the time spent traveling between 5 p.m. and 6 p.m. because it would be outside the employee's regular work hours. The employer would, however, have to compensate the employee for that extra hour in the event the employee was working while traveling (e.g., reading work-related materials or using a laptop computer for employer-related tasks). *See* 29 C.F.R. § 785.41.

Out-of-town travel during the employee's regular working hours must be compensated, even if the travel takes place on weekends or non-workdays. *See* 29 C.F.R. § 785.39. For example, if an employee normally works 9 a.m. to 5 p.m. Monday through Friday, and the employer requires the employee to travel on Saturday, the employee must be paid for all travel time occurring between 9 a.m. and 5 p.m. on Saturday and Sunday. Accordingly, if the employee worked 40 hours Monday through Friday, any time spent traveling from 9:00 a.m. to 5:00 p.m. that weekend would be compensable at one-and-a-half times the employee's hourly rate.

#### • **Travel by Private Automobile During Non-work Hours**

If an employee is required to drive, rather than travel by public transportation, the employee must be compensated for all travel time even during non-work hours. *See* 29 C.F.R. § 785.40. If the employer offers the employee the option of public transportation, but the employee chooses to drive instead, the employer may either count as hours worked the time spent driving or the time the employer would have had to count as hours worked had the employee used public transportation. *See* 29 C.F.R. § 785.40.

#### • **Applicable State Laws Cannot be Discounted**

Although many state wage and hour laws mirror the FLSA, it is important to check applicable state regulations to determine if they impose different requirements with regard to compensable working time. For example, California requires certain employers to pay non-exempt employees time-and-a-half for hours worked in excess of eight per day (as opposed to the FLSA's 40 hours per week) and double-time for hours worked in excess of 12 per day. It is always advisable to follow whatever applicable regulation, state or federal, is the most beneficial to the employee in order to insure full compliance with both federal and state requirements.

\* \* \*

In sum, a non-exempt employee is entitled to compensation for time spent traveling from one work site to another or out of town *during regular work hours*, but the employee is not entitled to compensation for time spent traveling (1) from home to his regular work site, and vice-versa; and (2) on overnight trips, during non-work hours, unless driving or performing actual work.

**(Endnotes)**

<sup>1</sup> Once again, any contractual language or past practice to the contrary would control.

## **WATCH OUT FOR THE NEW (AND OLD) PAY-DOCKING RESTRICTIONS**

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On August 23, 2004, the U.S. Department of Labor's revised regulations implementing the "white-collar" exemptions to the Fair Labor Standards Act ("FLSA") went into effect. While the changes are many, one area to which employers should pay particular attention is the regulations' pay-docking restrictions. While employers now have more flexibility for sanctioning exempt employees via pay docking, great care should be taken not to overstep the regulations' bounds.

### **A. Till Shortages – Old Advice Is Still Good Advice.**

Still alive and kicking, it appears, is a Wage and Hour Division Opinion Letter issued by the Department of Labor on April 1, 1999, which advises that requiring a manager to cover any cash shortages out of his or her paycheck is not a permissible deduction under the FLSA. The DOL's reasoning, consistent with the revised regulations, is that such a policy would destroy the employee's exempt status, because it would result in his or her not being paid on a "salary basis" as required by the FLSA.

The issue addressed in the Opinion Letter dealt with a practice common among restaurants with regard to the handling of cash received from restaurant patrons. In the Opinion Letter, the employer explained the practice as follows: First, all cash received for the day is counted and verified both by the manager and the wait-staff person involved. The manager then is responsible for transferring the cash to a locked bank bag and recording the total amount on a daily report form. The manager is the only individual in the restaurant with a key to the bank bag, which is placed overnight in a locked safe inside a locked office. When the manager brings the cash to the bank for deposit the next day, a bank representative counts the contents of the bag. Any discrepancy between the amount counted and recorded on the daily report the previous night by the manager and the amount counted and deposited by the bank representative is verified both by the manager and the bank representative.

The employer explained that it maintained a policy of deducting from the manager's next paycheck any difference in the amount on the daily report and the amount deposited by the bank representative. The employer therefore inquired as to whether its deduction policy conflicted with the salary requirements for exempt employees under the FLSA, and ultimately whether it was a permissible deduction under then 29 C.F.R. § 541.118 ("Salary basis." – now located in 29 C.F.R. § 541.602).

In laying out the relevant provisions of the FLSA, the DOL noted that, in order to qualify for the exemption from minimum wage and overtime requirements, an executive, administrative or professional employee must be compensated "on a salary basis." In order to meet this requirement, the employee must regularly receive on a weekly or less frequent basis a predetermined amount constituting all or part of his or her compensation. The DOL further explained that this predetermined amount is not subject to reduction because of variation in the quality or quantity of the work an employee performs. In other words, the DOL indicated that if an employee's pay is reduced because of a change in the quantity or quality of his or her work, then that employee is no longer being paid on a "salary basis" and is no longer exempt. The DOL found that because a deduction from a manager's paycheck to compensate for till shortages amounts to a sanction for diminished work quality, the pay docking is an impermissible deduction under the FLSA.

### **B. Other Improper Deductions From Pay Under The Regulations.**

- **Absences of less than one day.** Employers may not make deductions from the salary of an exempt employee for partial-day absences. 29 C.F.R. § 541.602(b)(1).
- **Absences occasioned by jury duty, attendance as a witness or temporary military leave.** Employers may not make deductions from the salary of an exempt employee occasioned by jury duty, attendance as a witness, or temporary military leave. The employer may, however, offset any amounts received by an employee in a particular week in the form of jury fees, witness fees, or military pay against the salary due for that particular week. 29 C.F.R. § 541.602(b)(3).
- **Absences occasioned by the employer.** Employers may not make deductions from the salary of an exempt employee because of absences caused by the employer or by the operating requirements of the business. If an employee is ready, willing and able to work, deductions cannot be made because the employer lacks available work. 29 C.F.R. § 541.602(a).

### **C. Improper Deductions May Mean Loss Of Exempt Status.**

Under the revised regulations, the effect of improper deductions from salary is described in its own section, 29 C.F.R. § 541.603. That section provides that employers who demonstrate a practice of making improper

deductions from salary shall lose the exemption, if the facts demonstrate that the employer did not intend to pay employees on a salary basis.

Several factors are considered in determining if the employer has an actual practice of making improper deductions. These include, but are not limited to:

- the number of improper deductions, as compared to the number of employee infractions warranting discipline;
- the time period during which the employer made the improper deductions;
- the number and geographic location of employees whose salary was reduced;
- the number and location of the managers responsible for taking the improper deductions; and
- whether the employer has communicated a policy permitting or prohibiting improper deductions.

29 C.F.R. § 541.603. The effect of an improper deduction and resulting lost exemption is more far-reaching than just to the particular employee involved. If the facts demonstrate an actual practice of improper deductions by an employer, the exemption is lost not only for the employee whose salary was reduced, but for all employees in the same job classification working for the same managers during the time period in which the improper deductions were made. 29 C.F.R. § 541.603(b).

Improper deductions that are “isolated” or “inadvertent” will not result in the loss of the exemption, if the employer reimburses the employee for the deduction. 29 C.F.R. § 541.603(c). Additionally, if an employer has a clearly communicated policy that prohibits the improper pay deductions set out in the revised regulations and includes a “complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future,” the affected employees will not lose the exemption, unless the employer “willfully violated the policy by continuing to make improper deductions after receiving employer complaints.” 29 C.F.R. § 541.603(d). The regulations make clear that “best evidence” of a clearly communicated policy is a written policy distributed to employees prior to the improper deduction.

#### **D. Permitted Deductions From Pay.**

Some deductions from an exempt employee’s paycheck are allowable. The revised regulations describe several of those situations. They include:

- **Personal absences of a day or more for reasons other than sickness or accident.** Unlike partial-day absences, employers may make deductions from an exempt employee’s salary when the employee is

absent from work for one or more full days for personal reasons, other than sickness or disability (discussed below). In other words, if an employee is absent for one and a half days for personal reasons, the employer may not deduct for the half day. 29 C.F.R. § 541.602(b)(1).

- **Personal absences of a day or more for sickness or accident.** Deductions from pay may be made for full-day absences due to sickness or disability (including work-related accidents), if the deductions are made in accordance with a bona fide plan, policy, or practice of providing compensation for loss of salary occasioned by such sickness or disability. 29 C.F.R. § 541.602(b)(2). Such deductions may be made before the employee qualifies under the relevant plan, policy, or practice and after the employee exhausts the leave allowance provided. The regulations provide as an example an employer’s policy that provides short-term disability insurance to replace an employee’s salary starting on the fourth day of absence. According to the regulations, the employer properly could deduct from the employee’s pay for the three days of absence before the employee qualified for benefits, during the leave period, and for absences after the leave period. Similarly, if state disability insurance or workers’ compensation laws provide salary replacement for absences of one or more full days, the employer may make pay deductions accordingly. 29 C.F.R. § 541.602(b)(1).

- **Good faith penalties for infractions of safety rules of major significance.** Employers may make deductions from the pay of exempt employees as a penalty for infractions of safety rules of major significance, so long as they impose the penalty in good faith. Safety rules of major significance are narrowly defined in the regulations, however, to include rules designed to prevent serious danger in the workplace or to other employees. The regulations provide as an example “no smoking” rules in explosive plants, oil refineries, or coal mines. 29 C.F.R. § 541.602(b)(4).

- **Disciplinary suspensions of one or more full days.** Deductions from the pay of an exempt employee are proper where an employer imposes unpaid, disciplinary suspensions in good faith for one or more full days as a penalty for infractions of workplace conduct rules. This type of disciplinary suspension must be made pursuant to a written policy generally applicable to all employees. The regulations provide as an example suspending an employee without pay for several days for violating an employer’s written policy prohibiting workplace violence or sexual harassment. *See* 29 C.F.R. § 541.602(b)(5).

- **Unpaid leave under the Family and Medical Leave Act.** Employers need not pay exempt employees their full salary for weeks during which they take unpaid leave under the Family and Medical Leave Act. Instead, employers are permitted to pay the percentage of their salary that is proportionate to the time actually worked. The regulations provide as an example the situation where an employee takes four hours of unpaid leave out of a 40-hour work week. In that case, the employer may deduct 10 percent from the employee’s normal salary that week. 29 C.F.R. § 541.602(b)(7).

## THE “SAFE HARBOR” PROVISION: A POINT OF CLARITY IN THE NEW REGULATIONS

By Michelle Murray, Esq.<sup>1</sup>  
*Piper Rudnick LLP*

One of the stated reasons for revising the regulations to the Fair Labor Standards Act (“FLSA”) was to clarify the “confusing, complex and outdated” duties test for classifying exempt employees so “that employees could understand their rights, employers could understand their legal obligations, and the Department [of Labor] could vigorously enforce the law.”<sup>2</sup> A cursory review, however, reveals that the new regulations are anything but clear. At times, it seems as though the new regulations simply substitute one vague and ambiguous concept for another.

In the midst of this seeming mess, the new regulations do make one thing clear: employers can minimize potential liabilities resulting from improper pay deductions by enacting and clearly communicating a company policy prohibiting improper pay deductions. This part of the new regulations is referred to as the “safe harbor” provision.<sup>3</sup>

### What is the effect of an improper pay deduction under the new regulations?

The new regulations continue the general rule that improper deductions of pay from the salaries of exempt employees, including deductions for variations in the quality or quantity of an employee’s work, may result in the loss of the employee’s exempt status.<sup>4</sup> This means that the employer will be required to pay its previously exempt employees time and a half for every hour worked in excess of forty hours per week, or otherwise known as overtime.

Whether an improper pay deduction results in the loss of the employee’s exempt status, however, depends upon whether the improper deduction was “isolated” or “inadvertent,” or part of a larger practice by the employer. The new regulations specifically state that an isolated or inadvertent deduction would not jeopardize an employee’s exempt status, so long as the employer reimburses the employee for the improper deduction.<sup>5</sup> Although not delineated in the text of the regulations, the Department of Labor has explained that “[i]nadvertent deductions are those taken unintentionally, for example, as a result of a clerical or time-keeping error.”<sup>6</sup>

Conversely, an employer will forfeit the exempt status of its employees, and thus, be liable, at a minimum, for back overtime pay, if the employer has an “actual practice” of making improper deductions from the salaries of its exempt employees.<sup>7</sup> The determination of whether an employer has an actual practice of making improper deductions is fact specific, and should include the consideration of the following: “the number of improper deductions, particularly compared to the number of employee infractions warranting discipline; the time period; the number and geographic locations of employees who received an improper reduction; the number and geographic locations of the managers re-

sponsible for the deductions; and whether the employer has a clearly articulated policy prohibiting such improper deductions.”<sup>8</sup>

If an actual practice of making improper deductions is established, the employer loses the exemption for those employees who were affected by the improper deduction for the entire period in which the improper deductions were made. In addition, the employer loses the exemption for those employees who were not actually affected by the improper deduction, but who are in the same job classification and work for the same manager for the entire period in which the improper deductions were made.<sup>9</sup> Other employees working in different job classifications or for different managers, however, do not lose their exempt status.<sup>10</sup>

### How does the “safe harbor” provision minimize liability?

In the event that an employer is found to have an actual practice of making improper deductions, the “safe harbor” provision minimizes the employer’s liability by limiting the impact of the improper deductions. Specifically, the “safe harbor” provision preserves the employees’ exempt status and provides the employer with the opportunity to correct any improper deductions through reimbursement.

In practical terms, this means that the employer will only be responsible for reimbursing the affected employees for the improper deductions. The employer will not have to pay any amount, including overtime, to any other employees or pay overtime for any extended period of time.

### What does an employer need to do to take advantage of the new “safe harbor” provision?

To take advantage of the “safe harbor” provision, an employer must enact and clearly communicate a company policy that:

- Prohibits improper deductions to the salaries of exempt employees;
- Provides employees with a complaint mechanism to raise concerns about possible improper deductions;
- Reimburses employees for any improper deductions; and
- Makes a good-faith commitment to comply with the FLSA in the future.<sup>11</sup>

While not specifically required, the new regulations advise employers to reduce this company policy into writing and distribute a copy to all employees “by 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.” *Id.*

The Department of Labor also suggests that following an employee complaint of improper deductions, an employer can demonstrate its good-faith commitment to comply in the future by, among other things, adopting or re-publishing to employees its policy prohibiting deductions; posting a notice of its future commitment on an employee

bulletin board or employer Intranet; providing training to its managers and supervisors; reprimanding or training the manager who made the actual improper deductions; or establishing a telephone number for employee complaints.<sup>12</sup>

### **Can an employer lose the protections of the “safe harbor” provision?**

The “safe harbor” provision is not available if the employer “willfully” violates its company policy by failing to reimburse its employees for any improper deductions or by continuing to make improper deductions after receiving employee complaints. If an employer is found to have willfully violated its policy in the foregoing manner, the employer will be held liable as if it did not have a written policy prohibiting improper deductions, and will lose the exemption for “any employees in the same job classification working for the same managers responsible for the actual improper deductions.”<sup>13</sup>

### **Conclusion**

Because the new regulations through the “safe harbor” provision specifically provide employers with a means to limit liability for improper deductions from exempt employees’ salaries, employers would be remiss not to take advantage of its protections. As such, employers should be encouraged to enact a written policy expressly prohibiting improper pay deductions, and to act diligently in responding to employee complaints and reimbursing any improper deductions.

### **(Endnotes)**

<sup>1</sup> Dodi Vogel assisted Ms. Murray with this article.

<sup>2</sup> Preamble, Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 60 Fed. Reg. 22122 (April 23, 2004) (hereinafter “Preamble”).

<sup>3</sup> See generally 29 C.F.R. §541.603.

<sup>4</sup> See *id.* §541.602(a).

<sup>5</sup> See *id.* §541.603(c).

<sup>6</sup> Preamble at 22181.

<sup>7</sup> See 29 C.F.R. §541.603(a).

<sup>8</sup> *Id.* By requiring that an employer must actually make improper deductions before it can lose the exemption, the new regulations essentially have eliminated the Supreme Court’s holding in *Auer v. Robbins*, 519 U.S. 452, 461 (1977) and its progeny, that a “significant likelihood” of an improper deduction was sufficient.

<sup>9</sup> See 29 C.F.R. §541.603(b).

<sup>10</sup> *Id.*

<sup>11</sup> See 29 C.F.R. §541.603(d).

<sup>12</sup> Preamble at 22182.

<sup>13</sup> *Id.*

## **THE RAMIFICATIONS OF THE NEW FLSA REGULATIONS UPON EXISTING STATE WAGE AND HOUR LAW: THE POTENTIAL FOR DIFFERENTIAL STANDARDS**

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With the recent implementation of the final Fair Labor Standards Act (“FLSA”) regulations governing “white collar” overtime exemptions, labor and employment law attorneys need not only to familiarize themselves with the new federal regulations, but also to refresh their knowledge of the various state wage and hour laws. Importantly, with the advent of the new regulations, employers may now face new multi-layered compliance requirements in various jurisdictions in which they seek to do business, depending upon whether or not the state in question has implemented a wage and hour law, and, if so, whether that law automatically tracks the changes to the FLSA regulations.

In general, most employers are subject to both federal and state wage and hour laws. Accordingly, employers must ensure compliance with both laws. In the case of a conflict between state law and the FLSA, the law more favorable to the employee applies. Thus, if a particular state’s law is more inclusive or more generous regarding overtime pay, an employer must adhere to that law, even though it will surpass the minimum compliance requirements of the FLSA. Conversely, if the federal law imposes a higher standard on employers than the state’s law, and the employer is subject to the FLSA, the employer must comply with the higher federal standard, despite the state’s less stringent compliance requirements. Accordingly, it is important for employers to be well educated about both the applicable state wage and hour law and/or regulations, as well as the new FLSA regulations related to overtime exemptions, and whether these different statutory schemes conflict, in order to ensure compliance and avoid potential liability.

With respect to a number of states, employers will face only one standard for overtime exemption requirements – the federal standard – because certain states have not enacted comprehensive wage and hour laws or regulations. Delaware and Virginia are two states which fall into this category.

Other state statutory schemes explicitly adopt the regulations of the FLSA, either in whole or in part, and, thus, the FLSA regulations govern, as recently amended, in accordance with the terms of the state statute. For instance, certain states, like Ohio, directly track the federal law with respect to overtime exemptions, and, thus, employers are subject to only one standard.<sup>1</sup>

Similarly, the District of Columbia Minimum Wage Act (“DCMWA”) explicitly exempts from the statutory overtime requirements employees employed in an executive, administrative or professional capacity “as these terms are defined by the Secretary of Labor under 201 *et*

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seq. of the Fair Labor Standards Act.”<sup>2</sup> However, employers should be cautioned that the DCMWA does not explicitly adopt all regulations promulgated by the Secretary of Labor regarding the FLSA, and, thus, the DCMWA might extend greater protection to employees in certain situations than that provided by the revised FLSA regulations. For instance, the FLSA’s new “Highly Compensated Employees” exemption to the overtime provisions would not apply to employers subject to both the DCMWA and the FLSA,<sup>3</sup> because the DCMWA does not provide an exemption for employees who are highly compensated, analogous to federal law.<sup>4</sup>

Other states, including Maryland, Pennsylvania, and West Virginia, do not provide for automatic tracking of the federal law, and, thus, will create a multi-tiered compliance scheme for those employers subject to both federal and state law.

With respect to determining which employees fall within the white collar exemptions to the overtime requirements, Maryland generally follows the language of the now-superseded FLSA regulations, including application of both the long and short tests for determining white collar exemptions.<sup>5</sup> For instance, under Maryland law, the salary requirement for determining whether employees are professional, executive or administrative employees is the same as the standard set forth in the former FLSA regulations.<sup>6</sup> Because the revised FLSA minimum salary requirement of \$455 is more favorable to employees than is the current Maryland minimum salary requirement, the federal salary standard governs such determination.

However, in other respects, the Maryland law is more employee-favorable, and, thus, should be applied over the federal law. For instance, like the District of Columbia, Maryland does not provide for an exemption from the overtime requirements for employees who are highly compensated, as does federal law in the new “Highly Compensated Employees” exemption, and, thus, such exemption would not apply to employees subject to both Maryland and federal law.

Further, because the “duties tests” for the white collar exemptions have changed in the new regulations, whereas Maryland law continues to generally follow the former federal “duties tests”, employers will need to analyze the tests to determine which provisions are more employee-favorable, and apply that test.

Of course, the foregoing is all subject to change, as various state legislatures and administrative entities may decide to update their statutes and/or regulations in accordance with the recent changes to the FLSA. However, given the recent changes to the FLSA regulations, attorneys who provide counsel to employers subject to both federal and state law would be well-advised at this time to work with their clients in conducting an analysis of how the new federal regulations, in conjunction with applicable state law and regulations, affect their clients’ current employee classifications and pay practices, and

in updating such classifications, practices and any corresponding policies accordingly.

**(Endnotes)**

<sup>1</sup> See Ohio Rev. Code Ann. § 4111.03(A)(A)(stating that overtime shall be paid “in the manner and methods provided in and subject to the exemptions of section 7 and section 13 of the Fair Labor Standards Act....”).

<sup>2</sup> D.C. Code Ann. § 32-1004(a).

<sup>3</sup> See 29 C.F.R. § 541.601.

<sup>4</sup> See D.C. Code Ann. §§ 32-1001 *et seq.*

<sup>5</sup> See Md. Regs. Code tit. 9 § 12.41.01 *et seq.*

<sup>6</sup> See *id.* §§ 12.41.01; 12.41.05; 12.41.17.

**MSBA LABOR AND EMPLOYMENT LAW SECTION HOSTS  
EEOC BROWN BAG LUNCH**

By Jim Hammerschmidt  
*Section Council Member*

On Wednesday, September 22, the MSBA Labor and Employment Law Section Council hosted its first brown bag lunch of the new term at the EEOC’s Baltimore District Office. It was very well attended and informative. A few of the highlights are as follows.

After introductions by Section Council Chair-Elect Glendora Hughes, EEOC Acting Deputy Director, Chester Kleinman told us the Baltimore District Office is in transition, and working closely with the Philadelphia District Office. It currently does not have a Director, and there is no plan to appoint one at this time. Currently, Marie M. Tomasso, the Director of the Philadelphia office, serves as the acting Director for Baltimore. The Baltimore office has also lost investigative and support personnel, resulting in claims processing delays. Its staff includes 22 investigators, nearly half of its prior strength. Nine of the investigators are in Baltimore, 7 in Norfolk and 6 in Richmond.

The changes in Baltimore may reflect an overall consolidation within the EEOC. On September 17, the agency announced that it authorized funding to establish a 2 year pilot National Call Center to handle unsolicited calls for general information. The goal is to free up the leaner staff in the agency’s field offices for mission-critical duties, such as charge intake, investigation, mediation, litigation and outreach. The Call Center is scheduled to commence operations in April, 2005. The telephone number and other procedures have not been announced yet.

Employees continue to file charges as at brisk rate. Mr. Kleinman announced that the Baltimore office has had approximately 10,500 inquires in 2004. It has accepted approximately 2,900 new charges (compared with about 2,700 charges last year at this time) and has also resolved approximately the same number. The majority of new charges, or about 65%, involve Title VII claims, with race and sex

discrimination charges continuing to dominate the filings. ADA claims represent approximately 15% of new charges, ADEA claims represent approximately 10% of new charges and the remaining 10% represent a mix of claims, including retaliation charges. To date in 2004, the Baltimore District Office has recovered about \$6,953,000 for individuals.

Marie Sciscione, Mediation Coordinator, briefly discussed Baltimore's mediation program and some of the program initiatives. Of the 2,900 new charges, approximately 1,700 were referred to the office's mediation program, enabling it to reach an early resolution of approximately 16% of the new charges. While many new charges are referred to mediation, Ms. Sciscione stated that her group does not accept them all and may return charges for investigation without giving the parties the option to mediate. Where the office does provide the parties an opportunity to mediate, approximately 30% the parties chose to do so and 80-90% of those claims are resolved in mediation. Program initiatives include Universal Agreements to Mediate, the Referral Back Mediation Pilot Program and Conciliation Mediation.

The Conciliation Mediation Program has not been widely adopted in Baltimore, and it does not appear that will change. Unlike the opportunity to mediate a claim prior to investigation or a determination, Conciliation Mediation is used in limited circumstances after a violation has been found. It requires approval from the EEOC's headquarters and will only occur where an employer is committed to providing a remedy and the only question is a matter of degree.

Gerald S. Kiel, Regional Attorney for the Baltimore District Office, discussed the difference between mediation and conciliation. Whereas mediation is voluntary process with a neutral mediator, conciliation is a statutory prerequisite to the EEOC initiating litigation. There is no neutral third-party to facilitate a resolution in the conciliation process. Further, according to Mr. Kiel, the EEOC's position in conciliation represents its assessment of the case, and the EEOC is not bound to negotiate that position.

Wilma Scott, the District Enforcement Manager, gave a run down of the office's charge processing procedure. Under the agency's priority charge processing program, the first step is to categorizes charges as either A, B or C after intake. Category A charges are ones where the initial facts appear to support a violation of the law; they are fast-tracked. Charges where the initial evidence is not as strong are put in category B and assigned for follow up investigation, and a request for information is typically sent to the respondent. Category B charges represent the largest group. Charges are put in Category C if obvious problems exist, such as jurisdiction, timeliness or weak facts. Category C charges are immediately dismissed, and the charging party is given its notice of right to sue.

Charges that have not been dismissed or fast-tracked are typically referred to mediation after being categorized. The investigators have no connection with the mediation process and do not receive any information concerning what occurred during mediation. Ms. Sciscione and Ms. Scott

both stressed the agency's commitment to keep a fire wall between the mediation and enforcement processes. If mediation fails, the charge will be returned to the enforcement division to complete its investigation by way of phone interviews, fact finding conferences, written information requests, and on-site investigations. Ms. Scott indicated that the agency is seeking to use fact finding conferences as an investigatory tool more frequently and will hold a conference if the respondent requests it.

Currently, the Baltimore office is litigating approximately 30 cases. The focus of its litigation efforts is on category A charges. In those cases, EEOC trial attorneys and investigators work closely during the agency's investigation to prepare the cases for litigation. The agency is also focusing on early identification of potential class action litigation, which is where Mr. Kiel said the EEOC believes it can most efficiently and effectively be an agent for change. Class action litigation may arise from the agency's review of sexual harassment claims, EEO-1 reports, employer policies affecting employees nationally, and EEOC's database for multiple charges against single employers.

Other areas that the agency is monitoring closely include pregnancy discrimination, which does not appear to be dissipating as much as previously thought, retaliation, hiring in non-tradition jobs for women, race-based cases, and claims by the nation's young workers. With respect to the latter, the agency has launched its Youth @ Work initiative, including a dedicated web site to educate the nation's next generation of workers, free outreach events and partnerships with businesses, human resource groups and trade associations.

For anyone who has experienced the frustration of trying to contact a "live body" at the Baltimore District Office recently, the two most valuable nuggets of information came at the end of the lunch where Mr. Kiel gave out phone numbers for him and Ms. Scott. Mr. Kiel can be reached directly at (410) 962-4207. Ms. Scott may be reached directly at (410) 962-3852.

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