VEDDER PRICE®

2011 Annual Employment Law Update

Practical Advice for In-House Counsel and Human Resource Professionals

Tuesday, June 14, 2011

Executive Conference Center
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New York, New York 10019

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2011 Annual Employment Law Update

Practical Advice for In-House Counsel and Human Resource Professionals

Agenda — Tab

8:00 – 8:30 a.m. Registration and Continental Breakfast

8:30 – 8:35 a.m. Welcome and Introduction
- ✦ Neal I. Korval

8:35 – 9:05 a.m. Practical Solutions to the Indefinite Medical Leave Problem ..... A
- ✦ Amy L. Bess
- ✦ Thomas M. Wilde

9:05 – 9:35 a.m. Continuing Wage-Hour Drama: New Federal and New York Developments ..... B
- ✦ Roy P. Salins
- ✦ Lyle S. Zuckerman

9:35 – 10:05 a.m. Developments and Trends in the Restrictive Covenant and Trade Secrets Area C
- ✦ Jonathan A. Wexler
- ✦ Scot A. Hinshaw

10:05 – 10:20 a.m. Break

10:20 – 10:45 a.m. Health and Wealth: Health Care Reform Law Update, and a Few Words about SOX, Dodd-Frank and FCA Whistleblower Protections ..... D
- ✦ Philip L. Mowery
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10:45 – 11:10 a.m. Must-Know Court Decisions: 2010–2011 ..... E
- ✦ Alan M. Koral
- ✦ Jonathan A. Wexler

11:10 – 12 noon Pre-Employment Screening and Selection Procedures: Know Your Rights…and Theirs ..... F
- ✦ Neal I. Korval
- ✦ Laura Sack
- ✦ Thomas G. Abram

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A

Practical Solutions to the Indefinite Medical Leave Problem

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Focus and Practical Tips

- Policies
- Leave requests
- Alternative reasonable accommodations

Why Do We Care? Because the EEOC Cares

- ADAA regulations released
- EEOC systematic lawsuits

State laws are implicated as well

So What Should an Employer Do?

FIRST: Evaluate Your Policies

- Do you have one?
- Address FMLA and non-FMLA situations?
- Limit the amount of leave?
- Full medical release required?

continued

FIRST: Evaluate Your Policies

- Consider revisions and additions
  - Guidelines for leave
  - Additional leave may be available
  - Provide contact information
  - Require medical documentation
  - No full medical releases

SECOND: Evaluate Your Practices

- What have you done in these circumstances?
- Key rule: document, document, document
- Dialogue required

continued

SECOND: Evaluate Your Practices

- Create a plan
  - Document by letter
  - Require medical documentation
  - If no response, send another letter
- Burden is worth the effort

THIRD: Consider the Employee Who Needs More Leave or Asks for Indefinite Leave

- Engage in an interactive process at the outset
- Evaluate each specific request
  - Length
  - Medical documentation/push back
  - Purpose of extra leave: to permit the employee to return to work

continued

THIRD: Consider the Employee Who Needs More Leave or Asks for Indefinite Leave

- Court opinions differ on required length of leave
- Check the law of your jurisdiction

continued

THIRD: Consider the Employee Who Needs More Leave or Asks for Indefinite Leave

- Engage in an interactive process during the leave
- Send follow-up letters and document discussions
- Beware of workers' compensation injuries

continued

THIRD: Consider the Employee Who Needs More Leave or Asks for Indefinite Leave

- Consider a transfer to an alternative position
  - Job descriptions up-to-date and accurate
  - Modification or restructuring of duties
  - Vacancies available
  - Can the employee fill, and is the employee entitled to fill?

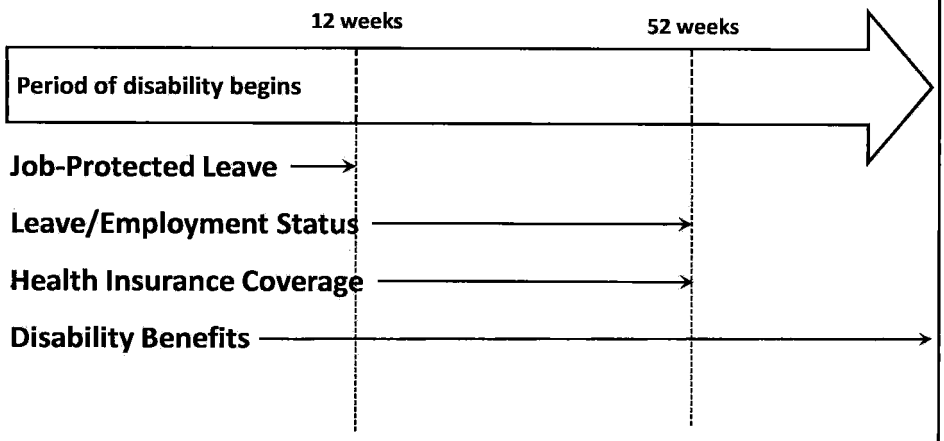
FOURTH: Evaluate Your Employee Benefit Programs

- Typical leave-of-absence and benefits arrangements
  - 12 months leave
  - Health insurance and other benefits continue while on leave
  - Disability benefits continue indefinitely

continued

FOURTH: Evaluate Your Employee Benefit Programs

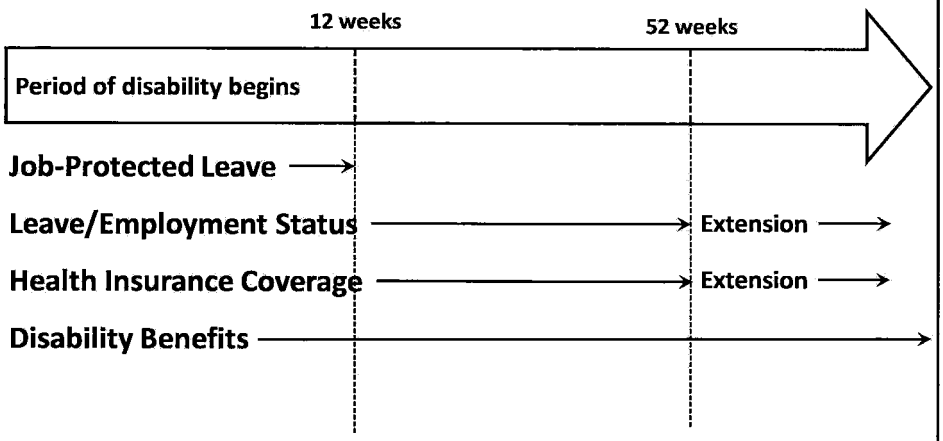
- Typical arrangement



continued

FOURTH: Evaluate Your Employee Benefit Programs

- Typical arrangement – leave extension requested



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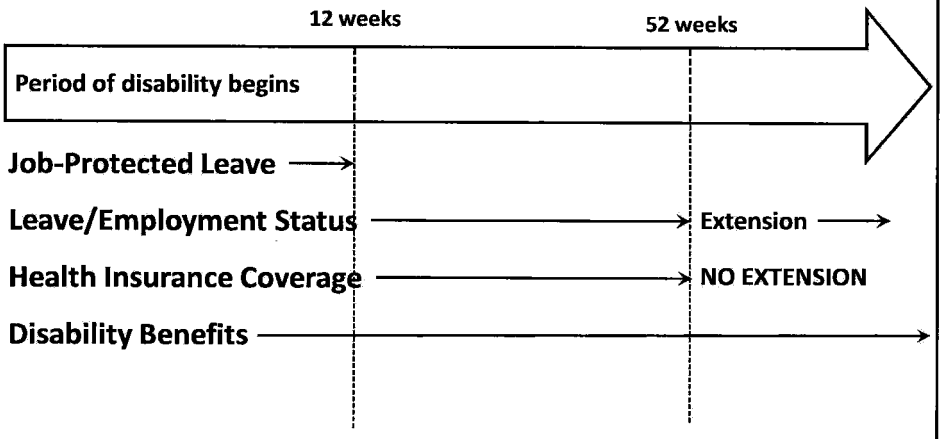
FOURTH: Evaluate Your Employee Benefit Programs

- Improved design



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Part III

Equal Employment Opportunity Commission

29 CFR Part 1630
Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended; Final Rule

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1630

RIN 3046–AA85

Regulations To Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Final Rule.

SUMMARY: The Equal Employment Opportunity Commission (the Commission or the EEOC) issues its final revised Americans with Disabilities Act (ADA) regulations and accompanying interpretive guidance in order to implement the ADA Amendments Act of 2008. The Commission is responsible for enforcement of title I of the ADA, as amended, which prohibits employment discrimination on the basis of disability. Pursuant to the ADA Amendments Act of 2008, the EEOC is expressly granted the authority to amend these regulations, and is expected to do so.

DATES: *Effective Date:* These final regulations will become effective on May 24, 2011.

FOR FURTHER INFORMATION CONTACT: Christopher J. Kuczynski, Assistant Legal Counsel, or Jeanne Goldberg, Senior Attorney Advisor, Office of Legal Counsel, U.S. Equal Employment Opportunity Commission at (202) 663–4638 (voice) or (202) 663–7026 (TTY). These are not toll-free-telephone numbers. This document is also available in the following formats: Large print, Braille, audio tape, and electronic file on computer disk. Requests for this document in an alternative format should be made to the Office of Communications and Legislative Affairs at (202) 663–4191 (voice) or (202) 663–4494 (TTY) or to the Publications Information Center at 1–800–669–3362.

SUPPLEMENTARY INFORMATION:

Introduction

The ADA Amendments Act of 2008 (the Amendments Act) was signed into law by President George W. Bush on September 25, 2008, with a statutory effective date of January 1, 2009. Pursuant to the Amendments Act, the definition of disability under the ADA, 42 U.S.C. 12101, *et seq.*, shall be construed in favor of broad coverage to the maximum extent permitted by the terms of the ADA as amended, and the determination of whether an individual has a disability should not demand extensive analysis. The Amendments Act makes important changes to the definition of the term "disability" by rejecting the holdings in several Supreme Court decisions and portions of the EEOC's ADA regulations. The effect of these changes is to make it easier for an individual *seeking* protection under the ADA to establish that he or she has a disability within the meaning of the ADA. Statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008 (2008 Senate Statement of Managers); Committee on Education and Labor Report together with Minority Views (to accompany H.R. 3195), H.R. Rep. No. 110–730 part 1, 110th Cong., 2d Sess. (June 23, 2008) (2008 House Comm. on Educ. and Labor Report); Committee on the Judiciary Report together with Additional Views (to accompany H.R. 3195), H.R. Rep. No. 110–730 part 2, 110th Cong., 2d Sess. (June 23, 2008) (2008 House Judiciary Committee Report).

The Amendments Act retains the ADA's basic definition of "disability" as an impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment. However, it changes the way that these statutory terms should be interpreted in several ways, therefore necessitating revision of the prior regulations and interpretive guidance contained in the accompanying "Appendix to Part 1630—Interpretive Guidance on Title I of the Americans with Disabilities Act," which are published at 29 CFR part 1630 (the appendix).

Consistent with the provisions of the Amendments Act and Congress's expressed expectation therein, the Commission drafted a Notice of Proposed Rulemaking (NPRM) that was circulated to the Office of Management and Budget for review (pursuant to Executive Order 12866) and to federal executive branch agencies for comment (pursuant to Executive Order 12067). The NPRM was subsequently published in the **Federal Register** on September 23, 2009 (74 FR 48431), for a sixty-day public comment period. The NPRM sought comment on the proposed regulations, which:

—Provided that the definition of "disability" shall be interpreted broadly;

—Revised that portion of the regulations defining the term "substantially limits" as directed in the Amendments Act by providing that a limitation need not "significantly" or "severely" restrict a major life activity in order to meet the standard, and by deleting reference to the terms "condition, manner, or duration" under which a major life activity is performed, in order to effectuate Congress's clear instruction that "substantially limits" is not to be misconstrued to require the "level of limitation, and the intensity of focus" applied by the Supreme Court in *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 (2002) (2008 Senate Statement of Managers at 6);

—Expanded the definition of "major life activities" through two non-exhaustive lists:

—The first list included activities such as 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 working, some of which the EEOC previously identified in regulations and sub-regulatory guidance, and some of which Congress additionally included in the Amendments Act;

—The second list included major bodily functions, such as functions of the immune system, special sense organs, and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions, many of which were included by Congress in the Amendments Act, and some of which were added by the Commission as further illustrative examples;

—Provided that mitigating measures other than "ordinary eyeglasses or contact lenses" shall not be considered in assessing whether an individual has a "disability";

—Provided that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;

—Provided that the definition of "regarded as" be changed so that it would no longer require a showing that an employer perceived the individual to be substantially limited in a major life activity, and so that an applicant or employee who is subjected to an action prohibited by the ADA (e.g., failure to hire, denial of promotion, or termination) because of an actual or perceived impairment will meet the "regarded as" definition of disability, unless the impairment is both "transitory and minor";

—Provided that actions based on an impairment include actions based on

symptoms of, or mitigating measures used for, an impairment;
—Provided that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation; and,
—Provided that qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision shall not be used unless shown to be job related for the position in question and consistent with business necessity.

To effectuate these changes, the NPRM proposed revisions to the following sections of 29 CFR part 1630 and the accompanying provisions of the appendix: § 1630.1 (added (c)(3) and (4)); § 1630.2(g)(3) (added cross-reference to 1630.2(l)); § 1630.2 (h) (replaced the term "mental retardation" with the term "intellectual disability"); § 1630.2(i) (revised definition of "major life activities" and provided examples); § 1630.2(j) (revised definition of "substantially limits" and provided examples); § 1630.2(k) (provided examples of "record of" a disability); § 1630.2(l) (revised definition of "regarded as" having a disability and provided examples); § 1630.2(m) (revised terminology); § 1630.2(o) (added (o)(4) stating that reasonable accommodations are not available to individuals who are only "regarded as" individuals with disabilities); § 1630.4 (renumbered section and added § 1630.4(b) regarding "claims of no disability"); § 1630.9 (revised terminology in § 1630.9(c) and added § 1630.9(e) stating that an individual covered only under the "regarded as" definition of disability is not entitled to reasonable accommodation); § 1630.10 (revised to add provision on qualification standards and tests related to uncorrected vision); and § 1630.16(a) (revised terminology).

These regulatory revisions were explained in the proposed revised part 1630 appendix containing the interpretive guidance. The Commission originally issued the interpretive guidance concurrent with the original part 1630 ADA regulations in order to ensure that individuals with disabilities understand their rights under these regulations and to facilitate and encourage compliance by covered entities. The appendix addresses the major provisions of the regulations and explains the major concepts. The appendix as revised will be issued and published in the *Code of Federal Regulations* with the final regulations. It will continue to represent the Commission's interpretation of the issues discussed in the regulations, and the Commission will be guided by it when resolving charges of employment discrimination under the ADA.

Summary and Response to Comments

The Commission received well over 600 public comments on the NPRM, including, among others: 5 comments from federal agencies that had not previously commented during the inter-agency review process under E.O. 12067 or the Office of Management and Budget review process under E.O. 12866; 61 comments from civil rights groups, disability rights groups, health care provider groups, and attorneys, attorney associations, and law firms on their behalf; 48 comments from employer associations and industry groups, as well as attorneys, attorney associations, and law firms on their behalf; 4 comments from state governments, agencies, or commissions, including one from a state legislator; and 536 comments from individuals, including individuals with disabilities and their family members or other advocates. Each of these comments was reviewed and considered in the preparation of this final rule. The Commission exercised its discretion to consider untimely comments that were received by December 15, 2009, three weeks following the close of the comment period, and these tallies include 8 such comments that were received. The comments from individuals included 454 comments that contained similar or identical content filed by or on behalf of individuals with learning disabilities and/or attention-deficit/hyperactivity disorder (AD/HD), although many of these comments also included an additional discussion of individual experiences.

Consistent with EO 13563, this rule was developed through a process that involved public participation. The proposed regulations, including the preliminary regulatory impact and regulatory flexibility analyses, were available on the Internet for a 60-day public-comment period, and during that time the Commission also held a series of forums in order to promote the open exchange of information. Specifically, the EEOC and the U.S. Department of Justice Civil Rights Division also held four "Town Hall Listening Sessions" in Oakland, California on October 26, 2009; in Philadelphia, Pennsylvania on October 30, 2009, in Chicago, Illinois on November 17, 2009, and in New Orleans, Louisiana on November 20, 2009. During these sessions, Commissioners heard in-person and telephonic comments on the NPRM from members of the public on both a pre-registration and walk-in basis. More than 60 individuals and representatives of the business/employer community and the disability advocacy community from across the country offered comments at these four sessions, a number of whom additionally submitted written comments.

All of the comments on the NPRM received electronically or in hard copy during the public comment period, including comments from the Town Hall Listening Sessions, may be reviewed at the United States Government's electronic docket system, *http://www.regulations.gov*, under docket number EEOC–2009–0012. In most instances, this preamble addresses the comments by issue rather than by referring to specific commenters or comments by name.

In general, informed by questions raised in the public comments, the Commission throughout the final regulations has refined language used in the NPRM to clarify its intended meaning, and has also streamlined the organization of the regulation to make it simpler to understand. As part of these revisions, many examples were moved to the appendix from the regulations, and NPRM language repeatedly stating that no negative implications should be drawn from the citation to particular impairments in the regulations and appendix was deleted as superfluous, given that the language used makes clear that impairments are referenced merely as examples. More significant or specific substantive revisions are reviewed below, by provision.

The Commission declines to make changes requested by some commenters to portions of the regulations and the appendix that we consider to be unaffected by the ADA Amendments Act of 2008, such as to 29 CFR 630.3 (exceptions to definitions), 29 CFR 1630.2(r) (concerning the "direct threat" defense), 29 CFR 1630.8 (association with an individual with a disability), and portions of the appendix that discuss the obligations of employers and individuals during the interactive process following a request for reasonable accommodation. The Commission has also declined to make revisions requested by commenters relating to health insurance, disability and other benefit programs, and the interaction of the ADA, the Family and Medical Leave Act (FMLA), and workers' compensation laws. The Commission believes the proposed regulatory language was clear with respect to any application it may have to these issues.

Terminology

The Commission has made changes to some of the terminology used in the final regulations and the appendix. For example, an organization that represents individuals who have HIV and AIDS asked that the regulations refer to "HIV infection," instead of "HIV and AIDS." An organization representing persons with epilepsy sought deletion or clarification of references to "seizure disorders" and "seizure disorders other than epilepsy," noting that "people who have chronic seizures have epilepsy, unless the seizure is due to [another underlying impairment]." This revision was not necessary since revisions to the regulations resulted in deletion of NPRM § 1630.2(j)(5)(iii) in which the reference to "seizure disorder" appeared. In addition, the Commission made further revisions to conform the regulations and appendix to the statutory deletion of the term "qualified individual with a disability" throughout most of title I of the ADA. The Commission did not make all changes in terminology suggested by commenters, for example declining to substitute the term "challenges" for the terms "disability" and "impairment," because this would have been contrary to the well-established terminology that Congress deliberately used in the ADA Amendments Act.

Section 1630.2(g): Disability

This section of the regulations includes the basic three-part definition of the term "disability" that was preserved but redefined in the ADA Amendments Act. For clarity, the Commission has referred to the first prong as "actual disability," to distinguish it from the second prong ("record of") and the third prong ("regarded as"). The term "actual disability" is used as short-hand terminology to refer to an impairment that substantially limits a major life activity within the meaning of the first prong of the definition of disability. The terminology selected is for ease of reference and is not intended to suggest that individuals with a disability under the first prong otherwise have any greater rights under the ADA than individuals whose impairments are covered under the "record of" or "regarded as" prongs, other than the restriction created by the Amendments Act that individuals covered only under the "regarded as" prong are not entitled to reasonable accommodation.

Although an individual may be covered under one or more of these three prongs of the definition, it appeared from comments that the NPRM did not make explicit enough that the "regarded as" prong should be the primary means of establishing coverage in ADA cases that do not involve reasonable accommodation, and that consideration of coverage under the first and second prongs will generally not be necessary except in situations where an individual needs a reasonable accommodation. Accordingly, in the final regulations, § 1630.2(g) and (j) and their accompanying interpretive guidance specifically state that cases in which an applicant or employee does not require reasonable accommodation can be evaluated solely under the "regarded as" prong of the definition of "disability."

Section 1630.2(h): Impairment

Some comments pointed out that the list of body systems in the definition of "impairment" in § 1630.2(h) of the NPRM was not consistent with the description of "major bodily functions" in § 1630.2(i)(1)(ii) that was added due to the inclusion in the Amendments Act of "major bodily functions" as major life activities. In response, the Commission has added references to the immune system and the circulatory system to § 1630.2(h), because both are mentioned in the definition of "major bodily functions" in § 1630.2(i)(1)(ii). Other apparent discrepancies between the definition of "impairment" and the list of "major bodily functions" can be accounted for by the fact that major bodily functions are sometimes defined in terms of the operation of an organ within a body system. For example, functions of the brain (identified in § 1630.2(i)) are part of the neurological system and may affect other body systems as well. The bladder, which is part of the genitourinary system, is already referenced in § 1630.2(h). In response to comments, the Commission has also made clear that the list of body systems in § 1630.2(h)(1) is non-exhaustive, just as the list of mental impairments in § 1630.2(h)(2) has always made clear with respect to its examples. The Commission has also amended the final appendix to § 1630.2(h) to conform to these revisions.

The Commission received several comments seeking explanation of whether pregnancy-related impairments may be disabilities. To respond to these inquiries, the final appendix states that although pregnancy itself is not an impairment, and therefore is not a disability, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a "record of" a substantially limiting impairment, or may be covered under the "regarded as" prong if it is the basis for a prohibited employment action and is not "transitory and minor."

Section 1630.2(i): Major Life Activities

A number of comments, mostly on behalf of individuals with disabilities, suggested that the Commission add more examples of major life activities, particularly to the first non-exhaustive list, including but not limited to typing, keyboarding, writing, driving, engaging in sexual relations, and applying fine motor coordination. Other suggestions ranged widely, including everything from squatting and getting around inside the home to activities such as farming, ranching, composting, operating water craft, and maintaining an independent septic tank.

The Commission does not believe that it is necessary to decide whether each of the many other suggested examples is in fact a major life activity, but we emphasize again that the statutory and regulatory examples are non-exhaustive. We also note that some of the activities that commenters asked to be added may be part of listed major life activities, or may be unnecessary to establishing that someone is an individual with a disability in light of other changes to the definition of "disability" resulting from the Amendments Act.

Some employer groups suggested that major life activities other than those specifically listed in the statute be deleted, claiming that the EEOC had exceeded its authority by including additional ones. Specific concerns were raised about the inclusion of "interacting with others" on behalf of employers who believed that recognizing this major life activity would limit the ability to discipline employees for misconduct.

Congress expressly provided that the two lists of examples of major life activities are non-exhaustive, and the Commission is authorized to recognize additional examples of major life activities. The final regulations retain "interacting with others" as an example of a major life activity, consistent with the Commission's long-standing position in existing enforcement guidance.

One disability rights group also asked the Commission to delete the long-standing definition of major life activities as those basic activities that most people in the general population "can perform with little or no difficulty" and substitute a lower standard. Upon consideration, we think that, while the ability of most people to perform the

activity is relevant when evaluating whether an individual is substantially limited, it is not relevant to whether the activity in question is a major life activity. Consequently, the final rule, like the statute itself, simply provides examples of activities that qualify as "major life activities" because of their relative importance.

Finally, some commenters asked that the final rule state explicitly that the standard from *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 (2002), for determining whether an activity qualifies as a major life activity—that it be of "central importance to most people's daily lives"—no longer applies after the ADA Amendments Act. The Commission agrees and has added language to this effect in the final regulations.

We have provided this clarification in the regulations, and, in the appendix, we explain what this means with respect to, for example, activities such as lifting and performing manual tasks. The final regulations also state that in determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability, and provide that whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

Section 1630.2(j): Substantially Limits

Overview

Although much of § 1630.2(j) of the final regulations is substantively the same as § 1630.2(j) of the NPRM, the structure of the section is somewhat different. Many of the examples that were in the text of the proposed rule have been relocated to the appendix. Section 1630.2(j)(1) in the final regulations lists nine "rules of construction" that are based on the statute itself and are essentially consistent with the content of §§ 1630.2(j)(1) through (4) of the NPRM. Section 1630.2(j)(2) in the final regulations makes clear that the question of whether an individual is substantially limited in a major life activity is not relevant to coverage under the "regarded as" prong. Section 1630.2(j)(3)(ii) in the final regulations notes that some impairments will, given their inherent nature, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward. In addition, § 1630.2(j)(3)(iii) includes examples of impairments that should easily be found to substantially limit a major life activity. These are the same impairments that were included as examples in § 1630.2(j)(5) of the NPRM. In response to comments (discussed below), § 1630.2(j)(4) discusses the concepts of "condition, manner, or duration" that may be useful in evaluating whether an individual is substantially limited in a major life activity in some cases. Section 1630.2(j)(5) in the final regulations offers examples of mitigating measures, and § 1630.2(j)(6) contains the definition of "ordinary eyeglasses or contact lenses." The discussion of how to determine whether someone is substantially limited in working in those rare cases where this may be at issue now appears in the appendix rather than the regulations, and has been revised as explained below. Finally, NPRM § 1630.2(j)(6), describing certain impairments that may or may not meet the definition of "substantially limits," and NPRM § 1630.2(j)(8), describing certain impairments that usually will not meet the definition of "substantially limits," have been deleted in favor of an affirmative statement in both the final regulations and the appendix that not every impairment will constitute a disability within the meaning of § 1630.2(j) (defining "substantially limits").

Meaning of "Substantially Limits"

Many commenters asked that the Commission more affirmatively define "substantially limits." Suggestions for further definitions of "substantial" included, among others, "ample," "considerable," "more than moderately restricts," "discernable degree of difficulty," "makes achievement of the activity difficult," and "causes a material difference from the ordinary processes by which most people in the general population perform the major life activity." The Commission has not added terms to quantify "substantially limits" in the final regulations. We believe this is consistent with Congress's express rejection of such an approach in the statute, which instead simply indicates that "substantially limits" is a lower threshold than "prevents" or "severely or significantly restricts," as prior Supreme Court decisions and the EEOC regulations had defined the term. The Commission ultimately concluded that a new definition would inexorably lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress. Therefore, following Congress's approach, the final regulations provide greater clarity and guidance by providing nine rules of construction that must be applied in determining whether an impairment substantially limits (or substantially limited) a major life activity. These rules are based on the provisions in the Amendments Act, and will guide interpretation of the term "substantially limits."

Comparison to "Most People"

The regulations say that in determining whether an individual has a substantially limiting impairment, the individual's ability to perform a major life activity should be compared to that of "most people in the general population." Both employer groups and organizations writing on behalf of individuals with disabilities said that the concept of "intra-individual" differences (disparities between an individual's aptitude and expected achievement versus the individual's actual achievement) that appears in the discussion of learning disabilities in the NPRM's appendix is inconsistent with the rule that comparison of an individual's limitations is always made by reference to most people. However, the Commission also received some comments from disability groups requesting that, in the assessment of whether an individual is substantially limited, the regulations allow for comparisons between an individual's experiences with and without an impairment, and comparisons between an individual and her peers—in addition to comparisons of the individual to "most people."

The Commission agrees that the reference to "intra-individual" differences, without further explanation, may be misconstrued as at odds with the agency's view that comparisons are always made between an individual and most people. Therefore, the Commission has added language to the discussion of learning disabilities in the appendix, in § 1630.2(j)(1)(v), clarifying that although learning disabilities may be diagnosed in terms of the difference between an individual's aptitude and actual versus expected achievement, a comparison to "most people" can nevertheless be made. Moreover, the appendix provides examples of ameliorative effects of mitigating measures that will be disregarded in making this comparison, and notes legislative history rejecting the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.

Relevance of Duration of an Impairment's Limitations in Assessing "Substantially Limits"

Many commenters expressed their view that the NPRM failed to clarify, or created confusion regarding, how long an impairment's limitation(s) must last in order for the impairment to be considered substantially limiting. Some thought the Commission was saying that impairments that are "transitory and minor" under the third prong can nevertheless be covered under the first or second prong of the definition of "disability." A few comments suggested that the Commission adopt a minimum duration of six months for an impairment to be considered substantially limiting, but more commenters simply wanted the Commission to specify whether, and if so what, duration is necessary to establish a substantial limitation.

In enacting the ADA Amendments Act, Congress statutorily defined "transitory" for purposes of the "transitory and minor" exception to newly-defined "regarded as" coverage as "an impairment with an actual or expected duration of 6 months or less," but did not include that limitation with respect to the first or second prong in the statute. 42 U.S.C. 12102(3)(B). Moreover, prior to the Amendments Act, it had been the Commission's long-standing position that if an impairment substantially limits, is expected to substantially limit, or previously substantially limited a major life activity for at least several months, it could be a disability under § 1630.2(g)(1) or a record of a disability under § 1630.2(g)(2). *See, e.g., EEOC Compliance Manual Section 902, "Definition of the Term Disability,"* § 902(4)(d) (originally issued in 1995), *http://www.eeoc.gov/policy/docs/902cm.html; EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities* (1997), *http://www.eeoc.gov/policy/docs/psych.html.* A six-month durational requirement would represent a more stringent standard than the EEOC had previously required, not the lower standard Congress sought to bring about through enactment of the ADA Amendments Act. Therefore, the Commission declines to provide for a six-month durational minimum for showing disability under the first prong or past history of a disability under the second prong.

Additionally, the Commission has not in the final regulations specified any specific minimum duration that an impairment's effects must last in order to be deemed substantially limiting. This accurately reflects the intent of the ADA Amendments Act, as conveyed in the joint statement submitted by co-sponsors Hoyer and Sensenbrenner. That statement explains that the duration of an impairment is only one factor in determining whether the impairment substantially limits a major life activity, and impairments that last only a short period of time may be covered if sufficiently severe. *See* Joint Hoyer-Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 at 5.

Mitigating Measures

The final regulations retain, as one of the nine rules of construction, the statutory requirement that mitigating measures, other than ordinary eyeglasses or contact lenses, must not be considered in determining whether an individual has a disability. Several organizations representing persons with disabilities suggested adding more examples of mitigating measures, including: job coaches, service animals, personal assistants, psychotherapy and other "human-mediated" treatments, and some specific devices used by persons who have hearing and/or vision impairments.

In the final regulations, the Commission has added psychotherapy, behavioral therapy, and physical therapy. In the appendix, the Commission has explained why other suggested examples were not included, noting first that the list is non-exhaustive. Some suggested additional examples of mitigating measures are also forms of reasonable accommodation, such as the right to use a service animal or job coach in the workplace. The Commission emphasizes that its decision not to list certain mitigating measures does not create any inference that individuals who use these measures would not meet the definition of "disability." For example, as the appendix points out, someone who uses a service animal will still be able to demonstrate a substantial limitation in major life activities such as seeing, hearing, walking, or performing manual tasks (depending on the reason the service animal is used).

Several employer groups asked the Commission to identify legal consequences that follow from an individual's failure to use mitigating measures that would alleviate the effects of an impairment. For example, some commenters suggested that such individuals would not be entitled to reasonable accommodation. The Commission has included a statement in the appendix pointing out that the determination of whether or not an individual's impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. For individuals who do not use a mitigating measure (including, for example, medication or reasonable accommodation that could alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations imposed by the impairment on the individual, and any negative (non-ameliorative) effects of mitigating measures used, determine whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures in fact used may not be considered in determining if the impairment is substantially limiting. However, the use or non-use of mitigating measures, and any consequences thereof, including any ameliorative and non-ameliorative effects, may be relevant in determining whether the individual is qualified or poses a direct threat to safety.

Commenters also asked for a clear statement regarding whether the non-ameliorative effects of mitigating measures may be considered in determining whether an impairment is substantially limiting. Some also asked for guidance regarding whether the positive and negative effects of mitigating measures can be taken into account when determining whether an individual needs a reasonable accommodation.

The final regulations affirmatively state that non-ameliorative effects may be considered in determining whether an impairment is substantially limiting. The appendix clarifies, however, that in many instances it will not be necessary to consider the non-ameliorative effects of mitigating measures to determine that an impairment is substantially limiting. For example, whether diabetes is substantially limiting will most often be analyzed by considering its effects on endocrine functions in the absence of mitigating measures such as medications or insulin, rather than by considering the measures someone must undertake to keep the condition under control (such as frequent blood sugar and insulin monitoring and rigid adherence to dietary restrictions). Likewise, whether someone with kidney disease has a disability will generally be assessed by considering limitations on kidney and bladder functions that would occur without dialysis rather than by reference to the burdens that dialysis treatment imposes. The

appendix also states that both the ameliorative and non-ameliorative effects of mitigating measures may be relevant in deciding non-coverage issues, such as whether someone is qualified, needs a reasonable accommodation, or poses a direct threat.

Some commenters also asked for a more precise definition than the statutory definition of the term "ordinary eyeglasses or contact lenses." For example, one commenter proposed that "fully corrected" means visual acuity of 20/20. Another commenter representing human resources professionals from large employers suggested a rule that any glasses that can be obtained from a "walk-in retail eye clinic" would be considered ordinary eyeglasses or contact lenses, including bi-focal and multi-focal lenses. An organization representing individuals who are blind or have vision impairments wanted us to say that glasses that enhance or augment a visual image but that may resemble ordinary eyeglasses should not be considered when determining whether someone is substantially limited in seeing.

The final regulations do not adopt any of these approaches. The Commission believes that the NPRM was clear that the distinction between "ordinary eyeglasses or contact lenses" on the one hand and "low vision devices" on the other is how they function, not how they look or where they were purchased. Whether lenses fully correct visual acuity or eliminate refractive error is best determined on the basis of current and objective medical evidence. The Commission emphasizes, however, that even if such evidence indicates that visual acuity is fully corrected or that refractive error is eliminated, this means only that the effect of the eyeglasses or contact lenses shall be considered in determining whether the individual is substantially limited in *seeing*, not that the individual is automatically excluded from the law's protection.

Numerous comments were made on the proposed inclusion of surgical interventions as mitigating measures. Many asked the Commission to delete the reference to surgical interventions entirely; others wanted us to delete the qualification that surgical interventions that permanently eliminate an impairment are not considered mitigating measures. Some comments proposed language that would exclude from mitigating measures those surgical interventions that "substantially correct" an impairment. Some comments endorsed the definition as written, but suggested we provide examples of surgical interventions that would permanently eliminate an impairment.

The Commission has eliminated "surgical interventions, except for those that permanently eliminate an impairment" as an example of a mitigating measure in the regulation, given the confusion evidenced in the comments about how this example would apply. Determinations about whether surgical interventions should be taken into consideration when assessing whether an individual has a disability are better assessed on a case-by-case basis.

Finally, some commenters asked the Commission to address generally what type of evidence would be sufficient to establish whether an impairment would be substantially limiting without the ameliorative effects of a mitigating measure that the individual uses. In response to such comments, the Commission has added to the appendix a statement that such evidence could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence concerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types.

Impairments That Are Episodic or in Remission

One commenter suggested that the regulatory provision on impairments that are "episodic or in remission" should be clarified to eliminate from coverage progressive impairments such as Parkinson's Disease on the ground that they would not be disabilities in the "early stages." The Commission declines to make this revision, recognizing that because "major bodily functions" are themselves "major life activities," Parkinson's Disease even in the "early stages" can substantially limit major life activities, such as brain or neurological functions. Some employer groups also asked the Commission to provide further guidance on distinguishing between episodic conditions and those that may, but do not necessarily, become episodic, as indicated by subsequent "flare ups." As the Commission has indicated in the regulations and appendix provisions on mitigating measures, these questions may in some cases be resolved by looking at evidence such as limitations experienced prior to the use of the mitigating measure or the expected course of a disorder absent mitigating measures. However, recognizing that there may be various ways that an impairment may be shown to be episodic, we decline to address such evidentiary issues with any greater specificity in the rulemaking.

Predictable Assessments

Section 1630.2(j)(5) of the NPRM provided examples of impairments that would "consistently meet the definition of disability" in light of the statutory changes to the definition of "substantially limits." Arguing that § 1630.2(j)(5) of the NPRM created a "per se list" of disabilities, many commenters, particularly representatives of employers and employer organizations, asked for the section's deletion, so that all impairments would be subject to the same individualized assessment. Equally strong support for this section was expressed by organizations representing individuals with disabilities, some of whom suggested that impairments such as learning disabilities, AD/HD, panic and anxiety disorder, hearing impairments requiring use of a hearing aid or cochlear implant, mobility impairments requiring the use of canes, crutches, or walkers, and multiple chemical sensitivity be added to the list of examples in NPRM § 1630.2(j)(5). Many of the commenters who expressed support for this section also asked that NPRM § 1630.2(j)(6) (concerning impairments that may be substantially limiting for some individuals but not for others) be deleted, as it *seemed* to suggest that these impairments were of lesser significance than those in NPRM § (j)(5).

In response to these concerns, the Commission has revised this portion of the regulations to make clear that the analysis of whether the types of impairments discussed in this section (now § 1630.2(j)(3)) substantially limit a major life activity does not depart from the hallmark individualized assessment. Rather, applying the various principles and rules of construction concerning the definition of disability, the individualized assessment of some types of impairments will, in virtually all cases, result in a finding that the impairment substantially limits a major life activity, and thus the necessary individualized assessment of these types of impairments should be particularly simple and straightforward. The regulations also provide examples of impairments that should easily be found to substantially limit a major life activity.

The Commission has also deleted § 1630.2(j)(6) that appeared in the NPRM. However, the Commission did not agree with those commenters who thought it was necessary to include in § 1630.2(j)(3) of the final regulations all the impairments that were the subject of

examples in NPRM § 1630.2(j)(6), or that other impairments not previously mentioned in either section should be included in (j)(3). The Commission has therefore declined to list additional impairments in § 1630.2(j)(3) of the final regulations. The regulations as written permit courts to conclude that any of the impairments mentioned in § 1630.2(j)(6) of the NPRM or other impairments "substantially limit" a major life activity.

Section 1630.2(j)(8) of the NPRM provided examples of impairments that "are usually not disabilities." Some commenters asked for clarity concerning whether, and under what circumstances, any of the impairments included in the examples might constitute disabilities under the first or second prong, or asked that the section title be revised by replacing "usually" with "consistently." Other commenters asked whether the listed impairments would be considered "transitory and minor" for purposes of the "regarded as" definition, or wanted clarification that the listed impairments were not necessarily "transitory and minor" in all instances. A few organizations recommended deletion of certain impairments from the list of examples, such as a broken bone that is expected to heal completely and a sprained joint. In the final regulations, the Commission deleted this section, again due to the confusion it presented.

Condition, Manner, or Duration

Comments from both employers and groups writing on behalf of individuals with disabilities proposed that the Commission continue to use the terms "condition, manner, or duration," found in the appendix accompanying EEOC's 1991 ADA regulations, as part of the definition of "substantially limits." Many employer groups seemed to think the concepts were relevant in all cases; disability groups generally thought they could be relevant in some cases, but do not need to be considered rigidly in all instances.

In response, the Commission has inserted the terms "condition, manner, or duration" as concepts that may be relevant in certain cases to show how an individual is substantially limited, although the concepts may often be unnecessary to conduct the analysis of whether an impairment "substantially limits" a major life activity. The Commission has also included language to illustrate what these terms mean, borrowing from the examples in § 1630.2(j)(6) of the NPRM, which has been deleted from the final regulations. For example, "condition, manner, or duration" might mean the difficulty or effort required to perform a major life activity, pain experienced when performing a major life activity, the length of time a major life activity can be performed, or the way that an impairment affects the operation of a major bodily function.

Substantially Limited in Working

The proposed rule had replaced the concepts of a "class" or "broad range" of jobs from the 1991 regulations defining substantial limitation in working with the concept of a "type of work." A number of commenters asked the Commission to restore the concepts of a class or broad range of jobs. Many other comments supported the "type of work" approach taken in the NPRM. Some supporters of the "type of work" approach sought additional examples of types of work (e.g., jobs requiring working around chemical fumes and dust, or jobs that require keyboarding or typing), and requested that certain statements in the appendix be moved into the regulations.

In issuing the final regulations, the Commission has moved the discussion of how to analyze the major life activity of working to the appendix, since no other major life activity is singled out in the regulations for elaboration. Rather than attempting to articulate a new "type of work" standard that may cause unnecessary confusion, the Commission has retained the original part 1630 "class or broad range of jobs" formulation in the appendix, although we explain how this standard must be applied differently than it was prior to the Amendments Act. We also provide a more streamlined discussion and examples of the standard to comply with Congress's exhortation in the Amendments Act to favor broad coverage and disfavor extensive analysis (Section 2(b)(5) (Findings and Purposes)).

Section 1630.2(k): Record of a Disability

Some commenters asked the Commission to revise this section to state that a "record" simply means a past history of a substantially limiting impairment, not necessarily that the past history has to be established by a specific document. Although some commenters sought deletion of the statement (in §§ 1630.2(o) and 1630.9) that individuals covered under the "record of" prong may get reasonable accommodations, others agreed that the language of the Amendments Act is consistent with the Commission's long-held position and wanted examples of when someone with a history of a substantially limiting impairment would need accommodation. Some comments recommended that the Commission make the point that a person with cancer (identified in one of the NPRM examples) could also be covered under the first prong.

The final regulations streamline this section by moving the examples of "record of" disabilities to the appendix. The Commission has also added a paragraph to this section to make clear that reasonable accommodations may be required for individuals with a record of an impairment that substantially limits a major life activity, and has provided an example of when a reasonable accommodation may be required. The Commission has not added language to state explicitly that the past history of an impairment need not be reflected in a specific document; we believe that this is clear in current law, and this point is reflected in the appendix.

Section 1630.2(l): Regarded As

Many comments revealed confusion as to both the new statutory and proposed regulatory definition of the "regarded as" prong in general, and the "transitory and minor" exception in particular. Other comments simply requested clarification of the "transitory and minor" exception. The final regulations provide further clarification and explanation of the scope of "regarded as" coverage.

The final regulations and appendix make clear that even if coverage is established under the "regarded as" prong, the individual must still establish the other elements of the claim (e.g., that he or she is qualified) and the employer may raise any available defenses. In other words, a finding of "regarded as" coverage is not itself a finding of liability.

The final regulations and appendix also explain that the fact that the "regarded as" prong requires proof of causation in order to show that a person is covered does not mean that proving a claim based on "regarded as" coverage is complex. As noted in the appendix, while a person must show, both for coverage under the "regarded as" prong and for ultimate liability, that he or she was subjected to a prohibited action because of an actual or perceived impairment, this showing need only be made once. Thus, a person proceeding under the "regarded as" prong may demonstrate a violation of the ADA by meeting the burden of proving that: (1) He or she has an impairment or was perceived by a covered entity to have an impairment, and (2) the covered entity discriminated against him or her because of the impairment in violation of the statute. Finally, the final regulations make clear that an employer

may show that an impairment is "transitory and minor" as a defense to "regarded as" coverage. 29 CFR 1630.15(f).

The final regulations and appendix, at § 1630.2(j), also make clear that the concepts of "major life activities" and "substantially limits" (relevant when evaluating coverage under the first or second prong of the definition of "disability") are not relevant in evaluating coverage under the "regarded as" prong. Thus, in order to have regarded an individual as having a disability, a covered entity need not have considered whether a major life activity was substantially limited, and an individual claiming to have been regarded as disabled need not demonstrate that he or she is substantially limited in a major life activity.

Concerning specific issues with which commenters disagreed, some criticized examples of impairments that the Commission said would be considered transitory and minor—specifically, a broken leg that heals normally and a sprained wrist that limits someone's ability to type for three weeks. These commenters claimed that these impairments, though transitory, are not minor. Consistent with its effort to streamline the text of the final rule, the Commission has deleted examples that appeared in the NPRM, illustrating how the "transitory and minor" exception applies. However, the appendix to § 1630.2(l) as well as the defense as set forth in § 1630.15(f) include examples involving an employer that takes a prohibited action against an employee with bipolar disorder that the employer claims it believed was transitory and minor, and an employer that takes a prohibited action against an individual with a transitory and minor hand wound that the employer believes is symptomatic of HIV infection. These examples are intended to illustrate the point that whether an actual or perceived impairment is transitory and minor is to be assessed objectively.

In response to a specific request in the preamble to the NPRM, the Commission received many comments about the position in the proposed rule that actions taken because of an impairment's symptoms or because of the use of mitigating measures constitute actions taken because of an impairment under the "regarded as" prong. Individuals with disabilities and organizations representing them for the most part endorsed the position, noting that the symptoms of, and mitigating measures used for, an impairment are part and parcel of the impairment itself, and that this provision is necessary to prevent employers from evading "regarded as" coverage by asserting that the challenged employment action was taken because of the symptom or medication, not the impairment, even when it knew of the connection between the two. Others asked the Commission to clarify that this interpretation applied even where the employer had no knowledge of the connection between the impairment and the symptom or mitigating measure. However, employers and organizations representing employers asked that this language be deleted in its entirety. They were particularly concerned that an employer could be held liable under the ADA for disciplining an employee for violating a workplace rule, where the violation resulted from an underlying impairment of which the employer was unaware.

In light of the complexity of this issue, the Commission believes that it requires a more comprehensive treatment than is possible in this regulation. Therefore, the final regulations do not explicitly address the issue of discrimination based on symptoms or mitigating measures under the "regarded as" prong. No negative inference concerning the merits of this issue should be drawn from this deletion. The Commission's existing position, as expressed in its policy guidance, court filings, and other regulatory and sub-regulatory documents, remains unchanged.

Finally, because the new law makes clear that an employer regards an individual as disabled if it takes a prohibited action against the individual because of an actual or perceived impairment that was not "transitory and minor," whether or not myths, fears, or stereotypes about disability motivated the employer's decision, the Commission has deleted certain language about myths, fears, and stereotypes from the 1991 version of this section of the appendix that might otherwise be misconstrued when applying the new ADA Amendments Act "regarded as" standard.

Issues Concerning Evidence of Disability

The Commission also received comments from both employer groups and organizations writing on behalf of people with disabilities asking that the regulations address what kind of information an employer may request about the nature of an impairment (e.g., during the interactive process in response to a request for reasonable accommodation), and the amount and type of evidence that would be sufficient in litigation to establish the existence of a disability. Some employer groups, for example, asked the Commission to emphasize that a person requesting a reasonable accommodation must participate in the interactive process by providing appropriate documentation where the disability and need for accommodation are not obvious or already known. Organizations writing on behalf of persons with disabilities asked the Commission to state in the regulations that a diagnosis of one of the impairments in NPRM § 1630.2(j)(5) is sufficient to establish the existence of a disability; that the Commission should emphasize, even more so than in the NPRM, that proving disability is not an onerous burden; that in many instances the question of whether a plaintiff in litigation has a disability should be the subject of stipulation by the parties; and that an impairment's effects on major bodily functions should be considered before its effects on other major life activities in determining whether an impairment substantially limits a major life activity. Both employer groups and organizations submitting comments on behalf of individuals with disabilities asked the Commission to clarify the statement in the NPRM that objective scientific and medical evidence can be used to establish the existence of a disability.

The Commission believes that most of these proposed changes regarding evidentiary matters are either unnecessary or not appropriate to address in the regulations. For example, the Commission has stated repeatedly in numerous policy documents and technical assistance publications that individuals requesting accommodation must provide certain supporting medical information if the employer requests it, and that the employer is permitted to do so if the disability and/or need for accommodation are not obvious or already known. The ADA Amendments Act does not alter this requirement. The Commission also does not think it appropriate to comment in the regulations or the appendix on how ADA litigation should be conducted, such as whether parties should stipulate to certain facts or whether use of certain major life activities by litigants or courts should be preferred.

However, based on the comments received, the Commission has concluded that clarification of language in the NPRM regarding use of scientific and medical evidence is warranted. The final regulations, at § 1630.2(j)(1)(v), state that the comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the

general population usually will not require scientific, medical, or statistical analysis. However, the final regulations also state that this provision is not intended to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate. In addition, the appendix discusses evidence that may show that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures.

Section 1630.2(m): Definition of "Qualified"

The final regulations and accompanying appendix make slight changes to this section to eliminate use of the term "qualified individual with a disability," consistent with the ADA Amendments Act's elimination of that term throughout most of title I of the ADA.

Section 1630.2(o): Reasonable Accommodation

The Commission has added a new provision (o)(4) in § 1630.2(o) of the final regulations, providing that a covered entity is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (§ 1630.2(g)(1)(iii)). The Commission has also made changes to this section to eliminate use of the term "qualified individual with a disability," consistent with the ADA Amendments Act's elimination of that term throughout most of title I of the ADA.

Section 1630.4: Discrimination Prohibited

The Commission has reorganized § 1630.4 of the final regulations, adding a new provision in § 1630.4(b) to provide, as stated in the Amendments Act, that nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an individual with a disability was granted an accommodation that was denied to an individual without a disability.

Section 1630.9: Not Making Reasonable Accommodation

The final regulations include a technical revision to § 1630.9(c) to conform citations therein to the amended ADA. In addition, a new § 1630.9(e) has been added stating again that a covered entity is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (§ 1630.2(g)(1)(iii)). In addition, the appendix to § 1630.9 is amended to revise references to the term "qualified individual with a disability" in order to conform to the statutory changes made by the Amendments Act.

Section 1630.10: Qualification Standards, Tests, and Other Selection Criteria.

The final regulations include a new § 1630.10(b) explaining the amended ADA provision regarding qualification standards and tests related to uncorrected vision.

Section 1630.15: Defenses

The final regulations include a new § 1630.15(f), and accompanying appendix section, explaining the "transitory and minor" defense to a charge of discrimination where coverage would be shown solely under the "regarded as" prong of the definition.

Section 1630.16: Specific Activities Permitted

The final regulations include terminology revisions to §§ 1630.16(a) and (f) to conform to the statutory deletion of the term "qualified individual with a disability" in most parts of title I.

Regulatory Procedures

Final Regulatory Impact Analysis

Executive Orders 12866 and 13563

The final rule, which amends 29 CFR Part 1630 and the accompanying interpretive guidance, has been drafted and reviewed in accordance with EO 12866, 58 FR 51735 (Sept. 30, 1993), Principles of Regulations, and EO 13563, 76 FR 3821, (Jan. 21, 2011), Improving Regulation and Regulatory Review. The rule is necessary to bring the Commission's prior regulations into compliance with the ADA Amendments Act of 2008, which became effective January 1, 2009, and explicitly invalidated certain provisions of the prior regulations. The new final regulations and appendix are intended to add to the predictability and consistency of judicial interpretations and executive enforcement of the ADA as now amended by Congress.

The final regulatory impact analysis estimates the annual costs of the rule to be in the range of $60 million to $183 million, and estimates that the benefits will be significant. While those benefits cannot be fully quantified and monetized at this time, the Commission concludes that consistent with EO 13563, the benefits (quantitative and qualitative) will justify the costs. Also consistent with EO 13563, we have attempted to "use the best available techniques to quantify anticipated present and future benefits and costs as accurately as possible." The Commission notes, however, that the rule and the underlying statute create many important benefits that, in the words of EO 13563, stem from "values that are difficult or impossible to quantify." Consistent with EO 13563, in addition to considering the rule's quantitative effects, the Commission has considered the rule's qualitative effects. Some of the benefits of the ADA Amendments Act (ADAAA or Amendments Act) and this final rule are monetary in nature, and likely involve increased productivity, but cannot be quantified at this time.

Other benefits, consistent with the Act, involve values such as (in the words of EO 13563) "equity, human dignity, fairness, and distributive impacts." In its statement of findings in the Act, Congress emphasized that "in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers." One of the stated purposes of the ADA Amendments Act is "to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection under the ADA." ADAAA Section 2(a)(1) and 2(b)(1). This rule implements that purpose by establishing standards for eliminating disability-based discrimination in the workplace. It also promotes inclusion and fairness in the workplace; combats second-class citizenship of individuals with disabilities; avoids humiliation and stigma; and promotes human dignity by enabling qualified individuals to participate in the workforce.

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Introduction

In enacting the ADA Amendments Act, Congress explicitly stated its expectation that the EEOC would amend its ADA regulations to reflect the changes made by the statute. These changes necessarily extend as well to the Interpretive Guidance (also known as the Appendix) that was published at the same time as the original ADA regulations and that provides further explanation on how the regulations should be interpreted.

The Amendments Act states that its purpose is "to reinstate a broad scope of protection" by expanding the definition of the term "disability." Congress found that persons with many types of impairments—including epilepsy, diabetes, HIV infection, cancer, multiple sclerosis, intellectual disabilities (formerly called mental retardation), major depression, and bipolar disorder—had been unable to bring ADA claims because they were found not to meet the ADA's definition of "disability." Yet, Congress thought that individuals with these and other impairments should be covered and revised the ADA accordingly. Congress explicitly rejected certain Supreme Court interpretations of the term "disability" and a portion of the EEOC regulations that it found had inappropriately narrowed the definition of disability. These amended regulations are necessary to implement fully the requirements of the ADA Amendments Act's broader definition of "disability."

Our assessment of both the costs and benefits of this rule was necessarily limited by the data that currently exists. Point estimates are not possible at this time. For that reason, and consistent with OMB Circular A–4, we have provided a range of estimates in this assessment.

The preliminary regulatory impact analysis ("preliminary analysis") set forth in the NPRM reviewed existing research and attempted to estimate the costs and benefits of the proposed rule. More specifically, the preliminary analysis attempted to estimate the costs employers would incur as the result of providing accommodations to more individuals with disabilities in light of the Amendments Act, the prevalence of accommodation already in the workplace, the cost per accommodation, the number of additional accommodations that the Amendments Act would need to generate to reach $100 million in costs in any given year, the administrative costs for firms with at least 150 employees, and the reported benefits of providing reasonable accommodations.

The preliminary analysis concluded that the costs of the proposed rule would very likely be below $100 million, but did not provide estimates of aggregated monetary benefits. Because existing research measuring the relevant costs and benefits is limited, the Commission's NPRM solicited public comment on its data and analysis.

The Commission's final regulatory impact analysis is based on the preliminary assessment but has changed significantly based on comments received during the public comment period on the NPRM as well as the inter-agency comment period on the final regulations under EO 12866.[1] These changes are consistent with the public participation provisions in EO 13563 and reflect the importance of having engaged and informed public participation. The limitations of the preliminary analysis approach are outlined below, and an alternative approach is provided to illustrate the range of benefits and costs.

These estimates are discussed seriatim in the following sections of this analysis.

I. Estimated Costs

A. Estimate of Increased Number of Individuals Whose Coverage Is Clarified by the ADAAA and the Final Regulations

For those employers that have 15 or more employees and are therefore covered by the proposed regulations, the potential costs of the rule stem from the likelihood that, due to Congress's mandate that the definition of disability be applied in a less restrictive manner, more individuals will qualify for coverage under the portion of the definition of disability that entitles them to request and receive reasonable accommodations.[2] Thus, we first consider the number of individuals whose coverage is clarified by the ADAAA and the final rule as a result of the changes made to the definition of "substantially limits a major life activity."[3] We then consider how many such individuals are likely to be participating in the labor force.

[1] The Commission specifically undertook to provide extensive opportunities for public participation in this rulemaking process. In addition to the more than 600 written comments received during the 60-day public comment period on the NPRM, the EEOC and the U.S. Department of Justice Civil Rights Division during that period also held four "Town Hall Listening Sessions" in Oakland, California on October 26, 2009, in Philadelphia, Pennsylvania on October 30, 2009, in Chicago, Illinois on November 17, 2009, and in New Orleans, Louisiana on November 20, 2009. For each of these sessions, Commissioners offered to be present all day to receive in-person or telephonic comments on any aspect of the NPRM from members of the public on both a pre-registration and walk-in basis. More than 60 individuals and representatives of the business/employer community and the disability advocacy community from across the country offered comments at these four sessions, a number of whom additionally submitted written comments.

[2] Individuals who are covered under the first two prongs of the definition of disability are entitled to reasonable accommodations, as well as to challenge hiring, promotion, and termination decisions and discriminatory terms and conditions of employment. Individuals covered solely under the third prong of the definition of disability are not entitled to reasonable accommodations. As we noted in the preliminary regulatory impact analysis, the primary costs are likely to derive from increased numbers of accommodations being provided by employers—assuming an accommodation is needed, an employee is qualified, and the accommodation does not pose an undue hardship. No comments challenged that assessment. Thus, while we discuss proposed increases in litigation costs below (which apply to claims brought by individuals covered under any prong of the definition), we focus our attention in this section on those individuals whose coverage is clarified under the first two prongs of the definition of disability.

[3] Prior to the ADAAA, individuals with impairments such as cancer, diabetes, epilepsy and HIV infection were sometimes found to be covered under the ADA, and sometimes not, depending on how well they functioned with their impairments, taking into account mitigating measures. Thus, it is not appropriate to say that all such individuals are "newly covered" under the ADA. For that reason, we refer to this group throughout this analysis as a group whose "coverage has been clarified" under the ADAAA.

(1) Summary of Preliminary Analysis

The preliminary regulatory impact analysis relied on a variety of demographic surveys conducted by the U.S. government which are designed to estimate the number of people with disabilities in the labor force. The resulting estimates differ somewhat based on the survey design, the sample size, the age range of the population under study, who is actually being surveyed (the household or the individual), the mode of survey administration, the definition of disability used, and the time-frame used to define employment status.

In attempting to estimate the increased number of individuals whose coverage was clarified by the ADAAA and who might need and request accommodation,[4] the Commission's preliminary impact analysis examined data from the following major population-representative Federal surveys that contain information about people with disabilities and their employment status: the Current Population Survey (CPS), the American Community Survey (ACS), the National Health Interview Survey (NHIS), and the Survey of Income and Program Participation (SIPP). Noting the limitations of this data as applied to estimating the number of individuals affected by the amended ADA, we nevertheless estimated that there were 8,229,000 people with disabilities who were working in 2007, and that between 2.2 million and 3.5 million workers reported that they had disabilities that caused difficulty in working.[5]

Both public comments and comments received during the inter-agency review process under EO 12866 highlighted a variety of limitations in our analysis. Indeed, the alternative that we later present indicates that the figure of 8.2 million people with disabilities used in the preliminary analysis significantly underestimated the number of workers with impairments whose coverage under the law will now be clarified.

The indicator of "disability" used by the ACS, CPS, and NIHS depends on a series of six questions that address functionality, including questions about whether an individual has any of the following: a severe vision or hearing impairment; a condition that substantially limits one or more basic physical activities such as walking, climbing stairs, reaching, lifting, or carrying; a physical, mental, or emotional condition lasting 6 months or more that results in difficulty learning, remembering, or concentrating; or a severe disability that results in difficulty dressing, bathing, getting around inside the home, going outside the home alone to shop or visit a doctor's office, or working at a job or business.

This survey definition clearly captures only a subset of the group of people with disabilities who would be covered under the ADA as amended. For example, among other things:

—With respect to both physical and mental impairments, the survey definition does not account for the addition of the operation of major bodily functions as major life activities under the newly amended law, such as functions of the immune system, normal cell growth, and brain, neurological, and endocrine functions. This makes it especially likely that the survey data is under-inclusive as to individuals with impairments such as HIV infection, epilepsy, cancer, diabetes, and mental impairments whose coverage is now clarified under the ADA.

—Even with respect to major life activities other than major bodily functions, the survey definition covers a narrower range of individuals with mental impairments since it is limited to mental or emotional conditions that result in difficulty learning, remembering, concentrating, or a severe disability resulting in difficulty doing specific self-care activities.

—The survey definition overall reflects an attempt to capture individuals with impairments whose limitations are considered "severe"— a degree of limitation which is no longer required in order for an impairment to be considered substantially limiting under the ADA as amended.

—The survey definition expressly excludes many individuals whose impairments last fewer than 6 months, even though such impairments may substantially limit a major life activity under the ADA prior to and after the ADA Amendments.

—The survey definition is limited to impairments that currently substantially limit a major life activity, and therefore does not capture individuals with a record of a substantially limiting impairment who may still need accommodation arising from that past history.

In the preliminary analysis, we used the number of employed individuals who have functional disabilities (as indicated by the six-question set described above) as a surrogate for the number of individuals with any disability who are working. We then tried to determine the subset of those employed individuals with disabilities whose coverage would be newly clarified as a result of the Amendments Act, acknowledging that some people whose coverage would be potentially clarified by the Amendments Act were probably not included in this baseline.

We declined to use the subset of workers with reported employment related disabilities, because we assumed that some of these individuals would have been covered even under the pre-ADAAA definition of "disability." Instead, the preliminary analysis examined the CDC's analysis of the Census/SIPP data on prevalence of certain medical conditions in the population of non-institutionalized individuals ages 18–64. *See* "Main cause of disability among civilian non-institutionalized U.S. adults aged 18 years or older with self reported disabilities, estimated affected population and percentages, by sex—United States, 2005," *http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5816a2.htm* (last visited Mar. 1, 2010). We chose to focus on those impairments in § 1630.2(j)(5) of the NPRM (those impairments that we believed would "consistently" meet the definition of a substantially limiting impairment), since we considered individuals with such impairments to be most likely to request accommodations as a result of the regulations due to a greater degree of certainty that they would be covered. We concluded that this data suggested that 13 percent of civilian non-institutionalized adults with disabilities have the following conditions: Cancer (2.2 percent), cerebral palsy (0.5 percent), diabetes (4.5 percent), epilepsy (0.6 percent), AIDS or AIDS related condition (0.2 percent), "mental or emotional" impairment (4.9 percent).

We assumed in our preliminary analysis that these impairments would occur with the same degree of frequency among employed adults who have functional disabilities as they do among

[4] The preliminary analysis focused on individuals whose coverage would be clarified under the ADAAA and who might need and request an accommodation. For purposes of clarity, our final assessment focuses first on the number of individuals whose coverage will be clarified under the ADAAA and who are participating in the labor force. We then move to a separate analysis of how many of those individuals might need and request accommodations.

[5] From 2003–07, the ACS included the following question on "Employment Disability" asked of persons ages 15 or older: "Because of a physical, mental, or emotional condition lasting six months or more, does this person have any difficulty in doing any of the following activities: (b) working at a job or business?" *See* "Frequently Asked Questions," Cornell University Disability Statistics, Online Resource for U.S. Disability Statistics, *http://www.ilr.cornell.edu/edi/disabilitystatistics/faq.cfm*.

the population of persons with disabilities generally, and so multiplied 13% times 8,229,000 workers with reported disabilities. We thus estimated that approximately 1,000,000 workers with disabilities had impairments that were more likely to be covered as the result of the ADAAA and the EEOC's regulations.

(2) Comments on Preliminary Analysis

The Commission received a number of public comments from employer associations arguing that our figures underestimated the increase in the number of individuals who would now be covered under the ADAAA, as people with disabilities. One employer association specifically argued that the Commission's preliminary estimate that 13 percent of the workers with work-limitation disabilities would consistently meet the definition of disability under NPRM § 1630.2(j)(5) left out a number of disabilities listed in that section such as autism, multiple sclerosis, and muscular dystrophy. This comment cited Centers for Disease Control (CDC) data that the prevalence rate for autism spectrum disorder is between 2 and 6 per 1,000 individuals, or 89,000 to 267,000 civilian non-institutionalized adults, as well as National Multiple Sclerosis Society data estimating that 400,000 Americans have multiple sclerosis, and Muscular Dystrophy Association statistics that approximately 250,000 Americans have muscular dystrophy. The commenter argued that adding these estimates to the 5.8 million non-institutionalized adults ages 18–64 who have cancer, cerebral palsy, diabetes, epilepsy, AIDS or AIDS related condition, or a mental or emotional impairment would increase the percentage of workers who would consistently meet the definition of disability under proposed section 1630.2(j)(5) to 15.1 percent. The commenter also noted that data from the Families and Work Institute estimates that 21 percent of workers are currently receiving treatment for high blood pressure, 7 percent have diabetes, and 4 percent are being treated for mental health issues. Finally, this commenter pointed out that a number of impairments similar to those listed in NPRM § 1630.2(j)(5), but not explicitly identified in that section, would presumably also meet the expanded definition of disability. Based on these observations, the commenter noted that the percentage of workers with covered disabilities could be 20 to 40 percent.

In contrast, some advocates for people with disabilities urged the Commission to delete any estimates at all of the numbers of persons who may meet the definition of "disability" as amended by the ADA Amendments Act or who may request reasonable accommodations. These groups noted that the broad purposes of the ADA, as compared to the more limited purposes of most existing data collections and the different definitions of "disability" used in those studies, made those estimates so uncertain, conjectural, and anecdotal as to be unhelpful and potentially detrimental to the goals of the ADAAA.

In addition, these advocates disputed the Commission's willingness in the preliminary analysis to allow that there may be an increase in requests for accommodation as a result of the ADAAA or the regulations, and therefore disagreed with the underlying premise of attempting to estimate the number of individuals with disabilities generally or the increase in the number of individuals whose coverage under the ADA would now be clarified. Their argument proceeded as follows: Employers and employees alike have generally been aware since title I of the ADA took effect in 1992 that requested accommodations needed by individuals with disabilities must be provided absent undue hardship, and that notwithstanding court rulings to the contrary, most employers and employees have continued to believe that disabilities include impairments such as those examples set forth in § 1630.2(j)(5) of the NPRM, e.g., epilepsy, depression, post traumatic stress disorder, multiple sclerosis, HIV infection, cerebral palsy, intellectual disabilities, bipolar disorder, missing limbs, and cancer. Therefore, these advocates argued, it is unlikely that individuals with such impairments have been refraining from requesting accommodations up until now, or that their requests for accommodation have been denied because they did not meet the legal definition of disability. This was the practical reality, even if improper denials by employers would have been difficult to remedy in the courts, given the pre-Amendments Act interpretation of the definition of disability.[6]

[6] These groups also noted that some individuals with covered disabilities will not seek work. Finally, they disputed the utility of the attempt to estimate the number of affected workers on the grounds the ADAAA simply restores the original interpretation of the definition of "disability," and there is no evidence that state or local laws with equivalent or broader definitions of disability have experienced a significant economic impact.

(3) Revised Analysis

(a) Number of Individuals Whose Coverage Is Clarified and Who Are Participating in the Labor Force

The Commission agrees with the comments made by both employer groups and advocates for people with disabilities that the referenced survey data regarding the numbers of workers with disabilities or with specific impairments—which, as noted in the preliminary analysis, researchers collected for other purposes—has limited relevance to determining the number of workers whose coverage has been clarified by the ADAAA. This conclusion qualifies any use of that data in the preliminary analysis, as well as in this final regulatory impact analysis.

In light of these limitations, we believe the Commission's preliminary analysis significantly underestimated the number of workers with disabilities whose coverage is clarified as a result of the ADAAA and the final regulations. First, we did not account for several impairments actually listed in § 1630.2(j)(3)(iii) of the final regulations, such as autism, multiple sclerosis, and muscular dystrophy. Second, as was pointed out during inter-agency review of the final regulations prior to publication, because the CDC analysis of the Census Data on the number of workers with self-reported disabilities was not derived in the same way as the ACS data, it would be incorrect to assume that CDC data on the prevalence of the impairments in § 1630.2(j)(3)(iii) reflects the frequency of those impairments among the 8,229,000 non-institutionalized workers with disabilities aged 18–64 found by the ACS. Moreover, as discussed below, the figures in the CDC analysis of the Census Data are obviously far lower than reported data on the incidence of these impairments in the population overall.

Therefore, for purposes of this final analysis, informed by both the public comments and comments received during the inter-agency review process under EO 12866, we conclude that the figure of 8.2 million people with disabilities used in the preliminary analysis, and the calculations made with it, significantly underestimated the number of workers with impairments that will now be covered as having a substantially limiting impairment or record thereof under the ADAAA and the final regulations.

Our revised analysis proceeds as follows. In analyzing the available data, we are mindful of the fact that the Amendments Act was designed to make it easier to meet the definition of

disability under the ADA and to expand the universe of people considered to have disabilities. Prior to the Amendments Act, the Supreme Court in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), used the ADA's finding that approximately 43 million Americans had disabilities as part of its reason for concluding that the benefits of mitigating measures (e.g., medication, corrective devices) an individual used had to be taken into account when determining whether a person had a substantially limiting impairment. The Amendments Act rejected this restrictive definition of disability and explicitly removed this finding from the law. It also provided that the ameliorative effects of mitigating measures (except ordinary eyeglasses or contact lenses) were not to be taken into account in determining whether a person's impairment substantially limited a major life activity.

Thus, based on the Amendments Act's rejection of *Sutton* alone—apart from the many other changes it made to the definition of a substantial limitation in a major life activity—we know that the number of people now covered under the ADA as having a substantially limiting impairment or a record thereof should be significantly more than 43 million. (The Court surmised that the 43 million number was derived from a National Council on Disability report, *Toward Independence* (Feb. 1986), available at *http://www.ncd.gov/newsroom/publications/1986/toward.htm*, which in turn was based on Census Bureau data and other studies that used "functional limitation" analyses of whether individuals were limited in performing selected basic activities.)

Under the ADA as amended, the definition of an impairment that substantially limits a major life activity will obviously be broader than captured by prior measures, since "substantial" no longer means "severe" or "significantly restricted," major life activities now include "major bodily functions," the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) are disregarded, and conditions that are episodic or in remission are substantially limiting if they would be when active. Based on the available data, it is impossible to determine with precision how many individuals have impairments that will meet the current definition of substantially limiting a major life activity or a record thereof. We do know, however, that, at a minimum, this group should easily be concluded to include individuals with the conditions listed in § 1630.2(j)(3)(iii) of the final regulations—including autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, and a variety of mental impairments.

While it is true that, prior to the Amendments Act, many of these individuals were assumed to be covered under the law by their employers, the reality was that large numbers of individuals with these conditions were considered by the courts not to have disabilities, based on an individualized assessment of how well the individuals were managing with their impairments, taking into account mitigating measures. Thus, for purposes of this regulatory assessment, we consider individuals with all of these impairments to be individuals whose coverage has now been clarified by the Amendments Act.

By contrast, we are not counting individuals with certain conditions also listed in § 1630.2(j)(3)(iii) of the final regulations—mobility impairments requiring use of a wheelchair, blindness, deafness, and intellectual disabilities—as individuals whose coverage has now been clarified by the Amendments Act since, notwithstanding some exceptions, courts consistently found such individuals to be covered under the ADA even prior to the Amendments Act.

Thus, we use as a starting point the data reported by government agencies and various organizations on the number of individuals in the United States with autism, cancer, cerebral palsy, diabetes, epilepsy, HIV infection, multiple sclerosis, muscular dystrophy, and a variety of mental impairments.[7] Adding these admittedly disparate and potentially overlapping numbers (and acknowledging that some of these estimates include children and are not restricted by employment status), we can assume a rough estimate of the number of individuals with these impairments who would be found substantially limited in a major life activity as a result of the Amendments Act, as follows:

—Autism—Approximately 1.5 million individuals in the United States are affected by autism.[8]
—Multiple Sclerosis—Approximately 400,000 Americans have multiple sclerosis according to the National Multiple Sclerosis Society.[9]
—Muscular Dystrophy—Approximately 250,000 Americans have muscular dystrophy according to the Muscular Dystrophy Association.[10]
—Cancer—In 2007, approximately 11,714,000 individuals were living with cancer in the United States.[11]
—Diabetes—An estimated 18.8 million adults in the United States have diabetes according to the CDC.[12]
—Epilepsy—Approximately 3 million Americans [13] (or subtracting approximately 326,000 schoolchildren under 15, about 2.6 million people 15 or over) have epilepsy, according to the Epilepsy Foundation website, and an estimated 2 million people have epilepsy, according to the CDC.
—Cerebral Palsy—Between 1.5 and 2 million children and adults have cerebral palsy in the United States according to the United Cerebral Palsy Research and Educational Foundation.[14]
—HIV Infection—The CDC estimates that more than 1.1 million Americans are living with HIV infection.[15]
—Mental Disabilities—Approximately 21 million individuals (6% or 1 in 17 Americans) have a serious mental illness according to the National Alliance on Mental Illness website (citing National Institute of Mental Health reports).[16]

Thus, based on this data, the number of individuals with the impairments cited in § 1630.2(j)(3)(iii) could be at least 60 million. In addition, we know that people with many other

[7] We note that this approach was used by one of the comments submitted by an employer association.

[8] *See* "What is Autism?" *http://www.autismspeaks.org/whatisit/index.php* (last visited Mar. 1, 2011); *see also* Centers for Disease Control, "Prevalence of the Autism Spectrum Disorders (ASDs) in Multiple Areas of the United States, 2000 and 2002," available at *http://www.cdc.gov/ncbddd/autism/documents/AutismCommunityReport.pdf* (various studies regarding prevalence in children).

[9] *See* "Who Gets MS?" *http://www.nationalmssociety.org/about-multiple-sclerosis/what-we-know-about-ms/who-gets-ms/index.aspx* (last visited Mar. 1, 2011).

[10] *See* "Answers to Frequently Asked Questions," *http://www.mda.org/news/080804telethon_basic_info.html* (last visited Mar. 1, 2011).

[11] *See* "Cancer Prevalence: How Many People Have Cancer?" *http://www.cancer.org/cancer/cancerbasics/cancer-prevalence* (last visited Mar. 1, 2011).

[12] *See* "2011 National Diabetes Fact Sheet" (released Jan. 26, 2011), *http://www.diabetes.org/diabetes-basics/diabetes-statistics/* (last visited Mar. 1, 2011).

[13] *See* "Epilepsy and Seizure Statistics," *http://www.epilepsyfoundation.org/about/statistics.cfm* (last visited Mar. 1, 2011); CDC, Epilepsy "Data and Statistics," *http://www.cdc.gov/Epilepsy/*.

[14] *See* "Cerebral Palsy Fact Sheet," *http://www.ucp.org/uploads/cp_fact_sheet.pdf* (last visited Mar. 1, 2011).

[15] *See* "HIV in the United States," *http://www.cdc.gov/hiv/topics/surveillance/resources/factsheets/us_overview.htm* (last visited Mar. 1, 2011).

[16] "What is Mental Illness: Mental Illness Facts," *http://www.nami.org/template.cfm?section=About_Mental_Illness* (last visited Mar. 1, 2011).

impairments will virtually always be covered under the amended ADA definition of an impairment that substantially limits a major life activity or record thereof.

We recognize that the above figures on the prevalence of § 1630.2(j)(3)(iii) impairments are over-inclusive as a measure of the potential number of workforce participants with these impairments, since in some instances they include people of all ages and those who are not in the labor force. Therefore, we must also identify how many of these individuals are currently participating in the labor force.

Again, we are faced with significant limitations in the data available to us. The newest data released in January 2011 by the Bureau of Labor Statistics (BLS) estimates that 20 percent of people with disabilities age 16 and older participate in the labor force and, of those, 13.6 percent are considered to be unemployed.[17] But the BLS uses a functional limitation analysis to determine who has a disability which, as we have explained above, is significantly different from the definition of disability under the ADA as amended. Hence, we must assume this percentage is extremely under-inclusive. The BLS data estimates that the labor force participation rate for all civilian non-institutionalized people 16 and older (including people with and without disabilities) is 64 percent. We can thus assume that somewhere between 20 and 64 percent of individuals with impairments identified in § 1630.2(j)(3)(iii) will be participating in the labor force.

Using the 60 million figure, if we assume 20% of individuals with impairments identified in § 1630.2(j)(3)(iii) of the final regulations are participating in the labor force, then, considering those impairments alone, approximately 12 million individuals whose coverage is now clarified under the ADA are in the labor force (20% times 60 million). If we assume 64% of individuals with these disabilities are in the labor force, then the number of labor force participants whose coverage is clarified under the ADA is approximately 38.4 million.

[17] Participants in the labor force include individuals who currently have a job or are actively looking for one. U.S. Department of Labor, Office of Disability Employment Policy, Disability Employment Statistics Q&A, *http://www.dol.gov/odep/categories/research/bls.htm.*

B. Estimated Increase in Reasonable Accommodation Requests and Costs Attributable to the ADAAA and the Final Regulations

(1) Summary of Preliminary Analysis

As noted above, our preliminary analysis had concluded there would be an additional one million people with disabilities covered under the ADA, as amended. The preliminary analysis then attempted to estimate the subset of these million workers who would actually need reasonable accommodations, relying on a study by Craig Zwerling *et al., Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994–1995,* 45 J. Occupational & Envtl. Med. 517 (2003). According to the Zwerling et. al study, 16% of employees with impairments or functional limitations surveyed said they need one of 17 listed accommodations. We assumed, therefore, using the 16% taken from the Zwerling study, that 16% of the one million workers whom we identified would also need accommodations, and that the resulting 160,000 requests would occur over a period of five years.

With regard to the potential costs of accommodations, the preliminary analysis set forth a review of the data from a series of studies providing a wide range of estimates of the mean and median costs of reasonable accommodation. The means cited in the data ranged from as low as $45 to as high as $1,434, based on a variety of studies done by academic and private researchers as well as the Job Accommodation Network (JAN). The $45 mean direct cost of accommodation was reported in a study (Helen Schartz *et al., Workplace Accommodations: Evidence-Based Outcomes* 27 Work 345 (2006)) examining the costs and benefits of providing reasonable accommodations, using data from an examination of costs at a major retailer from 1978 to 1997 (P. D. Blanck, *The Economics of the Employment Provisions of the Americans with Disabilities Act: Part I—Workplace Accommodations,* 46 *DePaul L. Rev.* 877 (1997)). The $1,434 mean cost of accommodation cited in the preliminary analysis was derived from data reviewed in JAN's January 2009 issue of its periodically updated study entitled "Workplace Accommodations: Low Cost, High Impact," which used 2008 data. The most recent JAN study, issued September 1, 2010, reported a mean accommodation cost of $1,183, based on 2009 data.

Using estimates of both the mean and median cost of accommodations, the preliminary analysis estimated that the ADA Amendments Act and these regulations would result in increased costs of reasonable accommodation of from $19,000,000 to $38,000,000 annually.

(2) Comments on Preliminary Analysis

The Commission received a number of public comments from employer associations arguing that because we had underestimated the incremental increase in the number of individuals with disabilities, we had also necessarily underestimated the number of additional requests for accommodation that could be attributable to the Amendments Act and the final regulations. Thus, one commenter recommended using a figure of 20% rather than 13% to represent the number of individuals with just those impairments identified in NPRM § 1630.2(j)(5) and then assumed that the percentage of those individuals who would request an accommodation would be 49%. That commenter thus concluded that a total of 576,000 individuals covered under § 1630.2(j)(5) would request a reasonable accommodation. This commenter also noted that even this figure would likely be too low because workers may move from job to job and renew accommodation requests, or a worker might need more than one accommodation.

The Commission also received comments from employers on the estimated costs of accommodations attributable to the Amendments Act and the regulations, primarily contending:

—The specific data on accommodation costs cited by the Commission in the preliminary analysis was too low (one employer association asserted that the cost will be at least $305.7 million for the first year, with administrative costs likely to exceed $101.9 million per year on a recurring basis; a state government entity commented that the Commission should take into account additional administrative costs employers may bear in order to comply, but did not attempt to estimate these additional costs);

—Each additional accommodation request will affect an employer's ability to cope with the overall number of requests; and

—The undue hardship defense is insufficient to address the financial concerns of small employers.

By contrast, disability rights groups asserted that even if the Commission's estimate of 160,000 additional workers who would request accommodations as a result of the ADA Amendments Act

provided an outer estimate of the number of affected workers, it was too high of a number to gauge the impact of the Amendments Act, in part because the Amendments Act affected those workers whom Congress had always intended to be covered by the ADA and because many employers were treating them as covered.

With regard to the costs of accommodations, a number of comments from academics and disability and civil rights organizations concurred with our preliminary conclusion that the cost would be below $100 million and that no economic impact analysis was required or feasible, and/or argued that the Commission's preliminary analysis had overstated the potential economic impact. Specifically, they argued that the Commission's rough estimates of the number and cost of accommodation requests were speculative and were unnecessary to conclude that the Act's costs are less than $100 million, since available research overwhelmingly demonstrates that accommodation costs are modest, and because neither the Amendments Act nor the proposed regulations change the basic structure of the original ADA. They also argued that the Commission's method of interpreting certain reasonable accommodation data resulted in overestimation of costs; that many accommodations for specific types of impairments have no or very little cost; and that over time, ongoing medical and technological advances can be reasonably expected to reduce both existing and new accommodation costs associated with the ADA or the Amendments Act.

Professor Peter Blanck of the Burton Blatt Institute at Syracuse University, a co-author of the 2006 "*Workplace Accommodations: Evidence-Based Outcomes*" study, filed public comments offering a number of clarifications specifically regarding citation to his study's data, and arguing that the Commission had overstated the cost of accommodations, because the preliminary analysis used a "mean" (or average, calculated by adding all values in a dataset and dividing by the number of points in the dataset), rather than a "median" (the middle point in a dataset).

Professor Blanck considered the median a better measure of the cost of accommodations because so many accommodations have no cost. He pointed out that based on his research, 49.4% of accommodations had zero direct costs. For the 50.6% of accommodations with a cost greater than zero, the median cost in the first calendar year was $600. Professor Blanck further found that for all accommodations, including those with a zero cost, the median cost of accommodations was found to be $25.

Of key importance, no public comments contradicted the Commission's observation in the preliminary analysis that there is a paucity of data on the costs of providing reasonable accommodation, and that much of the existing data is obtained either through limited sample surveys or through surveys that collect limited information. While some employer groups disputed the Commission's cost estimates, none cited any research or studies on actual accommodation costs.

(3) Revised Analysis

Our revised analysis of potential costs for additional accommodations begins with a revised estimate of the number of new accommodation requests, based on the upward adjustment of the number of people with disabilities whose coverage is clarified under the Amendments Act. As we note above, that range is 12 million to 38.4 million people.

(a) Estimated Number of New Accommodation Requests

Estimating the increase in expected requests for reasonable accommodations attributable to the Amendments Act and the final rule is difficult because it requires assuming that some number of individuals with disabilities will now perceive themselves as protected by the law and hence ask for accommodation, but had not previously assumed they were covered and therefore had not asked for accommodations. In reality, individuals with disabilities such as epilepsy, diabetes, cancer, and HIV infection may have considered themselves, and may have been treated by their employers as, individuals who could ask for accommodations such as flexible scheduling or time off. Moreover, in many cases, such accommodations may have been requested and provided without anyone in the process even considering such workplace changes as being required reasonable accommodations under the ADA.

Recognizing that it is impossible to determine with precision the number of individuals in the labor force whose coverage is now clarified under the law and who are likely to request and require reasonable accommodations as a result of that increased clarity, we have tried to determine the number of such individuals by taking the estimated number of labor force participants whose coverage has been clarified and multiplying it by the percentage of employees who report needing accommodations.

According to the Zwerling *et al.* study cited in our preliminary analysis, 16% of employees with impairments or functional limitations surveyed said they needed one of 17 listed accommodations. *Workplace Accommodations for People with Disabilities: National Health Interview Survey Disability Supplement, 1994–1995*, 45 J. Occupational & Envtl. Med. 517 (2003)). This 16% figure may be an overestimate of the percentage of those employees whose coverage has been clarified by the Amendments Act who will actually need accommodations, since of the 17 accommodations listed in the study, a number of them would more likely have been needed by individuals whose coverage was not questioned prior to the Amendments Act. For example, these accommodations include accessible restrooms, automatic doors, installation of a ramp or other means of physical access, and the provision of sign language interpreters or readers. These are types of accommodations that would apply specifically to individuals who were clearly covered under the ADA, even prior to the Amendments Act. Only 10.2% of the employees surveyed asked for accommodations such as break times, reduced hours, or job redesign, which are the more likely accommodations to be requested by those individuals whose coverage has now been clarified. Nevertheless, because the Zwerling study surveyed a limited range of people with disabilities, we will use the full 16% figure.

Applying the 16% figure to represent the percentage of individuals whose coverage has been clarified and who would need reasonable accommodations, the resulting increase in reasonable accommodations requested and required as a result of the Amendments Act could range from approximately 2 million (assuming 12 million labor force participants) to 6.1 million (assuming 38.4 million labor force participants).

(b) Factors Bearing on Reasonable Accommodation Costs

After fully considering the preliminary analysis and the public comments, and after further consideration of the issues, the Commission is persuaded of the following facts concerning the costs of accommodations:

—Of those reasonable accommodations requested and required, only a subset will have any costs associated with them. The studies show that about half of accommodations have zero or no cost, and had findings regarding

the mean cost ranging from $45 and $1,183. But most, if not all, of these studies have included accommodations for people who use wheelchairs, who are deaf, or who are blind. These tend to be the most expensive accommodations (e.g., physical access changes such as ramps, automatic doors, or accessible bathrooms; sign language interpreters and readers; Braille and/or computer technology for reading). Passage of the Amendments Act and promulgation of these regulations do not affect these individuals or render employers newly responsible for providing such accommodations, since there was never any dispute, even prior to enactment of the Amendments Act, that people with these kinds of impairments met the definition of disability. Therefore, any estimate of newly imposed costs of accommodations should generally exclude these types of higher-cost accommodations.

—To the extent the calculation of any mean accommodation cost is derived from data that includes accommodations that are purchased for a one-time cost but will be used over a period of years once owned by the employer (either for that employee's tenure or for future employees), the annual cost is actually much lower than the one-time cost. For example, physical renovations and accessibility measures, equipment, furniture, or technology, among other accommodations, may be used over a period of many years at no additional cost to the employer.

—A small percentage of people whose coverage has been clarified may need some physical modifications to their workspace—e.g., the person with mild cerebral palsy who might need voice recognition software for difficulty with keyboarding, or the person whose multiple sclerosis affects vision who needs a large computer screen.

—Most of the people who will benefit from the amended law and regulations are people with conditions like epilepsy, diabetes, cancer, HIV infection, and a range of mental disabilities. The types of accommodation these individuals will most commonly need are changes in schedule (arrival/departure times or break times), swapping of marginal functions, the ability to telework, policy modifications (e.g., altering for an individual with a disability when or how a task is performed, or making other types of exceptions to generally-applicable workplace procedures), reassignment to a vacant position for which the individual is qualified, time off for treatment or recuperation, or other similar accommodations.

—Many of these accommodations will not require significant financial outlays. Some accommodations, such as revising start and end times, allowing employees to make up hours missed from work, and creating compressed workweek schedules, may result in administrative or other indirect costs. However, they may also result in cost savings through increased retention, engagement, and productivity. Other accommodations, such as providing special equipment needed to work from home, will have costs, but might also result in cost savings (e.g., reduced transportation costs, environmental benefits, etc.).

—Time off, both intermittent and extended, may have attendant costs, such as temporary replacement costs and potential lost productivity. But these, too, may be offset by increased retention and decreased training costs for new employees.

—With respect to those individuals whose coverage has been clarified and who both request and need accommodation, employers will sometimes provide whatever is requested based on existing employer policies and procedures (e.g., use of accrued annual or sick leave or employer unpaid leave policies, employer short- or long-term disability benefits, employer flexible schedule options guaranteed by a collective bargaining agreement, voluntary transfer programs, or "early return to work" programs), or under another statute (e.g., the Family and Medical Leave Act or workers' compensation laws).

(c) Calculation of Mean Costs of Accommodations Derived From Studies

We disagree with Professor Blanck's observation that the median cost is the appropriate value for this analysis because this analysis seeks to estimate the total cost of new accommodations across the entire economy resulting from the Amendments Act and final rule. Using the median value in this case would not capture the total cost to the nation's economy.

For that reason, we will rely on the range of mean costs of accommodations derived from various studies and will attempt to make a reasonable estimation of the likely mean cost of accommodation for those employees whose coverage has been clarified as a result of the Amendments Act. In so doing, we again recognize that references to this data must be qualified by (1) the fact that high cost outlier accommodations are not ones likely to be requested by those whose coverage has been clarified by the Amendments Act and the final rule, and (2) the fact that reasonable accommodations are not needed, requested by, or provided for all individuals with disabilities.

The Job Accommodation Network (JAN) conducts an ongoing evaluation of employers that includes accommodation costs, using a questionnaire to collect data from employers who have consulted JAN for advice on providing reasonable accommodation. As noted above, the most recent JAN study (Workplace Accommodations: Low Cost, High Impact (JAN 2009 Data Analysis) (Sept. 1, 2010)) found that the median cost of reasonable accommodations that had more than a zero cost reported by JAN clients was $600, and the mean cost was $1,183.[18] JAN's cumulative data from 2004–2009 shows that employers in their ongoing study report that a high percentage (56%) of accommodations cost nothing to provide.

According to JAN,[19] its calculation of the $1,183 mean cost of accommodation was derived from a survey of 424 employers. Two of those employers reported outlying costs of $100,000 each, in both cases for the design and purchase of information system databases for proprietary information that would be accessible to employees with vision impairments. Such employees would have likely been covered by the ADA prior to the Amendments Act, and the type of higher-cost technological accommodation at issue is not the type of accommodation that will likely be needed by most of those whose coverage has been clarified by virtue of the Amendments Act and final regulations. Moreover, in each case, the database was being developed for business reasons, and not specifically as an accommodation.[20]

According to JAN, if these two outlier accommodations are deleted from the

[18] Information provided to the EEOC by Beth Loy, Ph.D., Job Accommodation Network.

[19] *Id.*

[20] *Id.* The survey data received by JAN did not indicate whether the $100,000 reported cost was the total cost of the database or the added cost of accessibility. Significantly, one of these employers is a federal agency that was required to purchase an accessible database under section 508 of the Rehabilitation Act of 1973, as amended, so would have had to do so anyway. Therefore, it is not clear that it would be appropriate to consider this a cost of accommodating a single employee under section 501 of the Rehabilitation Act, as amended. The other employer was a federal contractor, and may therefore have had obligations under its contract and/or section 503 of the Rehabilitation Act, as amended, to include accessible features. *Id.*

data set, the mean cost of accommodation based on the remaining 422 reported accommodations in the survey drops to $715.[21] Even this figure may overestimate the mean cost of accommodations needed for those whose coverage has been clarified by the Amendments Act, most of which we believe will have less significant costs. Nonetheless, we will use $715 as a starting point for calculating the annual mean cost of accommodations attributable to the changes in the definition of a substantially limiting impairment.

The mean cost of $715 represents the average one-time cost of providing a reasonable accommodation. However, JAN reports that many of these accommodations reported in the study involved ones that are then used by the employee (or additional employees) on an ongoing basis, in many cases presumably for a period of years. These included items such as software, chairs, desks, stools, headsets, keyboards, computer mice, sound absorption panels, lifting devices, and carts.[22] Given the nature of these items, their useful life, and ever-advancing technology, we assume for purposes of this analysis a useful life of five years for these items. If those accommodations that can be used on an ongoing basis are used for five years, this would reduce the mean annual cost to one-fifth of $715 (or $143, which we will round to $150 for purposes of this analysis) with respect to those accommodations. In addition, the mean of $715 includes one-time costs of more expensive accommodations such as equipment, technology, and physical workplace accessibility for individuals who were already covered, whereas we believe the cost of the majority of accommodations associated with those whose coverage is clarified by the Amendments Act will be lower. Therefore, any estimate of the mean cost of accommodations overall may exaggerate the cost of accommodations for such individuals. Thus, for purposes of considering the annual impact pursuant to EO 12866, we believe it is appropriate to use the estimated lower mean of $150.

(d) Accommodation Cost Scenarios

Using our estimates above regarding the possible range of the number of individuals whose coverage is clarified under the definition of a substantially limiting impairment or record thereof and who are likely to request and require accommodation, we can project the following estimates of the likely incremental cost of providing reasonable accommodation attributable to the Amendments Act and the final rule, using a $150 mean annual cost of accommodation. Since we would not expect all of these new accommodation requests to be made in a single year, we will assume they will be made over a period of five years, with estimated costs as follows, using the above-discussed estimate of the incremental increase in reasonable accommodations requested and required as a result of the Amendments as ranging from 2 million to 6.1 million:

400,000 new accommodations annually (2 million over 5 years) × $150 = $60 million annually

1.2 million new accommodations annually (6.1 million over 5 years) × $150 = $183 million annually

Thus, the lower-bound estimated cost of the incremental increase in accommodations attributable to the Amendments Act and the final regulations would be $60 million annually, and the higher-bound estimated cost would be $183 million. The Commission recognizes that the range of cost estimates is quite large. However, given the lack of available data and the limitations in existing data, the resultant high level of uncertainty about the number of individuals whose coverage is clarified under the Amendments Act, the uncertainty about the number of such individuals who would be newly asking for accommodations, and the uncertainty about the actual mean cost of the accommodations that might be requested by these individuals, we are not able to provide more precise estimates of the costs of new accommodations attributable to the ADA Amendments Act and the final rule.

C. Estimated Increase in Administrative and Legal Costs Attributable to the ADAAA and the Final Regulations

(1) Summary of Preliminary Analysis

In the preliminary analysis, the Commission posited that administrative costs of complying with the ADA Amendments Act might be estimated at $681 in a human resource manager's time,[23] plus the fees, if any, charged for any training course attended.

With respect to training costs, we noted that the EEOC provides a large number of free outreach presentations for employers, human resource managers, and their counsel, as well as fee-based training sessions offered at approximately $350. Therefore, the preliminary analysis offered a rough estimate of these administrative costs, even if fee-based training were sought, of $1,031. The preliminary analysis assumed that these figures will underestimate costs at large firms but will overestimate costs at small firms and at firms that do not have to alter their policies. This would have resulted in a one time cost of approximately $70 million, although the Commission was unable to identify empirical research to support these very rough estimates. This figure assumed firms with fewer than 150 employees would incur no administrative costs from this rule. The preliminary analysis further assumed that smaller entities are less likely to have detailed reasonable accommodation procedures containing information relating to the definition of disability that must be revised or deleted. We posited in our preliminary analysis that larger firms, such as the 18,000 firms with more than 500 employees, would be more likely to have formal procedures that may need to be revised.[24]

The preliminary analysis also found that while there may be additional costs associated with processing and adjudicating additional requests for accommodation, these costs may be offset in part by the fact that application of the revised definition of "disability" will decrease the time spent processing accommodation requests generally. There were no findings or assumptions regarding increased or decreased litigation costs in the preliminary analysis.

(2) Comments on Preliminary Analysis

Various employer groups commented that the definitional changes will cause confusion and litigation, with associated costs, and that the Commission's preliminary estimate of training and related costs was not based on sufficient research. Specifically, they commented that the Commission had underestimated the costs that have been or will be incurred by employers to update internal policies and procedures to reflect the broader definition of disability and to train personnel to ensure appropriate compliance with the ADAAA and the final regulations, and that the Commission should have taken into account not just salaries but also benefits paid to such individuals to represent the cost of time spent on such training. They also asserted that there

[21] *Id.*

[22] *Id.*

[23] Occupational Outlook Handbook, 2008–09 Edition, *http://stats.bls.gov/OCO/OCOS021.htm* (downloaded September 2, 2009).

[24] *http://www.sba.gov/advo/research/us_06ss.pdf* (downloaded Sept. 2, 2009).

would be recurring costs of one-third of first year costs (which they estimated would be more than $305 million for all employers).

By contrast, other commenters asserted that the Commission's preliminary analysis overestimated administrative costs because it failed to account for administrative benefits. They argued that costs associated with needed updates to employer policies and procedures will also have the benefit of simplifying and streamlining those policies and procedures and the coverage determination part of the interactive process.

(3) Revised Analysis of Administrative Costs

The Commission concludes that it inappropriately assessed the additional training costs that would be incurred by employers with 150 or more employees. Employers of this size are likely to receive training on both the ADAAA and the final regulations as part of fee-based or free periodic update training on EEO topics that they otherwise regularly attend. Our preliminary analysis did not account for this fact, but rather assumed that most or all such employers would attend a training on the regulations, at a cost of $350.00, that they would not otherwise have attended.

Even if some larger employers decide to attend an EEO training in a particular year because of the issuance of the final regulations (when they otherwise would not have attended such a training), information about the final regulations is likely to account for only a fraction of the training (typically the EEOC's one- and two-day training sessions involve multiple topics). Therefore, only a fraction of the $350.00 we assumed an employer would spend on training can be said to be a cost resulting from the ADAAA or the final regulations.

The Commission also concludes that it should have accounted for administrative costs borne by employers with 15 to 149 employees. These costs are limited, however, by the fact that such businesses generally tend to lack formal reasonable accommodation policies and usually avail themselves of free resources (e.g., guidance and technical assistance documents on the EEOC's Web site) in response to particular issues that arise, rather than receiving formal training on a regular basis. Additionally, smaller employers are called upon to process far fewer reasonable accommodation requests and may more easily be able to establish undue hardship, even where an accommodation is requested by someone whose coverage has been clarified under the ADAAA.

We also note that emphasizing the anticipated "difference" in compliance costs between smaller and larger entities may overlook some specific benefits incurred by smaller entities. For example, the EEOC makes available more free outreach and training materials to employers than it does paid trainings. Moreover, as noted above, smaller entities are less likely to have detailed reasonable accommodation procedures containing information relating to the definition of disability that must be revised or deleted. The EEOC expects to issue new or revised materials for small businesses as part of revisions made to all of our ADA publications, which include dozens of enforcement guidances and technical assistance documents, some of which are specifically geared toward small business (e.g., "The ADA: A Primer for Small Business," *http://www.eeoc.gov/ada/adahandbook.html*).

Notwithstanding the one-time costs to some employers associated with making and implementing those revisions to their internal procedures, the Commission notes that there will be significant time savings that will be achieved on an ongoing basis once employers begin utilizing their newly simplified procedures. Additionally, after initial revision, subsequent updates will not be needed more frequently than they were prior to the ADAAA and final regulations, and there is no reason to anticipate recurring costs of any significance.

(4) Analysis of Legal Costs

It is difficult to predict either the increase or decrease in legal costs as a result of the Amendments Act and the final rule.

We anticipate that the legal fees and litigation costs regarding whether an individual is a person with a disability within the meaning of the ADA will significantly decrease in light of the ADAAA and its mandate that coverage be construed broadly. However, in those cases where courts would previously have declined to reach the merits of ADA claims based on a determination that a plaintiff did not have a disability, legal fees and litigation costs regarding the merits of the case—e.g., whether an individual was subject to discrimination on the basis of his or her disability, whether an individual with a disability is "otherwise qualified," whether an accommodation constitutes an "undue hardship," etc.—might increase as a result of more cases proceeding to the merits.

In addition, we anticipate that in light of the ADAAA, including the expanded "regarded as" definition of disability contained in the ADAAA, there will be an increase in the number of EEOC charges and lawsuits filed. In particular, we anticipate that more individuals with disabilities might file charges with the Commission. Moreover, we anticipate that plaintiffs' lawyers, who previously might not have filed an ADA lawsuit because they believed that an employee would not be covered under the Supreme Court's cramped reading of the term "disability," will now be more inclined to file lawsuits in cases where the lawyers believe that discrimination on the basis of disability—broadly defined—has occurred. As a result, we believe that there may be additional legal fees and litigation costs associated with bringing and defending these claims, but we have no basis on which to estimate what those costs might be.

There will be costs to the Commission primarily for increased charge workload. The Congressional Budget Office (CBO) estimated these costs based on H.R. 3195, a prior version of the legislation that became the ADAAA. The CBO found that the bill would increase this workload by no more than 10 percent in most years, or roughly 2,000 charges annually. Based on the EEOC staffing levels needed to handle the agency's current caseload, CBO expected that implementing H.R. 3195 would require 50 to 60 additional employees. CBO estimated that the costs to hire those new employees would reach $5 million by fiscal year 2010, subject to appropriation of the necessary amounts. (H.R. 3195, ADA Amendments Act of 2008, Congressional Budget Office, June 23, 2008, at 2.) Nevertheless, we note that although charge data indicate an increase in ADA charges over the period of time since the Amendments Act became effective, this increase may be attributable to factors unrelated to the change in the ADA definition of disability. For example, government research has found a higher incidence of termination of individuals with disabilities than those without disabilities during economic downturns. Kaye, H. Steven, "The Impact of the 2007–09 Recession on Workers with Disabilities," Monthly Labor Review Online (U.S. Dept. of Labor Bureau of Labor Statistics, Oct. 2010, Vol. 133, No. 10), *http://www.bls.gov/opub/mlr/2010/10/art2exc.htm* (last visited Mar. 1, 2010). We also note that ADA charges were steadily rising over a period of years even prior to enactment of the ADA Amendments Act. To the extent that factors other than the Amendments

Act explain or partially explain the increase in ADA charges since the Act took effect, the increase in charges would not be attributable to the Amendments Act or the final regulations.

In sum, while there might be a potential increase in legal fees attributable to the ADAAA or the final regulations, we are unable to attach any dollar figure to what that increase might be.

II. Estimated Benefits Attributable to the ADAAA and the Final Regulations

A. Benefits of Accommodations Attributable to the ADAAA and the Final Regulations

(1) Summary of Preliminary Analysis

While the preliminary impact analysis made reference to various benefits of the rule in the discussion of assumptions and its review of various projected costs, it did not separately itemize, review, or quantify these benefits.

(2) Comments on Preliminary Analysis

Commenters said that the EEOC did not adequately account for the benefits of reasonable accommodation. In particular, Professor Peter Blanck submitted seven of his studies and argued that "research shows accommodations yield measurable benefits with economic value that should be deducted from the cited costs to yield a net value."[25]

Professor Blanck states that "research shows employees who receive accommodations are more productive and valued members of their organizations." He asserts that the contributions of accommodated employees with disabilities show measurable economic value for organizations, and that the analysis of economic impact must therefore take into account both direct benefits and indirect benefits as a potential offset to any potential accommodation costs reviewed in the preliminary analysis or cited by the employer groups. Examples of direct benefits reported by employers in these research studies include the ability to retain, hire, and promote qualified personnel; increased employee attendance (productivity); avoidance of costs associated with underperformance, injury, and turnover; benefits from savings in workers' compensation and related insurance; and increased diversity. The authors also note a number of indirect benefits: Improved interactions with co-workers; increased company morale, productivity, and profitability; improved interactions with customers; increased workplace safety; better overall company attendance; and increased customer base.

Professor Blanck's statement is that based on the studies he has reviewed and submitted, the quantified net benefits of providing accommodations are a significant offset to any cost incurred and, indeed, result in a net value. For example, he summarized the specific accommodation benefit data found in the 2006 "Workplace Accommodations: Evidence-Based Outcomes" study, as follows:

—Monetary estimates of direct benefits were provided by 95 respondents and are a median of $1,000 total when zero benefit estimates are included. When zero benefit estimates are excluded, the median benefit is $5,500 (based on 62 respondents). Some respondents were unable to provide exact estimates, but they could provide estimates within ranges (of 75 respondents, 66.4% reported direct benefits greater than $1,000, 16.1% reported direct benefits between $500 and $1,000, 10.2% reported direct benefits between $100 and $500, and the remaining 7.3% reported direct benefits less than $100).

—Respondents were asked to estimate the value of indirect benefits (e.g., improved interactions at work, improved morale, and increased company productivity, safety, attendance, and profitability, etc.). Out of 77 respondents who were able to do so, 57.1% reported no indirect benefits, but 33 respondents did report indirect benefits greater than zero, at a median value of $1,000. An additional 58 respondents were able to estimate the value of indirect benefits categorically in ranges. When combined with the 33 who reported exact estimates, 48.4% reported indirect benefits greater than $1,000, 18.7% reported a value between $500 and $1,000, 19.8% reported a value between $100 and $500, and the remaining 13.2% reported a value less than $100.

—This study reports conservative estimates of the Calendar Year Net Benefit by obtaining the difference between the First Calendar Year Direct Cost and the Direct Benefit estimates. This comparison was made for 87 respondents; the mean benefit was $11,335 and the median was $1,000. For 59.8% the direct benefits associated with providing the accommodation more than offset the direct costs, and for 21.8% benefits and costs equaled each other (the remaining 18.4% reported costs that were greater than benefits).

(3) Conclusions Regarding Benefits of Accommodations Attributable to the ADAAA and the Final Regulations

We agree with the commenters who noted the existence of surveys documenting both tangible and intangible benefits through the provision of reasonable accommodations. For example, in its most recent survey of employers, the Job Accommodation Network found that the following percentage of respondents reported the following benefits from accommodations they had provided to employees with disabilities:

	Percent
Direct benefits:	
Company retained a valued employee	89
Increased the employee's productivity	71

[25] Blanck, P.D. (1994), *Communicating the Americans with Disabilities Act: Transcending Compliance—A case report on Sears Roebuck & Co.*, The Annenberg Washington Program. (also in J. Burns (Ed.), *Driving Down Health Care Costs*, at 209–241, New York, Panel Publishers; Blanck, P.D. (1996); *Communicating the Americans with Disabilities Act: Transcending Compliance—1996: Follow-up report on Sears, Roebuck & Co.* Washington, D.C.: The Annenberg Washington Program. (also published as: Blanck, P.D. (1996), *Transcending Title I of the Americans with Disabilities Act: A Case Report on Sears, Roebuck & Co.*, Mental & Physical Disability Law Reporter, 20(2), 278–86) (mean cost was $45.20 on 71 accommodations made at Sears between 1993–1995)); Blanck, P.D. & Steele, P. (1998), *The Emerging Role of the Staffing Industry in the Employment of Persons with Disabilities—A Case Report on Manpower Inc.* Iowa City, IA: Iowa CEO and Law, Health Policy and Disability Center (data from 10 no-cost case studies of accommodation by Manpower); Hendricks, D.J., Batiste, L., Hirsh, A., Bowler, D. Schartz, H., & Blanck, P. (Fall 2005), *Cost and Effectiveness of Accommodations in the Workplace: Preliminary Results of a Nationwide Study*. Disability Studies Quarterly, Part I, 25(4); Schartz, H., Schartz, K., Hendricks, D.J., & Blanck, P. (2006), *Workplace Accommodations: Empirical Study of Current Employees*, Mississippi Law Journal, 75, 917–43 (for those employers providing monetary estimates of benefits of accommodation, 81.3% reported benefits that offset the costs; 61.3% reported benefits outweighing the cost, 20% reported benefits that equaled the costs, and the remaining 18.7% reported costs exceeding benefits); Schartz, H., Hendricks, D.J., & Blanck, P. (2006), *Workplace Accommodations: Evidence-Based Outcomes*, Work, 27, 345–354 (addressing "disability-related direct cost," the amount of direct cost that is more than the employer would have paid for an employee in same position without a disability); Schur, L., Kruse, D. Blasi, J. & Blanck, P. (2009), *Is Disability Disabling In All Workplaces?: Disability, Workplace Disparities, and Corporate Culture*, Industrial Relations, 48(3), 381–410, July (finding disability is linked to lower average pay, job security, training, and participation in decisions, and to more negative attitudes toward the job and company, but finding no disability "attitude gaps" in workplaces rated highly by all employees for fairness and responsiveness).

	Percent
Eliminated costs associated with training a new employee	60
Increased the employee's attendance	52
Increased diversity of the company	43
Saved workers' compensation or other insurance costs	39
Company hired a qualified person with a disability	14
Company promoted an employee	11
Indirect benefits:	
Improved interactions with co-workers	68
Increased overall company morale	62
Increased overall company productivity	59
Improved interactions with customers	47
Increased workplace safety	44
Increased overall company attendance	38
Increased profitability	32
Increased customer base	18

Job Accommodation Network (Original 2005, Updated 2007, Updated 2009, Updated 2010). *Workplace Accommodations: Low Cost, High Impact, http://AskJAN.org/media/LowCostHighImpact.doc* (last visited Mar. 1, 2011).

The JAN study did not attempt to attach numerical figures to the direct benefits noted in the survey. However, taking one of those benefits—increased retention of workers—the Commission notes that employers should experience cost savings by retaining rather than replacing a worker. According to data from the Society for Human Resource Management (SHRM), the average cost-per-hire for all industries in 2009 was $1,978. Society for Human Resource Management, *SHRM 2010 Customized Human Capital Benchmarking Report* (All Industries Survey) at 13 (2010). Such costs increase for knowledge based industries, such as high-tech where the cost-per-hire was $3,045. Id.; Society for Human Resource Management, *SHRM 2010 Customized Human Capital Benchmarking Report* (High Tech Industries Survey) at 13 (2010). In addition, the time-to-fill for positions in all industries was an average of 27 days, but time to fill for high-tech positions increased to an average of 35 days. Id.; All Industries Survey at 13.

In addition, although limited, the existing data shows that providing flexible work arrangements such as flexible scheduling and telecommuting reduces absenteeism, lowers turnover, improves the health of workers, and increases productivity. *See* Council of Economic Advisors, Work-Life Balance and the Economics of Workplace Flexibility (March 2010) (available at *http://www.whitehouse.gov/blog/2010/03/31/economics-workplace-flexibility*).

The Commission does not feel there is sufficient data to state unequivocally, as Professor Blank does, that there is always a net value to providing accommodations. However, it is apparent from surveys conducted of both employers and employees that there are significant direct and indirect benefits to providing accommodations that may potentially be commensurate with the costs.

The Commission also concludes that there are potential additional benefits regarding the provision of accommodations made by the ADAAA. Specifically:

—The changes made by the Amendments Act and the clarity regarding coverage provided by the Act and the final regulations should make the reasonable accommodation process simpler for employers. For example, to the extent employers may have spent time before reviewing medical records to determine whether a particular individual's diabetes or epilepsy satisfied the legal definition of a substantially limiting impairment, there may be a cost savings in terms of reduced time spent by front-line supervisors, managers, human resources staff, and even employees who request reasonable accommodation.

—The Amendments Act reverses at least three courts of appeals decisions that previously permitted individuals who were merely "regarded as" individuals with disabilities to be potentially entitled to reasonable accommodation. The Amendments Act and the regulations clearly provide that individuals covered only under the "regarded as" prong of the definition of disability will not be entitled to reasonable accommodation. This change benefits employers by both clarifying and limiting who is entitled to reasonable accommodations under the ADA.

B. Other Benefits Attributable to the ADAAA and the Final Regulations

Apart from specific benefits regarding the provision of accommodations, the Commission notes that a number of monetary and non-monetary benefits may result from the ADAAA and the final regulations, including but not limited to specifically the following:

(1) Efficiencies in Litigation

—The Amendments Act and final regulations will make it clearer to employers and employees what their rights and responsibilities are under the statute, thus decreasing the need for litigation regarding the definition of disability.

—To the extent that litigation remains unavoidable in certain circumstances, the Amendments Act and the final regulations reduce the need for costly experts to address "disability" and streamline the issues requiring judicial attention.

(2) Fuller Employment

—Fuller employment of individuals with disabilities will provide savings to the federal government and to employers by potentially moving individuals with disabilities into the workforce who otherwise are or would be collecting Social Security Disability Insurance (SSDI) from the government, or collecting short- or long-term disability payments through employer-sponsored insurance plans.

—Fuller employment of individuals with disabilities will stimulate the economy to the extent those individuals will have greater disposable income and enhance the number of taxpayers and resulting government revenue.

The Commission has not undertaken to quantify these benefits in monetary terms. However, we assume for purposes of our analysis that the sum total of these benefits will be significant.

(3) Non-discrimination and Other Intrinsic Benefits

The Commission also concludes that a wide range of qualitative, dignitary, and related intrinsic benefits must be considered. These benefits include the values identified in EO 13563, such as equity, human dignity, and fairness. Specifically, the qualitative benefits attributable to the ADA Amendments Act and the final rule include but are not limited to the following:

—Provision of reasonable accommodation to workers who would otherwise have been denied it benefits workers and potential workers with disabilities by diminishing discrimination against qualified individuals and by enabling them to reach their full potential. This protection against discrimination promotes human dignity and equity by enabling qualified workers to participate in the workforce.

—Provision of reasonable accommodation to workers who would otherwise have been denied it

reduces stigma, exclusion, and humiliation, and promotes self-respect.

—Interpreting and applying the ADA as amended will further integrate and promote contact with individuals with disabilities, yielding third-party benefits that include both (1) diminishing stereotypes often held by individuals without disabilities and (2) promoting design, availability, and awareness of accommodations that can have general usage benefits and also attitudinal benefits. *See* Elizabeth Emens, *Accommodating Integration*, 156 U. Pa. L. Rev. 839, 850–59 (2008) (explaining a wide range of potential third-party benefits that may arise from workplace accommodations).

—Provision of reasonable accommodation to workers who would otherwise have been denied it benefits both employers and coworkers in ways that may not be subject to monetary quantification, including increasing diversity, understanding, and fairness in the workplace.

—Provision of reasonable accommodation to workers who would otherwise have been denied it benefits workers in general and society at large by creating less discriminatory work environments.

Conclusion

In the foregoing final regulatory impact analysis, the Commission concludes that the approximate costs of reasonable accommodations attributable to the ADA Amendments Act and these regulations will range greatly and in some instances would exceed $100 million annually, depending on assumptions made about the number of individuals in the labor force whose coverage has been clarified under the ADAAA and the number of such individuals who will receive reasonable accommodation. We estimate that the lower bound annual incremental cost of accommodations would be approximately $60 million, assuming that 16% of 12 million individuals whose coverage has been clarified request reasonable accommodations over five years at a mean cost of $150. We also estimate that the upper bound annual incremental cost of accommodations would be approximately $183 million, assuming that 16% of 38.4 million individuals whose coverage has been clarified request reasonable accommodations over five years at a mean cost of $150. We do not believe that administrative costs will add significantly to the annual costs resulting from the final regulations, and we believe it is not possible to accurately estimate any decrease or increase in legal costs.

The Commission further concludes that the Amendments Act and the final regulations will have extensive quantitative and qualitative benefits for employers, government entities, and individuals with and without disabilities. Regardless of the number of accommodations provided to additional applicants or employees as a result of the Amendments Act and these regulations, the Commission believes that the resulting benefits will be significant and could be in excess of $100 million annually. Therefore, the rule will have a significant economic impact within the meaning of EO 12866. Consistent with Executive Order 13563, the Commission concludes that the benefits (quantitative and qualitative) of the rule justify the costs.

Unfunded Mandates Reform Act

The Commission notes that by its terms the Unfunded Mandates Reform Act does not apply to legislative or regulatory provisions that establish or enforce any "statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability." 2 U.S.C. 658a. Accordingly, it does not apply to this rulemaking.

Regulatory Flexibility Act

Title I of the ADA applies to all employers with 15 or more employees, approximately 822,000 of which are small firms (entities with 15–500 employees) according to data provided by the Small Business Administration Office of Advocacy. *See* Firm Size Data at *http://sba.gov/advo/research/data.html#us*. The rule is expected to apply uniformly to all such small businesses.

The Commission certifies under 5 U.S.C. 605(b) that this final rule will not have a significant economic impact on a substantial number of small entities because it imposes no reporting burdens and because of the no-cost and low-cost nature of the types of accommodations that most likely will be requested and required by those whose coverage has been clarified under the amended ADA's definition of an impairment that substantially limits a major life activity.[26]

In the public comments on the preliminary assessment, one employer organization submitted alternative estimates of the number of individuals who will be affected by the regulations, arguing that a final regulatory flexibility analysis is warranted, including alternatives to reduce costs. The organization estimated that 576,000 individuals will newly request reasonable accommodations due to the Amendments Act. Another employer organization suggested that the preliminary regulatory impact analysis use of the CPS–ASEC might have underestimated the number of people that would be considered to have a disability under these implementing regulations. For the reasons explained in the final regulatory impact analysis, the Commission has significantly revised upward its preliminary estimates of the number of individuals whose coverage has been clarified under the ADAAA and who may request and require accommodations, accounting for alternative sources of data cited by commenters and identified through the inter-agency review process under EO 12866. However, the Commission has also set forth in the final regulatory impact analysis its rationale for concluding that this incremental increase in reasonable accommodations will primarily entail accommodations with no or little costs.

No comments suggested regulatory alternatives that would be more suitable for small businesses. As described above, portions of the Commission's ADA regulations were rendered invalid by the changes Congress made to the ADA in enacting the Amendments Act, and the Commission therefore had no alternative but to conform its regulations to the changes Congress made in the statute to the definition of disability. Therefore, the rationale for this regulatory action is legislative direction. However, even absent this direction, the adopted course of action is the most appropriate one, and it is the Commission's conclusion that the title I

[26] This conclusion is consistent with the Commission's finding in the final regulatory impact analysis that the costs imposed by the Amendments Act and the final regulations may, depending on the data used, impose a cost in excess of $100 million annually for purposes of EO 12866. Unlike 12866, the Regulatory Flexibility Act requires a determination of whether a rule will have a "significant economic impact on a substantial number of small entities," which is not defined by a specific dollar threshold for purposes of the Regulatory Flexibility Act. Rather, the Small Business Administration (SBA) advises that agencies tailor the level, scope, and complexity of their analysis to the regulated small entity community at issue in each rule. The SBA advises that agencies should consider both adverse impacts and beneficial impacts under the Regulatory Flexibility Act, and can minimize an adverse impact by including beneficial impacts in the analysis, consistent with the legislative history of the Act that provided examples of significant impact to include adverse costs impact that is greater than the value of the regulatory good. As set forth in our final regulatory impact analysis, the Commission believes the estimated benefits of the Amendments Act and these final regulations will be significant.

regulations are likely to have benefits far exceeding costs.

In issuing these final regulations, the Commission has considered and complied with the provisions of the new EO 13563, in particular emphasizing public participation and inter-agency coordination. The Commission's regulations explain and implement Congress's amendments to the statute, but do not impinge on employer freedom of choice regarding matters of compliance. To the extent the final regulations and appendix provide clear explication of the new rules of construction for the definition of disability and examples of their application, the regulations provide information to the public in a form that is clear and intelligible, and promote informed decisionmaking.

Projected Reporting, Recordkeeping, and Other Compliance Requirements of the Final Rule

The rule does not include reporting requirements and imposes no new recordkeeping requirements. Compliance costs are expected to stem primarily from the costs of providing reasonable accommodation for individuals with substantially limiting impairments who would request and require accommodations. For all the reasons stated in the foregoing regulatory impact analysis, it is difficult to quantify how many additional requests for reasonable accommodation might result from the ADA Amendments Act and the final regulations. We estimate that the lower bound annual incremental cost of accommodations would be approximately $60 million, assuming that 16% of 12 million individuals whose coverage has been clarified request reasonable accommodations over five years at a mean cost of $150. We also estimate that the upper bound annual incremental cost of accommodations would be approximately $183 million, assuming that 16% of 38.4 million individuals whose coverage has been clarified request reasonable accommodations over five years at a mean cost of $150.

As explained in the final regulatory impact analysis, these cost figures are over-estimations for a multitude of reasons. In particular, the figures are based on a mean accommodation cost, whereas almost half of all accommodations impose no costs and the types of accommodations most likely needed by individuals whose coverage has been clarified as a result of the Amendments Act would most likely be low and no-cost accommodations.

We do not believe that administrative costs will add significantly to the annual costs resulting from the final regulations. We recognize that covered employers may in some cases need to revise internal policies and procedures to reflect the broader definition of disability under the Amendments Act and train personnel to ensure appropriate compliance with the ADAAA and the revised regulations. In addition, there will be costs associated with reviewing and analyzing the final regulations or publications describing their effects and recommended compliance practices.

Although these types of administrative costs may be particularly difficult for small businesses that operate with a smaller margin, the Commission will continue to take steps to reduce that burden. The Commission is issuing along with the final regulations a user-friendly question-and-answer guide intended to educate and promote compliance. The Commission also expects to prepare a small business handbook and to revise all of its ADA publications, which include dozens of enforcement guidances and technical assistance documents, some of which are specifically geared toward small business. Moreover, the Commission also intends to continue the provision of technical assistance to small business in its outreach efforts. In fiscal year 2009 alone, compliance with ADA standards was the main topic at 570 no-cost EEOC outreach events, reaching more than 35,000 people, many of whom were from small businesses.

Finally, any estimates of costs do not take into account the offsetting benefits noted by the research studies submitted by commenters and reviewed above in the final regulatory impact analysis. The Commission believes the estimated benefits of the Amendments Act and these final regulations are significant.

For the foregoing reasons, the Commission concludes that the regulations will not have a significant economic impact on a substantial number of small entities.

Relevant Federal Rules That May Duplicate, Overlap or Conflict With the Proposed Rule

The Commission is unaware of any duplicative, overlapping, or conflicting federal rules.

Paperwork Reduction Act

These regulations contain no information collection requirements subject to review by the Office of Management and Budget under the Paperwork Reduction Act. *See* 44 U.S.C. 3501, *et seq.*

Congressional Review Act

To the extent this rule is subject to the Congressional Review Act, the Commission has complied with its requirements by submitting this final rule to Congress prior to publication in the Federal Register.

List of Subjects in 29 CFR Part 1630

Equal employment opportunity, Individuals with disabilities.

Dated: March 10, 2011.

For the commission.

Jacqueline A. Berrien,

Chair.

Accordingly, for the reasons set forth in the preamble, the EEOC amends 29 CFR part 1630 as follows:

PART 1630—REGULATIONS TO IMPLEMENT THE EQUAL EMPLOYMENT PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

■ 1. Revise the authority citation for 29 CFR part 1630 to read as follows:

Authority: 42 U.S.C. 12116 and 12205a of the Americans with Disabilities Act, as amended.

■ 2. Revise § 1630.1 to read as follows:

§ 1630.1 Purpose, applicability, and construction.

(a) *Purpose.* The purpose of this part is to implement title I of the Americans with Disabilities Act (ADA), as amended by the ADA Amendments Act of 2008 (ADAAA or Amendments Act), 42 U.S.C. 12101, *et seq.*, requiring equal employment opportunities for individuals with disabilities. The ADA as amended, and these regulations, are intended to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities, and to provide clear, strong, consistent, enforceable standards addressing discrimination.

(b) *Applicability.* This part applies to "covered entities" as defined at § 1630.2(b).

(c) *Construction*—(1) In general. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790–794a, as amended), or the regulations issued by Federal agencies pursuant to that title.

(2) *Relationship to other laws.* This part does not invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State or political subdivision of any State or

jurisdiction that provides greater or equal protection for the rights of individuals with disabilities than is afforded by this part.

(3) *State workers' compensation laws and disability benefit programs.* Nothing in this part alters the standards for determining eligibility for benefits under State workers' compensation laws or under State and Federal disability benefit programs.

(4) *Broad coverage.* The primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. Consistent with the Amendments Act's purpose of reinstating a broad scope of protection under the ADA, the definition of "disability" in this part shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability. The question of whether an individual meets the definition of disability under this part should not demand extensive analysis.

■ 3. Amend § 1630.2 as follows:

■ a. Revise paragraphs (g) through (m).

■ b. In paragraph (o)(1)(ii), remove the words "a qualified individual with a disability" and add, in their place, "an individual with a disability who is qualified".

■ c. In paragraph (o)(3), remove the words "the qualified individual with a disability" and add, in their place, "the individual with a disability".

■ d. Add paragraph (o)(4).

The revisions and additions read as follows:

§ 1630.2 Definitions.

* * * * *

(g) *Definition of "disability."*

(1) *In general. Disability* means, with respect to an individual—

(i) A physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment as described in paragraph (l) of this section. This means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both "transitory and minor."

(2) An individual may establish coverage under any one or more of these three prongs of the definition of disability, i.e., paragraphs (g)(1)(i) (the "actual disability" prong), (g)(1)(ii) (the "record of" prong), and/or (g)(1)(iii) (the "regarded as" prong) of this section.

(3) Where an individual is not challenging a covered entity's failure to make reasonable accommodations and does not require a reasonable accommodation, it is generally unnecessary to proceed under the "actual disability" or "record of" prongs, which require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. In these cases, the evaluation of coverage can be made solely under the "regarded as" prong of the definition of disability, which does not require a showing of an impairment that substantially limits a major life activity or a record of such an impairment. An individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation.

Note to paragraph (g): *See* § 1630.3 for exceptions to this definition.

(h) *Physical or mental impairment* means—

(1) 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; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed "mental retardation"), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(i) *Major life activities*—(1) *In general.* Major life activities include, but are not limited to:

(i) 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 working; and

(ii) The operation of a major bodily function, including functions of the immune system, special sense organs and skin; normal cell growth; and digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(2) In determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability. ADAAA Section 2(b)(4) (Findings and Purposes). Whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life."

(j) *Substantially limits*—

(1) *Rules of construction.* The following rules of construction apply when determining whether an impairment substantially limits an individual in a major life activity:

(i) The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. "Substantially limits" is not meant to be a demanding standard.

(ii) An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(iii) The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis.

(iv) The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term "substantially limits" shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for "substantially limits" applied prior to the ADAAA.

(v) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(vi) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

(vii) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(viii) An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment.

(ix) The six-month "transitory" part of the "transitory and minor" exception to "regarded as" coverage in § 1630.15(f) does not apply to the definition of "disability" under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

(2) *Non-applicability to the "regarded as" prong.* Whether an individual's impairment "substantially limits" a major life activity is not relevant to coverage under paragraph (g)(1)(iii) (the "regarded as" prong) of this section.

(3) *Predictable assessments*—(i) The principles set forth in paragraphs (j)(1)(i) through (ix) of this section are intended to provide for more generous coverage and application of the ADA's prohibition on discrimination through a framework that is predictable, consistent, and workable for all individuals and entities with rights and responsibilities under the ADA as amended.

(ii) Applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraphs (g)(1)(i) (the "actual disability" prong) or (g)(1)(ii) (the "record of" prong) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: Deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.

(4) *Condition, manner, or duration*—

(i) At all times taking into account the principles in paragraphs (j)(1)(i) through (ix) of this section, in determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity.

(ii) Consideration of facts such as condition, manner, or duration may include, among other things, consideration of the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function. In addition, the non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual's impairment substantially limits a major life activity.

(iii) In determining whether an individual has a disability under the "actual disability" or "record of" prongs of the definition of disability, the focus is on how a major life activity is substantially limited, and not on what outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(iv) Given the rules of construction set forth in paragraphs (j)(1)(i) through (ix) of this section, it may often be unnecessary to conduct an analysis involving most or all of these types of facts. This is particularly true with respect to impairments such as those described in paragraph (j)(3)(iii) of this section, which by their inherent nature should be easily found to impose a substantial limitation on a major life activity, and for which the individualized assessment should be particularly simple and straightforward.

(5) *Examples of mitigating measures*—Mitigating measures include, but are not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (defined as devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aid(s) and cochlear implant(s) or other implantable hearing devices, mobility devices, and oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or "auxiliary aids or services" (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(6) *Ordinary eyeglasses or contact lenses—defined.* Ordinary eyeglasses or contact lenses are lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(k) *Has a record of such an impairment*—

(1) *In general.* An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(2) *Broad construction.* Whether an individual has a record of an impairment that substantially limited a major life activity shall be construed

broadly to the maximum extent permitted by the ADA and should not demand extensive analysis. An individual will be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment. In determining whether an impairment substantially limited a major life activity, the principles articulated in paragraph (j) of this section apply.

(3) *Reasonable accommodation.* An individual with a record of a substantially limiting impairment may be entitled, absent undue hardship, to a reasonable accommodation if needed and related to the past disability. For example, an employee with an impairment that previously limited, but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or "monitoring" appointments with a health care provider.

(l) *"Is regarded as having such an impairment."* The following principles apply under the "regarded as" prong of the definition of disability (paragraph (g)(1)(iii) of this section) above:

(1) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

(2) Except as provided in § 1630.15(f), an individual is "regarded as having such an impairment" any time a covered entity takes a prohibited action against the individual because of an actual or perceived impairment, even if the entity asserts, or may or does ultimately establish, a defense to such action.

(3) Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established under title I of the ADA only when an individual proves that a covered entity discriminated on the basis of disability within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

(m) The term *"qualified,"* with respect to an individual with a disability, means that the individual satisfies the requisite skill, experience, education and other job-related requirements of the employment position such individual holds or desires and, with or without reasonable accommodation, can perform the essential functions of such position. *See* § 1630.3 for exceptions to this definition.

(o) * * *

(4) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (paragraph (g)(1)(i) of this section), or "record of" prong (paragraph (g)(1)(ii) of this section), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (paragraph (g)(1)(iii) of this section).

* * * * *

■ 4. Revise § 1630.4 to read as follows:

§ 1630.4 Discrimination prohibited.

(a) *In general*—(1) It is unlawful for a covered entity to discriminate on the basis of disability against a qualified individual in regard to:

(i) Recruitment, advertising, and job application procedures;

(ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

(iii) Rates of pay or any other form of compensation and changes in compensation;

(iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;

(v) Leaves of absence, sick leave, or any other leave;

(vi) Fringe benefits available by virtue of employment, whether or not administered by the covered entity;

(vii) Selection and financial support for training, including: apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;

(viii) Activities sponsored by a covered entity, including social and recreational programs; and

(ix) Any other term, condition, or privilege of employment.

(2) The term discrimination includes, but is not limited to, the acts described in §§ 1630.4 through 1630.13 of this part.

(b) *Claims of no disability.* Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of his lack of disability, including a claim that an individual with a disability was granted an accommodation that was denied to an individual without a disability.

■ 5. Amend § 1630.9 as follows:

■ a. Revise paragraph (c).

■ b. In paragraph (d), in the first sentence, remove the words "A qualified individual with a disability" and add, in their place, the words "An individual with a disability".

■ c. In paragraph (d), in the last sentence, remove the words "a qualified individual with a disability" and add, in their place, the word "qualified".

■ d. Add paragraph (e).

The revisions and additions read as follows:

§ 1630.9 Not making reasonable accommodation.

* * * * *

(c) A covered entity shall not be excused from the requirements of this part because of any failure to receive technical assistance authorized by section 507 of the ADA, including any failure in the development or dissemination of any technical assistance manual authorized by that Act.

* * * * *

(e) A covered entity is required, absent undue hardship, to provide a reasonable accommodation to an otherwise qualified individual who meets the definition of disability under the "actual disability" prong (§ 1630.2(g)(1)(i)), or "record of" prong (§ 1630.2(g)(1)(ii)), but is not required to provide a reasonable accommodation to an individual who meets the definition of disability solely under the "regarded as" prong (§ 1630.2(g)(1)(iii)).

■ 6. Revise § 1630.10 to read as follows:

§ 1630.10 Qualification standards, tests, and other selection criteria.

(a) *In general.* It is unlawful for a covered entity to use qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity.

(b) *Qualification standards and tests related to uncorrected vision.* Notwithstanding § 1630.2(j)(1)(vi) of this part, a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other

selection criterion, as used by the covered entity, is shown to be job related for the position in question and is consistent with business necessity. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability, but must be adversely affected by the application of the standard, test, or other criterion.

■ 7. Amend § 1630.15 by redesignating paragraph (f) as paragraph (g), and adding new paragraph (f) to read as follows:

§ 1630.15 Defenses.

* * * * *

(f) *Claims based on transitory and minor impairments under the "regarded as" prong.* It may be a defense to a charge of discrimination by an individual claiming coverage under the "regarded as" prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) "transitory and minor." To establish this defense, a covered entity must demonstrate that the impairment is both "transitory" and "minor." Whether the impairment at issue is or would be "transitory and minor" is to be determined objectively. A covered entity may not defeat "regarded as" coverage of an individual simply by demonstrating that it subjectively believed the impairment was transitory and minor; rather, the covered entity must demonstrate that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. For purposes of this section, "transitory" is defined as lasting or expected to last six months or less.

* * * * *

■ 8. Amend § 1630.16(a) by removing from the last sentence the word "because" and adding, in its place, the words "on the basis".

* * * * *

■ 9. Amend the Appendix to Part 1630 as follows:

■ A. Remove the "Background."

■ B. Revise the "Introduction."

■ C. Add "Note on Certain Terminology Used" after the "Introduction."

■ D. Revise § 1630.1.

■ E. Revise Sections 1630.2(a) through (f).

■ F. Revise § 1630.2(g).

■ G. Revise § 1630.2(h).

■ H. Revise § 1630.2(i).

■ I. Revise § 1630.2(j).

■ J. Add § 1630.2(j)(1), 1630.2(j)(3), 1630.2(j)(4), and 1630.2(j)(5) and (6).

■ K. Revise § 1630.2(k).

■ L. Revise § 1630.2(l).

■ M. Amend § 1630.2(m) by revising the heading and first sentence.

■ N. Amend § 1630.2(o) as follows:

■ i. Remove the first paragraph and add, in its place, three new paragraphs.

■ ii. Remove the words "a qualified individual with a disability" wherever they appear and add, in their place, "an individual with a disability".

■ iii. Remove the words "the qualified individual with a disability" wherever they appear and add, in their place, "the individual with a disability".

■ O. Revise § 1630.4.

■ P. Amend § 1630.5 by revising the first paragraph.

■ Q. Amend § 1630.9 as follows:

■ i. Remove the words "a qualified individual with a disability" wherever they appear and add, in their place, "the individual with a disability".

■ ii. Remove the words "the qualified individual with a disability" wherever they appear and add, in their place, "the individual with a disabilty".

■ iii. Add new § 1630.9(a) after existing § 1630.9(d).

■ R. Revise § 1630.10.

■ S. Amend § 1630.15 by adding new § 1630.15(f) after existing § 1630.15(e).

■ T. Amend § 1630.16(a) by removing, in the last sentence, the words "qualified individuals with disabilities" and adding, in their place, "individuals with disabilities who are qualified and".

■ U. Amend § 1630.16(f) by removing, in the last paragraph, the words "a qualified individual with a disability" and adding, in their place, "an individual with a disability who is qualified".

The revisions and additions read as follows:

Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act

Introduction

The Americans with Disabilities Act (ADA) is a landmark piece of civil rights legislation signed into law on July 26, 1990, and amended effective January 1, 2009. See 42 U.S.C. 12101 *et seq.*, as amended. In passing the ADA, Congress recognized that "discrimination against individuals with disabilities continues to be a serious and pervasive social problem" and that the "continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity." 42 U.S.C. 12101(a)(2), (8). Discrimination on the basis of disability persists in critical areas such as housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, access to public services, and employment. 42 U.S.C. 12101(a)(3). Accordingly, the ADA prohibits discrimination in a wide range of areas, including employment, public services, and public accommodations.

Title I of the ADA prohibits disability-based discrimination in employment. The Equal Employment Opportunity Commission (the Commission or the EEOC) is responsible for enforcement of title I (and parts of title V) of the ADA. Pursuant to the ADA as amended, the EEOC is expressly granted the authority and is expected to amend these regulations. 42 U.S.C. 12205a. Under title I of the ADA, covered entities may not discriminate against qualified individuals on the basis of disability in regard to job application procedures, the hiring, advancement or discharge of employees, employee compensation, job training, or other terms, conditions, and privileges of employment. 42 U.S.C. 12112(a). For these purposes, "discriminate" includes (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee; (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicants or employees to discrimination; (3) utilizing standards, criteria, or other methods of administration that have the effect of discrimination on the basis of disability; (4) not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability, unless the covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the covered entity; (5) denying employment opportunities to a job applicant or employee who is otherwise qualified, if such denial is based on the need to make reasonable accommodation; (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criterion is shown to be job related for the position in question and is consistent with business necessity; and (7) subjecting applicants or employees to prohibited medical inquiries or examinations. See 42 U.S.C. 12112(b), (d).

As with other civil rights laws, individuals seeking protection under these anti-discrimination provisions of the ADA generally must allege and prove that they are members of the "protected class."[1] Under the

[1] Claims of improper disability-related inquiries or medical examinations, improper disclosure of confidential medical information, or retaliation may be brought by any applicant or employee, not just individuals with disabilities. See, e.g., *Gossette* v. *Minnesota Power & Light*, 188 F.3d 964, 969–70 (8th Cir. 1999); *Fredenburg* v. *Contra Costa County Dep't of Health Servs.*, 172 F.3d 1176, 1182 (9th Cir. 1999); *Griffin* v. *Steeltek, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998). Likewise, a nondisabled applicant or employee may challenge an employment action that is based on the disability of an individual with

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ADA, this typically means they have to show that they meet the statutory definition of "disability." 2008 House Judiciary Committee Report at 5. However, "Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage." Id.

In the original ADA, Congress defined "disability" as (1) a physical or mental impairment that substantially limits one or more major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. 42 U.S.C. 12202(2). Congress patterned these three parts of the definition of disability—the "actual," "record of," and "regarded as" prongs—after the definition of "handicap" found in the Rehabilitation Act of 1973. 2008 House Judiciary Committee Report at 6. By doing so, Congress intended that the relevant case law developed under the Rehabilitation Act would be generally applicable to the term "disability" as used in the ADA. H.R. Rep. No. 485 part 3, 101st Cong., 2d Sess. 27 (1990) (1990 House Judiciary Report or House Judiciary Report); *see also* S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989) (1989 Senate Report or Senate Report); H.R. Rep. No. 485 part 2, 101st Cong., 2d Sess. 50 (1990) (1990 House Labor Report or House Labor Report). Congress expected that the definition of disability and related terms, such as "substantially limits" and "major life activity," would be interpreted under the ADA "consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act"—i.e., expansively and in favor of broad coverage. ADA Amendments Act of 2008 (ADAAA or Amendments Act) at Section 2(a)(1)–(8) and (b)(1)–(6) (Findings and Purposes); *see also* Senate Statement of the Managers to Accompany S. 3406 (2008 Senate Statement of Managers) at 3 ("When Congress passed the ADA in 1990, it adopted the functional definition of disability from section 504 of the Rehabilitation Act of 1973, in part, because after 17 years of development through case law the requirements of the definition were well understood. Within this framework, with its generous and inclusive definition of disability, courts treated the determination of disability as a threshold issue but focused primarily on whether unlawful discrimination had occurred."); 2008 House Judiciary Committee Report at 6 & n.6 (noting that courts had interpreted this Rehabilitation Act definition "broadly to include persons with a wide range of physical and mental impairments").

That expectation was not fulfilled. ADAAA Section 2(a)(3). The holdings of several Supreme Court cases sharply narrowed the broad scope of protection Congress originally intended under the ADA, thus eliminating protection for many individuals whom Congress intended to protect. Id. For example, in *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), the Court ruled that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures. In *Sutton*, the Court also adopted a restrictive reading of the meaning of being "regarded as" disabled under the ADA's definition of disability. Subsequently, in *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 (2002), the Court held that the terms "substantially" and "major" in the definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled" under the ADA, and that to be substantially limited in performing a major life activity under the ADA, "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives."

As a result of these Supreme Court decisions, lower courts ruled in numerous cases that individuals with a range of substantially limiting impairments were not individuals with disabilities, and thus not protected by the ADA. *See* 2008 Senate Statement of Managers at 3 ("After the Court's decisions in *Sutton* that impairments must be considered in their mitigated state and in *Toyota* that there must be a demanding standard for qualifying as disabled, lower courts more often found that an individual's impairment did not constitute a disability. As a result, in too many cases, courts would never reach the question whether discrimination had occurred."). Congress concluded that these rulings imposed a greater degree of limitation and expressed a higher standard than it had originally intended, and coupled with the EEOC's 1991 ADA regulations which had defined the term "substantially limits" as "significantly restricted," unduly precluded many individuals from being covered under the ADA. Id. ("[t]hus, some 18 years later we are faced with a situation in which physical or mental impairments that would previously have been found to constitute disabilities are not considered disabilities under the Supreme Court's narrower standard" and "[t]he resulting court decisions contribute to a legal environment in which individuals must demonstrate an inappropriately high degree of functional limitation in order to be protected from discrimination under the ADA").

Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008. The ADAAA was signed into law on September 25, 2008, and became effective on January 1, 2009. This legislation is the product of extensive bipartisan efforts, and the culmination of collaboration and coordination between legislators and stakeholders, including representatives of the disability, business, and education communities. *See* Statement of Representatives Hoyer and Sensenbrenner, 154 Cong. Rec. H8294–96 (daily ed. Sept. 17, 2008) (Hoyer-Sensenbrenner Congressional Record Statement); Senate Statement of Managers at 1. The express purposes of the ADAAA are, among other things:

(1) To carry out the ADA's objectives of providing "a clear and comprehensive national mandate for the elimination of discrimination" and "clear, strong, consistent, enforceable standards addressing discrimination" by reinstating a broad scope of protection under the ADA;

(2) To reject the requirement enunciated in *Sutton* and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) To reject the Supreme Court's reasoning in *Sutton* with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) To reject the standards enunciated by the Supreme Court in *Toyota* that the terms "substantially" and "major" in the definition of disability under the ADA "need to be interpreted strictly to create a demanding standard for qualifying as disabled," and that to be substantially limited in performing a major life activity under the ADA "an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives";

(5) To convey congressional intent that the standard created by the Supreme Court in *Toyota* for "substantially limits," and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA;

(6) To convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(7) To express Congress' expectation that the EEOC will revise that portion of its current regulations that defines the term "substantially limits" as "significantly restricted" to be consistent with the ADA as amended.

ADAAA Section 2(b). The findings and purposes of the ADAAA "give[] clear guidance to the courts and * * * [are] intend[ed] to be applied appropriately and consistently." 2008 Senate Statement of Managers at 5.

The EEOC has amended its regulations to reflect the ADAAA's findings and purposes. The Commission believes that it is essential also to amend its appendix to the original regulations at the same time, and to reissue this interpretive guidance as amended concurrently with the issuance of the amended regulations. This will help to ensure that individuals with disabilities understand their rights, and to facilitate and encourage compliance by covered entities under this part.

Accordingly, this amended appendix addresses the major provisions of this part and explains the major concepts related to disability-based employment discrimination. This appendix represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by this

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whom the applicant or employee is known to have a relationship or association. *See* 42 U.S.C. 12112(b)(4).

ADA, this typically means they have to show that they meet the statutory definition of "disability." 2008 House Judiciary Committee Report at 5. However, "Congress did not intend for the threshold question of disability to be used as a means of excluding individuals from coverage." Id.

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Consequently, Congress amended the ADA with the Americans with Disabilities Act Amendments Act of 2008. The ADAAA was signed into law on September 25, 2008, and became effective on January 1, 2009. This legislation is the product of extensive bipartisan efforts, and the culmination of collaboration and coordination between legislators and stakeholders, including representatives of the disability, business, and education communities. *See* Statement of Representatives Hoyer and Sensenbrenner, 154 Cong. Rec. H8294–96 (daily ed. Sept. 17, 2008) (Hoyer-Sensenbrenner Congressional Record Statement); Senate Statement of Managers at 1. The express purposes of the ADAAA are, among other things:

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ADAAA Section 2(b). The findings and purposes of the ADAAA "give[] clear guidance to the courts and * * * [are] intend[ed] to be applied appropriately and consistently." 2008 Senate Statement of Managers at 5.

The EEOC has amended its regulations to reflect the ADAAA's findings and purposes. The Commission believes that it is essential also to amend its appendix to the original regulations at the same time, and to reissue this interpretive guidance as amended concurrently with the issuance of the amended regulations. This will help to ensure that individuals with disabilities understand their rights, and to facilitate and encourage compliance by covered entities under this part.

Accordingly, this amended appendix addresses the major provisions of this part and explains the major concepts related to disability-based employment discrimination. This appendix represents the Commission's interpretation of the issues addressed within it, and the Commission will be guided by this

whom the applicant or employee is known to have a relationship or association. *See* 42 U.S.C. 12112(b)(4).

appendix when resolving charges of employment discrimination.

Note on Certain Terminology Used

The ADA, the EEOC's ADA regulations, and this appendix use the term "disabilities" rather than the term "handicaps" which was originally used in the Rehabilitation Act of 1973, 29 U.S.C. 701–796. Substantively, these terms are equivalent. As originally noted by the House Committee on the Judiciary, "[t]he use of the term 'disabilities' instead of the term 'handicaps' reflects the desire of the Committee to use the most current terminology. It reflects the preference of persons with disabilities to use that term rather than 'handicapped' as used in previous laws, such as the Rehabilitation Act of 1973 * * *." 1990 House Judiciary Report at 26–27; *see* also 1989 Senate Report at 21; 1990 House Labor Report at 50–51.

In addition, consistent with the Amendments Act, revisions have been made to the regulations and this Appendix to refer to "individual with a disability" and "qualified individual" as separate terms, and to change the prohibition on discrimination to "on the basis of disability" instead of prohibiting discrimination against a qualified individual "with a disability because of the disability of such individual." "This ensures that the emphasis in questions of disability discrimination is properly on the critical inquiry of whether a qualified person has been discriminated against on the basis of disability, and not unduly focused on the preliminary question of whether a particular person is a 'person with a disability.'" 2008 Senate Statement of Managers at 11.

The use of the term "Americans" in the title of the ADA, in the EEOC's regulations, or in this Appendix as amended is not intended to imply that the ADA only applies to United States citizens. Rather, the ADA protects all qualified individuals with disabilities, regardless of their citizenship status or nationality, from discrimination by a covered entity.

Finally, the terms "employer" and "employer or other covered entity" are used interchangeably throughout this Appendix to refer to all covered entities subject to the employment provisions of the ADA.

Section 1630.1 Purpose, Applicability and Construction

Section 1630.1(a) Purpose

The express purposes of the ADA as amended are to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; to ensure that the Federal Government plays a central role in enforcing the standards articulated in the ADA on behalf of individuals with disabilities; and to invoke the sweep of congressional authority to address the major areas of discrimination faced day-to-day by people with disabilities. 42 U.S.C. 12101(b). The EEOC's ADA regulations are intended to implement these Congressional purposes in simple and straightforward terms.

Section 1630.1(b) Applicability

The EEOC's ADA regulations as amended apply to all "covered entities" as defined at § 1630.2(b). The ADA defines "covered entities" to mean an employer, employment agency, labor organization, or joint labor-management committee. 42 U.S.C. 12111(2). All covered entities are subject to the ADA's rules prohibiting discrimination. 42 U.S.C. 12112.

Section 1630.1(c) Construction

The ADA must be construed as amended. The primary purpose of the Amendments Act was to make it easier for people with disabilities to obtain protection under the ADA. *See* Joint Hoyer-Sensenbrenner Statement on the Origins of the ADA Restoration Act of 2008, H.R. 3195 (reviewing provisions of H.R. 3195 as revised following negotiations between representatives of the disability and business communities) (Joint Hoyer-Sensenbrenner Statement) at 2. Accordingly, under the ADA as amended and the EEOC's regulations, the definition of "disability" "shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]." 42 U.S.C. 12102(4)(A); *see also* 2008 Senate Statement of Managers at 3 ("The ADA Amendments Act * * * reiterates that Congress intends that the scope of the [ADA] be broad and inclusive."). This construction is also intended to reinforce the general rule that civil rights statutes must be broadly construed to achieve their remedial purpose. Id. at 2; *see also* 2008 House Judiciary Committee Report at 19 (this rule of construction "directs courts to construe the definition of 'disability' broadly to advance the ADA's remedial purposes" and thus "brings treatment of the ADA's definition of disability in line with treatment of other civil rights laws, which should be construed broadly to effectuate their remedial purposes").

The ADAAA and the EEOC's regulations also make clear that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, not whether the individual meets the definition of disability. ADAAA Section 2(b)(5). This means, for example, examining whether an employer has discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a "reasonable accommodation" to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation "interactive process." *See also* 2008 Senate Statement of Managers at 4 ("[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory."); 2008 House Judiciary Committee Report at 6 ("An individual who does not qualify as disabled * * * does not meet th[e] threshold question of coverage in the protected class and is therefore not permitted to attempt to prove his or her claim of discriminatory treatment.").

Further, the question of whether an individual has a disability under this part "should not demand extensive analysis." ADAAA Section 2(b)(5). *See* also House Education and Labor Committee Report at 9 ("The Committee intends that the establishment of coverage under the ADA should not be overly complex nor difficult. * * *").

In addition, unless expressly stated otherwise, the standards applied in the ADA are intended to provide at least as much protection as the standards applied under the Rehabilitation Act of 1973.

The ADA does not preempt any Federal law, or any State or local law, that grants to individuals with disabilities protection greater than or equivalent to that provided by the ADA. This means that the existence of a lesser standard of protection to individuals with disabilities under the ADA will not provide a defense to failing to meet a higher standard under another law. Thus, for example, title I of the ADA would not be a defense to failing to prepare and maintain an affirmative action program under section 503 of the Rehabilitation Act. On the other hand, the existence of a lesser standard under another law will not provide a defense to failing to meet a higher standard under the ADA. *See* 1990 House Labor Report at 135; 1990 House Judiciary Report at 69–70.

This also means that an individual with a disability could choose to pursue claims under a State discrimination or tort law that does not confer greater substantive rights, or even confers fewer substantive rights, if the potential available remedies would be greater than those available under the ADA and this part. The ADA does not restrict an individual with a disability from pursuing such claims in addition to charges brought under this part. 1990 House Judiciary Report at 69–70.

The ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. It does not preempt State, county, or local laws, ordinances or regulations that are consistent with this part and designed to protect the public health from individuals who pose a direct threat to the health or safety of others that cannot be eliminated or reduced by reasonable accommodation. However, the ADA does preempt inconsistent requirements established by State or local law for safety or security sensitive positions. *See* 1989 Senate Report at 27; 1990 House Labor Report at 57.

An employer allegedly in violation of this part cannot successfully defend its actions by relying on the obligation to comply with the requirements of any State or local law that imposes prohibitions or limitations on the eligibility of individuals with disabilities who are qualified to practice any occupation or profession. For example, suppose a municipality has an ordinance that prohibits individuals with tuberculosis from teaching school children. If an individual with dormant tuberculosis challenges a private school's refusal to hire him or her on the basis of the tuberculosis, the private school

would not be able to rely on the city ordinance as a defense under the ADA.

Paragraph (c)(3) is consistent with language added to section 501 of the ADA by the ADA Amendments Act. It makes clear that nothing in this part is intended to alter the determination of eligibility for benefits under state workers' compensation laws or Federal and State disability benefit programs. State workers' compensation laws and Federal disability benefit programs, such as programs that provide payments to veterans with service-connected disabilities and the Social Security Disability Insurance program, have fundamentally different purposes than title I of the ADA.

Section 1630.2 Definitions

Sections 1630.2(a)–(f) Commission, Covered Entity, etc.

The definitions section of part 1630 includes several terms that are identical, or almost identical, to the terms found in title VII of the Civil Rights Act of 1964. Among these terms are "Commission," "Person," "State," and "Employer." These terms are to be given the same meaning under the ADA that they are given under title VII. In general, the term "employee" has the same meaning that it is given under title VII. However, the ADA's definition of "employee" does not contain an exception, as does title VII, for elected officials and their personal staffs. It should further be noted that all State and local governments are covered by title II of the ADA whether or not they are also covered by this part. Title II, which is enforced by the Department of Justice, became effective on January 26, 1992. *See* 28 CFR part 35.

The term "covered entity" is not found in title VII. However, the title VII definitions of the entities included in the term "covered entity" (e.g., employer, employment agency, labor organization, etc.) are applicable to the ADA.

Section 1630.2(g) Disability

In addition to the term "covered entity," there are several other terms that are unique to the ADA as amended. The first of these is the term "disability." "This definition is of critical importance because as a threshold issue it determines whether an individual is covered by the ADA." 2008 Senate Statement of Managers at 6.

In the original ADA, "Congress sought to protect anyone who experiences discrimination because of a current, past, or perceived disability." 2008 Senate Statement of Managers at 6. Accordingly, the definition of the term "disability" is divided into three prongs: An individual is considered to have a "disability" if that individual (1) has a physical or mental impairment that substantially limits one or more of that person's major life activities (the "actual disability" prong); (2) has a record of such an impairment (the "record of" prong); or (3) is regarded by the covered entity as an individual with a disability as defined in § 1630.2(l) (the "regarded as" prong). The ADAAA retained the basic structure and terms of the original definition of disability. However, the Amendments Act altered the interpretation and application of this critical statutory term in fundamental ways. *See* 2008 Senate Statement of Managers at 1 ("The bill maintains the ADA's inherently functional definition of disability" but "clarifies and expands the definition's meaning and application.").

As noted above, the primary purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. *See* Joint Hoyer-Sensenbrenner Statement at 2. Accordingly, the ADAAA provides rules of construction regarding the definition of disability. Consistent with the congressional intent to reinstate a broad scope of protection under the ADA, the ADAAA's rules of construction require that the definition of "disability" "shall be construed in favor of broad coverage of individuals under [the ADA], to the maximum extent permitted by the terms of [the ADA]." 42 U.S.C. 12102(4)(A). The legislative history of the ADAAA is replete with references emphasizing this principle. *See* Joint Hoyer-Sensenbrenner Statement at 2 ("[The bill] establishes that the definition of disability must be interpreted broadly to achieve the remedial purposes of the ADA"); 2008 Senate Statement of Managers at 1 (the ADAAA's purpose is to "enhance the protections of the [ADA]" by "expanding the definition, and by rejecting several opinions of the United States Supreme Court that have had the effect of restricting the meaning and application of the definition of disability"); *id.* (stressing the importance of removing barriers "to construing and applying the definition of disability more generously"); *id.* at 4 ("The managers have introduced the [ADAAA] to restore the proper balance and application of the ADA by clarifying and broadening the definition of disability, and to increase eligibility for the protections of the ADA."); *id.* ("It is our expectation that because the bill makes the definition of disability more generous, some people who were not covered before will now be covered."); *id.* (warning that "the definition of disability should not be unduly used as a tool for excluding individuals from the ADA's protections"); *id.* (this principle "sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently"); 2008 House Judiciary Committee Report at 5 ("The purpose of the bill is to restore protection for the broad range of individuals with disabilities as originally envisioned by Congress by responding to the Supreme Court's narrow interpretation of the definition of disability.").

Further, as the purposes section of the ADAAA explicitly cautions, the "primary object of attention" in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations. As noted above, this means, for example, examining whether an employer has discriminated against an employee, including whether an employer has fulfilled its obligations with respect to providing a "reasonable accommodation" to an individual with a disability; or whether an employee has met his or her responsibilities under the ADA with respect to engaging in the reasonable accommodation "interactive process." ADAAA Section 2(b)(5); *see* also 2008 Senate Statement of Managers at 4 ("[L]ower court cases have too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory."); 2008 House Judiciary Committee Report (criticizing pre-ADAAA court decisions which "prevented individuals that Congress unquestionably intended to cover from ever getting a chance to prove their case"). Accordingly, the threshold coverage question of whether an individual's impairment is a disability under the ADA "should not demand extensive analysis." ADAAA Section 2(b)(5).

Section 1630.2(g)(2) provides that an individual may establish coverage under any one or more (or all three) of the prongs in the definition of disability. However, to be an individual with a disability, an individual is only required to satisfy one prong.

As § 1630.2(g)(3) indicates, in many cases it may be unnecessary for an individual to resort to coverage under the "actual disability" or "record of" prongs. Where the need for a reasonable accommodation is not at issue—for example, where there is no question that the individual is "qualified" without a reasonable accommodation and is not seeking or has not sought a reasonable accommodation—it would not be necessary to determine whether the individual is substantially limited in a major life activity (under the actual disability prong) or has a record of a substantially limiting impairment (under the record of prong). Such claims could be evaluated solely under the "regarded as" prong of the definition. In fact, Congress expected the first and second prongs of the definition of disability "to be used only by people who are affirmatively seeking reasonable accommodations * * *" and that "[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation * * *—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment." Joint Hoyer-Sensenbrenner Statement at 4. An individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodation or requires a reasonable accommodation.

To fully understand the meaning of the term "disability," it is also necessary to understand what is meant by the terms "physical or mental impairment," "major life activity," "substantially limits," "record of," and "regarded as." Each of these terms is discussed below.

Section 1630.2(h) Physical or Mental Impairment

Neither the original ADA nor the ADAAA provides a definition for the terms "physical or mental impairment." However, the legislative history of the Amendments Act notes that Congress "expect[s] that the current regulatory definition of these terms,

as promulgated by agencies such as the U.S. Equal Employment Opportunity Commission (EEOC), the Department of Justice (DOJ) and the Department of Education Office of Civil Rights (DOE OCR) will not change." 2008 Senate Statement of Managers at 6. The definition of "physical or mental impairment" in the EEOC's regulations remains based on the definition of the term "physical or mental impairment" found in the regulations implementing section 504 of the Rehabilitation Act at 34 CFR part 104. However, the definition in EEOC's regulations adds additional body systems to those provided in the section 504 regulations and makes clear that the list is non-exhaustive.

It is important to distinguish between conditions that are impairments and physical, psychological, environmental, cultural, and economic characteristics that are not impairments. The definition of the term "impairment" does not include physical characteristics such as eye color, hair color, left-handedness, or height, weight, or muscle tone that are within "normal" range and are not the result of a physiological disorder. The definition, likewise, does not include characteristic predisposition to illness or disease. Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a "record of" a substantially limiting impairment," or may be covered under the "regarded as" prong if it is the basis for a prohibited employment action and is not "transitory and minor."

The definition of an impairment also does not include common personality traits such as poor judgment or a quick temper where these are not symptoms of a mental or psychological disorder. Environmental, cultural, or economic disadvantages such as poverty, lack of education, or a prison record are not impairments. Advanced age, in and of itself, is also not an impairment. However, various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis would constitute impairments within the meaning of this part. *See* 1989 Senate Report at 22–23; 1990 House Labor Report at 51–52; 1990 House Judiciary Report at 28–29.

Section 1630.2(i) Major Life Activities

The ADAAA provided significant new guidance and clarification on the subject of "major life activities." As the legislative history of the Amendments Act explains, Congress anticipated that protection under the ADA would now extend to a wider range of cases, in part as a result of the expansion of the category of major life activities. *See* 2008 Senate Statement of Managers at 8 n.17.

For purposes of clarity, the Amendments Act provides an illustrative list of major life activities, including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. The ADA Amendments expressly made this statutory list of examples of major life activities non-exhaustive, and the regulations include sitting, reaching, and interacting with others as additional examples. Many of these major life activities listed in the ADA Amendments Act and the regulations already had been included in the EEOC's 1991 now-superseded regulations implementing title I of the ADA and in sub-regulatory documents, and already were recognized by the courts.

The ADA as amended also explicitly defines "major life activities" to include the operation of "major bodily functions." This was an important addition to the statute. This clarification was needed to ensure that the impact of an impairment on the operation of a major bodily function would not be overlooked or wrongly dismissed as falling outside the definition of "major life activities" under the ADA. 2008 House Judiciary Committee Report at 16; *see also* 2008 Senate Statement of Managers at 8 ("for the first time [in the ADAAA], the category of 'major life activities' is defined to include the operation of major bodily functions, thus better addressing chronic impairments that can be substantially limiting").

The regulations include all of those major bodily functions identified in the ADA Amendments Act's non-exhaustive list of examples and add a number of others that are consistent with the body systems listed in the regulations' definition of "impairment" (at § 1630.2(h)) and with the U.S. Department of Labor's nondiscrimination and equal employment opportunity regulations implementing section 188 of the Workforce Investment Act of 1998, 29 U.S.C. 2801, *et seq.* Thus, special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions are major bodily functions not included in the statutory list of examples but included in § 1630.2(i)(1)(ii). The Commission has added these examples to further illustrate the non-exhaustive list of major life activities, including major bodily functions, and to emphasize that the concept of major life activities is to be interpreted broadly consistent with the Amendments Act. The regulations also provide that the operation of a major bodily function may include the operation of an individual organ within a body system. This would include, for example, the operation of the kidney, liver, pancreas, or other organs.

The link between particular impairments and various major bodily functions should not be difficult to identify. Because impairments, by definition, affect the functioning of body systems, they will generally affect major bodily functions. For example, cancer affects an individual's normal cell growth; diabetes affects the operation of the pancreas and also the function of the endocrine system; and Human Immunodeficiency Virus (HIV) infection affects the immune system. Likewise, sickle cell disease affects the functions of the hemic system, lymphedema affects lymphatic functions, and rheumatoid arthritis affects musculoskeletal functions.

In the legislative history of the ADAAA, Congress expressed its expectation that the statutory expansion of "major life activities" to include major bodily functions (along with other statutory changes) would lead to more expansive coverage. *See* 2008 Senate Statement of Managers at 8 n.17 (indicating that these changes will make it easier for individuals to show that they are eligible for the ADA's protections under the first prong of the definition of disability). The House Education and Labor Committee explained that the inclusion of major bodily functions would "affect cases such as *U.S.* v. *Happy Time Day Care Ctr.* in which the courts struggled to analyze whether the impact of HIV infection substantially limits various major life activities of a five-year-old child, and recognizing, among other things, that 'there is something inherently illogical about inquiring whether' a five-year-old's ability to procreate is substantially limited by his HIV infection; *Furnish* v. *SVI Sys., Inc,* in which the court found that an individual with cirrhosis of the liver caused by Hepatitis B is not disabled because liver function—unlike eating, working, or reproducing—'is not integral to one's daily existence;' and *Pimental* v. *Dartmouth-Hitchcock Clinic,* in which the court concluded that the plaintiff's stage three breast cancer did not substantially limit her ability to care for herself, sleep, or concentrate. The Committee expects that the plaintiffs in each of these cases could establish a [substantial limitation] on major bodily functions that would qualify them for protection under the ADA." 2008 House Education and Labor Committee Report at 12.

The examples of major life activities (including major bodily functions) in the ADAAA and the EEOC's regulations are illustrative and non-exhaustive, and the absence of a particular life activity or bodily function from the examples does not create a negative implication as to whether an omitted activity or function constitutes a major life activity under the statute. *See* 2008 Senate Statement of Managers at 8; *see also* 2008 House Committee on Educ. and Labor Report at 11; 2008 House Judiciary Committee Report at 17.

The Commission anticipates that courts will recognize other major life activities, consistent with the ADA Amendments Act's mandate to construe the definition of disability broadly. As a result of the ADA Amendments Act's rejection of the holding in *Toyota Motor Mfg., Ky., Inc.* v. *Williams,* 534 U.S. 184 (2002), whether an activity is a "major life activity" is not determined by reference to whether it is of "central importance to daily life." *See Toyota,* 534 U.S. at 197 (defining "major life activities" as activities that are of "central importance to most people's daily lives"). Indeed, this holding was at odds with the earlier Supreme Court decision of *Bragdon* v. *Abbott,* 524 U.S. 624 (1998), which held that a major life activity (in that case, reproduction) does not have to have a "public, economic or daily aspect." *Id.* at 639.

Accordingly, the regulations provide that in determining other examples of major life activities, the term "major" shall not be interpreted strictly to create a demanding standard for disability. Cf. 2008 Senate Statement of Managers at 7 (indicating that a person is considered an individual with a disability for purposes of the first prong when one or more of the individual's

"important life activities" are restricted) (citing 1989 Senate Report at 23). The regulations also reject the notion that to be substantially limited in performing a major life activity, an individual must have an impairment that prevents or severely restricts the individual from doing "activities that are of central importance to most people's daily lives." *Id.*; *see* also 2008 Senate Statement of Managers at 5 n.12.

Thus, for example, lifting is a major life activity regardless of whether an individual who claims to be substantially limited in lifting actually performs activities of central importance to daily life that require lifting. Similarly, the Commission anticipates that the major life activity of performing manual tasks (which was at issue in *Toyota*) could have many different manifestations, such as performing tasks involving fine motor coordination, or performing tasks involving grasping, hand strength, or pressure. Such tasks need not constitute activities of central importance to most people's daily lives, nor must an individual show that he or she is substantially limited in performing all manual tasks.

Section 1630.2(j) Substantially Limits

In any case involving coverage solely under the "regarded as" prong of the definition of "disability" (e.g., cases where reasonable accommodation is not at issue), it is not necessary to determine whether an individual is "substantially limited" in any major life activity. *See* 2008 Senate Statement of Managers at 10; id. at 13 ("The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong."). Indeed, Congress anticipated that the first and second prongs of the definition of disability would "be used only by people who are affirmatively seeking reasonable accommodations * * *" and that "[a]ny individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation * * *—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment." Joint Hoyer-Sensenbrenner Statement at 4. Of course, an individual may choose, however, to proceed under the "actual disability" and/or "record of" prong regardless of whether the individual is challenging a covered entity's failure to make reasonable accommodations or requires a reasonable accommodation. The concept of "substantially limits" is only relevant in cases involving coverage under the "actual disability" or "record of" prong of the definition of disability. Thus, the information below pertains to these cases only.

Section 1630.2(j)(1) Rules of Construction

It is clear in the text and legislative history of the ADAAA that Congress concluded the courts had incorrectly construed "substantially limits," and disapproved of the EEOC's now-superseded 1991 regulation defining the term to mean "significantly restricts." *See* 2008 Senate Statement of Managers at 6 ("We do not believe that the courts have correctly instituted the level of coverage we intended to establish with the term 'substantially limits' in the ADA" and "we believe that the level of limitation, and the intensity of focus, applied by the Supreme Court in *Toyota* goes beyond what we believe is the appropriate standard to create coverage under this law."). Congress extensively deliberated over whether a new term other than "substantially limits" should be adopted to denote the appropriate functional limitation necessary under the first and second prongs of the definition of disability. *See* 2008 Senate Statement of Managers at 6–7. Ultimately, Congress affirmatively opted to retain this term in the Amendments Act, rather than replace it. It concluded that "adopting a new, undefined term that is subject to widely disparate meanings is not the best way to achieve the goal of ensuring consistent and appropriately broad coverage under this Act." *Id.* Instead, Congress determined "a better way * * * to express [its] disapproval of *Sutton* and *Toyota* (along with the current EEOC regulation) is to retain the words 'substantially limits,' but clarify that it is not meant to be a demanding standard." *Id.* at 7. To achieve that goal, Congress set forth detailed findings and purposes and "rules of construction" to govern the interpretation and application of this concept going forward. *See* ADAAA Sections 2–4; 42 U.S.C. 12102(4).

The Commission similarly considered whether to provide a new definition of "substantially limits" in the regulation. Following Congress's lead, however, the Commission ultimately concluded that a new definition would inexorably lead to greater focus and intensity of attention on the threshold issue of coverage than intended by Congress. Therefore, the regulations simply provide rules of construction that must be applied in determining whether an impairment substantially limits (or substantially limited) a major life activity. These are each discussed in greater detail below.

Section 1630.2(j)(1)(i): Broad Construction; not a Demanding Standard

Section 1630.2(j)(1)(i) states: "The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."

Congress stated in the ADA Amendments Act that the definition of disability "shall be construed in favor of broad coverage," and that "the term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008." 42 U.S.C. 12101(4)(A)–(B), as amended. "This is a textual provision that will legally guide the agencies and courts in properly interpreting the term 'substantially limits.'" Hoyer-Sensenbrenner Congressional Record Statement at H8295. As Congress noted in the legislative history of the ADAAA, "[t]o be clear, the purposes section conveys our intent to clarify not only that 'substantially limits' should be measured by a lower standard than that used in *Toyota*, but also that the definition of disability should not be unduly used as a tool for excluding individuals from the ADA's protections." 2008 Senate Statement of Managers at 5 (also stating that "[t]his rule of construction, together with the rule of construction providing that the definition of disability shall be construed in favor of broad coverage of individuals sends a clear signal of our intent that the courts must interpret the definition of disability broadly rather than stringently"). Put most succinctly, "substantially limits" "is not meant to be a demanding standard." 2008 Senate Statement of Managers at 7.

Section 1630.2(j)(1)(ii): Significant or Severe Restriction Not Required; Nonetheless, Not Every Impairment Is Substantially Limiting

Section 1630.2(j)(1)(ii) states: "An impairment is a disability within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting. Nonetheless, not every impairment will constitute a 'disability' within the meaning of this section."

In keeping with the instruction that the term "substantially limits" is not meant to be a demanding standard, the regulations provide that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. However, to be substantially limited in performing a major life activity an individual need not have an impairment that prevents or significantly or severely restricts the individual from performing a major life activity. *See* 2008 Senate Statement of Managers at 2, 6–8 & n.14; 2008 House Committee on Educ. and Labor Report at 9–10 ("While the limitation imposed by an impairment must be important, it need not rise to the level of severely restricting or significantly restricting the ability to perform a major life activity to qualify as a disability."); 2008 House Judiciary Committee Report at 16 (similarly requiring an "important" limitation). The level of limitation required is "substantial" as compared to most people in the general population, which does not require a significant or severe restriction. Multiple impairments that combine to substantially limit one or more of an individual's major life activities also constitute a disability. Nonetheless, not every impairment will constitute a "disability" within the meaning of this section. *See* 2008 Senate Statement of Managers at 4 ("We reaffirm that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA.")

Section 1630.2(j)(1)(iii): Substantial Limitation Should Not Be Primary Object of Attention; Extensive Analysis Not Needed

Section 1630.2(j)(1)(iii) states: "The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations, not whether an individual's impairment substantially limits a major life activity. Accordingly, the threshold issue of whether an impairment 'substantially limits' a major life activity should not demand extensive analysis."

Congress retained the term "substantially limits" in part because it was concerned that adoption of a new phrase—and the resulting need for further judicial scrutiny and construction—would not "help move the focus from the threshold issue of disability to the primary issue of discrimination." 2008 Senate Statement of Managers at 7.

This was the primary problem Congress sought to solve in enacting the ADAAA. It recognized that "clearing the initial [disability] threshold is critical, as individuals who are excluded from the definition 'never have the opportunity to have their condition evaluated in light of medical evidence and a determination made as to whether they [are] 'otherwise qualified.'" 2008 House Judiciary Committee Report at 7; *see also* id. (expressing concern that "[a]n individual who does not qualify as disabled does not meet th[e] threshold question of coverage in the protected class and is therefore not permitted to attempt to prove his or her claim of discriminatory treatment"); 2008 Senate Statement of Managers at 4 (criticizing pre-ADAAA lower court cases that "too often turned solely on the question of whether the plaintiff is an individual with a disability rather than the merits of discrimination claims, such as whether adverse decisions were impermissibly made by the employer on the basis of disability, reasonable accommodations were denied, or qualification standards were unlawfully discriminatory").

Accordingly, the Amendments Act and the amended regulations make plain that the emphasis in ADA cases now should be squarely on the merits and not on the initial coverage question. The revised regulations therefore provide that an impairment is a disability if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population and deletes the language to which Congress objected. The Commission believes that this provides a useful framework in which to analyze whether an impairment satisfies the definition of disability. Further, this framework better reflects Congress's expressed intent in the ADA Amendments Act that the definition of the term "disability" shall be construed broadly, and is consistent with statements in the Amendments Act's legislative history. *See* 2008 Senate Statement of Managers at 7 (stating that "adopting a new, undefined term" and the "resulting need for further judicial scrutiny and construction will not help move the focus from the threshold issue of disability to the primary issue of discrimination," and finding that "'substantially limits' as construed consistently with the findings and purposes of this legislation establishes an appropriate functionality test of determining whether an individual has a disability" and that "using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations or modifications").

Consequently, this rule of construction makes clear that the question of whether an impairment substantially limits a major life activity should not demand extensive analysis. As the legislative history explains, "[w]e expect that courts interpreting [the ADA] will not demand such an extensive analysis over whether a person's physical or mental impairment constitutes a disability." Hoyer-Sensenbrenner Congressional Record Statement at H8295; *see id.* ("Our goal throughout this process has been to simplify that analysis.")

Section 1630.2(j)(1)(iv): Individualized Assessment Required, But With Lower Standard Than Previously Applied

Section 1630.2(j)(1)(iv) states: "The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, in making this assessment, the term 'substantially limits' shall be interpreted and applied to require a degree of functional limitation that is lower than the standard for 'substantially limits' applied prior to the ADAAA."

By retaining the essential elements of the definition of disability including the key term "substantially limits," Congress reaffirmed that not every individual with a physical or mental impairment is covered by the first prong of the definition of disability in the ADA. *See* 2008 Senate Statement of Managers at 4. To be covered under the first prong of the definition, an individual must establish that an impairment substantially limits a major life activity. That has not changed—nor will the necessity of making this determination on an individual basis. Id. However, what the ADAAA changed is the standard required for making this determination. Id. at 4–5.

The Amendments Act and the EEOC's regulations explicitly reject the standard enunciated by the Supreme Court in *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002), and applied in the lower courts in numerous cases. *See* ADAAA Section 2(b)(4). That previous standard created "an inappropriately high level of limitation necessary to obtain coverage under the ADA." Id. at Section 2(b)(5). The Amendments Act and the EEOC's regulations reject the notion that "substantially limits" should be interpreted strictly to create a demanding standard for qualifying as disabled. Id. at Section 2(b)(4). Instead, the ADAAA and these regulations establish a degree of functional limitation required for an impairment to constitute a disability that is consistent with what Congress originally intended. 2008 Senate Statement of Managers at 7. This will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking to prove discrimination under the ADA. *Id.*

Section 1630.2(j)(1)(v): Scientific, Medical, or Statistical Analysis Not Required, But Permissible When Appropriate

Section 1630.2(j)(1)(v) states: "The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population usually will not require scientific, medical, or statistical analysis. Nothing in this paragraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate."

The term "average person in the general population," as the basis of comparison for determining whether an individual's impairment substantially limits a major life activity, has been changed to "most people in the general population." This revision is not a substantive change in the concept, but rather is intended to conform the language to the simpler and more straightforward terminology used in the legislative history to the Amendments Act. The comparison between the individual and "most people" need not be exacting, and usually will not require scientific, medical, or statistical analysis. Nothing in this subparagraph is intended, however, to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

The comparison to most people in the general population continues to mean a comparison to other people in the general population, not a comparison to those similarly situated. For example, the ability of an individual with an amputated limb to perform a major life activity is compared to other people in the general population, not to other amputees. This does not mean that disability cannot be shown where an impairment, such as a learning disability, is clinically diagnosed based in part on a disparity between an individual's aptitude and that individual's actual versus expected achievement, taking into account the person's chronological age, measured intelligence, and age-appropriate education. Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act.

Section 1630.2(j)(1)(vi): Mitigating Measures

Section 1630.2(j)(1)(vi) states: "The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. However, the ameliorative effects of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity."

The ameliorative effects of mitigating measures shall not be considered in determining whether an impairment substantially limits a major life activity. Thus, "[w]ith the exception of ordinary eyeglasses and contact lenses, impairments must be examined in their unmitigated state." *See* 2008 Senate Statement of Managers at 5.

This provision in the ADAAA and the EEOC's regulations "is intended to eliminate the catch-22 that exist[ed] * * * where individuals who are subjected to discrimination on the basis of their disabilities [we]re frequently unable to

invoke the ADA's protections because they [we]re not considered people with disabilities when the effects of their medication, medical supplies, behavioral adaptations, or other interventions [we]re considered." Joint Hoyer-Sensenbrenner Statement at 2; *see also* 2008 Senate Statement of Managers at 9 ("This provision is intended to eliminate the situation created under [prior] law in which impairments that are mitigated [did] not constitute disabilities but [were the basis for discrimination]."). To the extent cases pre-dating the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended. *See* 2008 House Judiciary Committee Report at 9 & nn.25, 20–21 (citing, e.g., *McClure* v. *General Motors Corp.*, 75 F. App'x 983 (5th Cir. 2003) (court held that individual with muscular dystrophy who, with the mitigating measure of "adapting" how he performed manual tasks, had successfully learned to live and work with his disability was therefore not an individual with a disability); *Orr* v. *Wal-Mart Stores, Inc.*, 297 F.3d 720 (8th Cir. 2002) (court held that *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471 (1999), required consideration of the ameliorative effects of plaintiff's careful regimen of medicine, exercise and diet, and declined to consider impact of uncontrolled diabetes on plaintiff's ability to see, speak, read, and walk); *Gonzales* v. *National Bd. of Med. Examiners*, 225 F.3d 620 (6th Cir. 2000) (where the court found that an individual with a diagnosed learning disability was not substantially limited after considering the impact of self-accommodations that allowed him to read and achieve academic success); *McMullin* v. *Ashcroft*, 337 F. Supp. 2d 1281 (D. Wyo. 2004) (individual fired because of clinical depression not protected because of the successful management of the condition with medication for fifteen years); *Eckhaus* v. *Consol. Rail Corp.*, 2003 WL 23205042 (D.N.J. Dec. 24, 2003) (individual fired because of a hearing impairment was not protected because a hearing aid helped correct that impairment); *Todd* v. *Academy Corp.*, 57 F. Supp. 2d 448, 452 (S.D. Tex. 1999) (court held that because medication reduced the frequency and intensity of plaintiff's seizures, he was not disabled)).

An individual who, because of the use of a mitigating measure, has experienced no limitations, or only minor limitations, related to the impairment may still be an individual with a disability, where there is evidence that in the absence of an effective mitigating measure the individual's impairment would be substantially limiting. For example, someone who began taking medication for hypertension before experiencing substantial limitations related to the impairment would still be an individual with a disability if, without the medication, he or she would now be substantially limited in functions of the cardiovascular or circulatory system.

Evidence showing that an impairment would be substantially limiting in the absence of the ameliorative effects of mitigating measures could include evidence of limitations that a person experienced prior to using a mitigating measure, evidence concerning the expected course of a particular disorder absent mitigating measures, or readily available and reliable information of other types. However, we expect that consistent with the Amendments Act's command (and the related rules of construction in the regulations) that the definition of disability "should not demand extensive analysis," covered entities and courts will in many instances be able to conclude that a substantial limitation has been shown without resort to such evidence.

The Amendments Act provides an "illustrative but non-comprehensive list of the types of mitigating measures that are not to be considered." *See* 2008 Senate Statement of Managers at 9. Section 1630.2(j)(5) of the regulations includes all of those mitigating measures listed in the ADA Amendments Act's illustrative list of mitigating measures, including reasonable accommodations (as applied under title I) or "auxiliary aids or services" (as defined by 42 U.S.C. 12103(1) and applied under titles II and III).

Since it would be impossible to guarantee comprehensiveness in a finite list, the list of examples of mitigating measures provided in the ADA and the regulations is non-exhaustive. *See* 2008 House Judiciary Committee Report at 20. The absence of any particular mitigating measure from the list in the regulations should not convey a negative implication as to whether the measure is a mitigating measure under the ADA. *See* 2008 Senate Statement of Managers at 9.

For example, the fact that mitigating measures include "reasonable accommodations" generally makes it unnecessary to mention specific kinds of accommodations. Nevertheless, the use of a service animal, job coach, or personal assistant on the job would certainly be considered types of mitigating measures, as would the use of any device that could be considered assistive technology, and whether individuals who use these measures have disabilities would be determined without reference to their ameliorative effects. *See* 2008 House Judiciary Committee Report at 20; 2008 House Educ. & Labor Rep. at 15. Similarly, adaptive strategies that might mitigate, or even allow an individual to otherwise avoid performing particular major life activities, are mitigating measures and also would not be considered in determining whether an impairment is substantially limiting. *Id.*

The determination of whether or not an individual's impairment substantially limits a major life activity is unaffected by whether the individual chooses to forgo mitigating measures. For individuals who do not use a mitigating measure (including for example medication or reasonable accommodation that could alleviate the effects of an impairment), the availability of such measures has no bearing on whether the impairment substantially limits a major life activity. The limitations posed by the impairment on the individual and any negative (non-ameliorative) effects of mitigating measures used determine whether an impairment is substantially limiting. The origin of the impairment, whether its effects can be mitigated, and any ameliorative effects of mitigating measures in fact used may not be considered in determining if the impairment is substantially limiting. However, the use or non-use of mitigating measures, and any consequences thereof, including any ameliorative and non-ameliorative effects, may be relevant in determining whether the individual is qualified or poses a direct threat to safety.

The ADA Amendments Act and the regulations state that "ordinary eyeglasses or contact lenses" *shall* be considered in determining whether someone has a disability. This is an exception to the rule that the ameliorative effects of mitigating measures are not to be taken into account. "The rationale behind this exclusion is that the use of ordinary eyeglasses or contact lenses, without more, is not significant enough to warrant protection under the ADA." Joint Hoyer-Sensenbrenner Statement at 2. Nevertheless, as discussed in greater detail below at § 1630.10(b), if an applicant or employee is faced with a qualification standard that requires uncorrected vision (as the plaintiffs in the *Sutton* case were), and the applicant or employee who is adversely affected by the standard brings a challenge under the ADA, an employer will be required to demonstrate that the qualification standard is job related and consistent with business necessity. 2008 Senate Statement of Managers at 9.

The ADAAA and the EEOC's regulations both define the term "ordinary eyeglasses or contact lenses" as lenses that are "intended to fully correct visual acuity or eliminate refractive error." So, if an individual with severe myopia uses eyeglasses or contact lenses that are intended to fully correct visual acuity or eliminate refractive error, they are ordinary eyeglasses or contact lenses, and therefore any inquiry into whether such individual is substantially limited in seeing or reading would be based on how the individual sees or reads with the benefit of the eyeglasses or contact lenses. Likewise, if the only visual loss an individual experiences affects the ability to see well enough to read, and the individual's ordinary reading glasses are intended to completely correct for this visual loss, the ameliorative effects of using the reading glasses must be considered in determining whether the individual is substantially limited in seeing. Additionally, eyeglasses or contact lenses that are the wrong prescription or an outdated prescription may nevertheless be "ordinary" eyeglasses or contact lenses, if a proper prescription would fully correct visual acuity or eliminate refractive error.

Both the statute and the regulations distinguish "ordinary eyeglasses or contact lenses" from "low vision devices," which function by magnifying, enhancing, or otherwise augmenting a visual image, and which are not considered when determining whether someone has a disability. The regulations do not establish a specific level of visual acuity (e.g., 20/20) as the basis for determining whether eyeglasses or contact lenses should be considered "ordinary" eyeglasses or contact lenses. Whether lenses fully correct visual acuity or eliminate refractive error is best determined on a case-by-case basis, in light of current and objective medical evidence. Moreover, someone who uses ordinary eyeglasses or contact lenses is not automatically considered to be outside

the ADA's protection. Such an individual may demonstrate that, even with the use of ordinary eyeglasses or contact lenses, his vision is still substantially limited when compared to most people.

Section 1630.2(j)(1)(vii): Impairments That Are Episodic or in Remission

Section 1630.2(j)(1)(vii) states: "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity in its active state. "This provision is intended to reject the reasoning of court decisions concluding that certain individuals with certain conditions—such as epilepsy or post traumatic stress disorder—were not protected by the ADA because their conditions were episodic or intermittent." Joint Hoyer-Sensenbrenner Statement at 2–3. The legislative history provides: "This * * * rule of construction thus rejects the reasoning of the courts in cases like *Todd* v. *Academy Corp.* [57 F. Supp. 2d 448, 453 (S.D. Tex. 1999)] where the court found that the plaintiff's epilepsy, which resulted in short seizures during which the plaintiff was unable to speak and experienced tremors, was not sufficiently limiting, at least in part because those seizures occurred episodically. It similarly rejects the results reached in cases [such as *Pimental* v. *Dartmouth-Hitchock Clinic*, 236 F. Supp. 2d 177, 182–83 (D.N.H. 2002)] where the courts have discounted the impact of an impairment [such as cancer] that may be in remission as too short-lived to be substantially limiting. It is thus expected that individuals with impairments that are episodic or in remission (e.g., epilepsy, multiple sclerosis, cancer) will be able to establish coverage if, when active, the impairment or the manner in which it manifests (e.g., seizures) substantially limits a major life activity." 2008 House Judiciary Committee Report at 19–20.

Other examples of impairments that may be episodic include, but are not limited to, hypertension, diabetes, asthma, major depressive disorder, bipolar disorder, and schizophrenia. *See* 2008 House Judiciary Committee Report at 19–20. The fact that the periods during which an episodic impairment is active and substantially limits a major life activity may be brief or occur infrequently is no longer relevant to determining whether the impairment substantially limits a major life activity. For example, a person with post-traumatic stress disorder who experiences intermittent flashbacks to traumatic events is substantially limited in brain function and thinking.

Section 1630.2(j)(1)(viii): Substantial Limitation in Only One Major Life Activity Required

Section 1630.2(j)(1)(viii) states: "An impairment that substantially limits one major life activity need not substantially limit other major life activities in order to be considered a substantially limiting impairment."

The ADAAA explicitly states that an impairment need only substantially limit one major life activity to be considered a disability under the ADA. *See* ADAAA Section 4(a); 42 U.S.C. 12102(4)(C). "This responds to and corrects those courts that have required individuals to show that an impairment substantially limits more than one life activity." 2008 Senate Statement of Managers at 8. In addition, this rule of construction is "intended to clarify that the ability to perform one or more particular tasks within a broad category of activities does not preclude coverage under the ADA." *Id.* To the extent cases pre-dating the applicability of the 2008 Amendments Act reasoned otherwise, they are contrary to the law as amended. Id. (citing *Holt* v. *Grand Lake Mental Health Ctr., Inc.*, 443 F. 3d 762 (10th Cir. 2006) (holding an individual with cerebral palsy who could not independently perform certain specified manual tasks was not substantially limited in her ability to perform a "broad range" of manual tasks)); *see also* 2008 House Judiciary Committee Report at 19 & n.52 (this legislatively corrects court decisions that, with regard to the major life activity of performing manual tasks, "have offset substantial limitation in the performance of some tasks with the ability to perform others" (citing *Holt*)).

For example, an individual with diabetes is substantially limited in endocrine function and thus an individual with a disability under the first prong of the definition. He need not also show that he is substantially limited in eating to qualify for coverage under the first prong. An individual whose normal cell growth is substantially limited due to lung cancer need not also show that she is substantially limited in breathing or respiratory function. And an individual with HIV infection is substantially limited in the function of the immune system, and therefore is an individual with a disability without regard to whether his or her HIV infection substantially limits him or her in reproduction.

In addition, an individual whose impairment substantially limits a major life activity need not additionally demonstrate a resulting limitation in the ability to perform activities of central importance to daily life in order to be considered an individual with a disability under § 1630.2(g)(1)(i) or § 1630.2(g)(1)(ii), as cases relying on the Supreme Court's decision in *Toyota Motor Mfg., Ky., Inc.* v. *Williams*, 534 U.S. 184 (2002), had held prior to the ADA Amendments Act.

Thus, for example, someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting, and need not also show that he is unable to perform activities of daily living that require lifting in order to be considered substantially limited in lifting. Similarly, someone with monocular vision whose depth perception or field of vision would be substantially limited, with or without any compensatory strategies the individual may have developed, need not also show that he is unable to perform activities of central importance to daily life that require *seeing* in order to be substantially limited in seeing.

Section 1630.2(j)(1)(ix): Effects of an Impairment Lasting Fewer Than Six Months Can Be Substantially Limiting

Section 1630.2(j)(1)(ix) states: "The six-month 'transitory' part of the 'transitory and minor' exception to 'regarded as' coverage in § 1630.2(l) does not apply to the definition of 'disability' under § 1630.2(g)(1)(i) or § 1630.2(g)(1)(ii). The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."

The regulations include a clear statement that the definition of an impairment as transitory, that is, "lasting or expected to last for six months or less," only applies to the "regarded as" (third) prong of the definition of "disability" as part of the "transitory and minor" defense to "regarded as" coverage. It does not apply to the first or second prong of the definition of disability. *See* Joint Hoyer-Sensenbrenner Statement at 3 ("[T]here is no need for the transitory and minor exception under the first two prongs because it is clear from the statute and the legislative history that a person can only bring a claim if the impairment substantially limits one or more major life activities or the individual has a record of an impairment that substantially limits one or more major life activities.").

Therefore, an impairment does not have to last for more than six months in order to be considered substantially limiting under the first or the second prong of the definition of disability. For example, as noted above, if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability. At the same time, "[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe." Joint Hoyer-Sensenbrenner Statement at 5.

Section 1630.2(j)(3) Predictable Assessments

As the regulations point out, disability is determined based on an individualized assessment. There is no "per se" disability. However, as recognized in the regulations, the individualized assessment of some kinds of impairments will virtually always result in a determination of disability. The inherent nature of these types of medical conditions will in virtually all cases give rise to a substantial limitation of a major life activity. Cf. *Heiko* v. *Columbo Savings Bank, F.S.B.*, 434 F.3d 249, 256 (4th Cir. 2006) (stating, even pre-ADAAA, that "certain impairments are by their very nature substantially limiting: the major life activity of seeing, for example, is always substantially limited by blindness"). Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

This result is the consequence of the combined effect of the statutory changes to the definition of disability contained in the

Amendments Act and flows from application of the rules of construction set forth in §§ 1630.2(j)(1)(i)–(ix) (including the lower standard for "substantially limits"; the rule that major life activities include major bodily functions; the principle that impairments that are episodic or in remission are disabilities if they would be substantially limiting when active; and the requirement that the ameliorative effects of mitigating measures (other than ordinary eyeglasses or contact lenses) must be disregarded in assessing whether an individual has a disability).

The regulations at § 1630.2(j)(3)(iii) provide examples of the types of impairments that should easily be found to substantially limit a major life activity. The legislative history states that Congress modeled the ADA definition of disability on the definition contained in the Rehabilitation Act, and said it wished to return courts to the way they had construed that definition. *See* 2008 House Judiciary Committee Report at 6. Describing this goal, the legislative history states that courts had interpreted the Rehabilitation Act definition "broadly to include persons with a wide range of physical and mental impairments such as epilepsy, diabetes, multiple sclerosis, and intellectual and developmental disabilities * * * even where a mitigating measure—like medication or a hearing aid—might lessen their impact on the individual." Id.; *see also* id. at 9 (referring to individuals with disabilities that had been covered under the Rehabilitation Act and that Congress intended to include under the ADA—"people with serious health conditions like epilepsy, diabetes, cancer, cerebral palsy, multiple sclerosis, intellectual and developmental disabilities"); id. at n.6 (citing cases also finding that cerebral palsy, hearing impairments, mental retardation, heart disease, and vision in only one eye were disabilities under the Rehabilitation Act); id. at 10 (citing testimony from Rep. Steny H. Hoyer, one of the original lead sponsors of the ADA in 1990, stating that "we could not have fathomed that people with diabetes, epilepsy, heart conditions, cancer, mental illnesses and other disabilities would have their ADA claims denied because they would be considered too functional to meet the definition of disability"); 2008 Senate Statement of Managers at 3 (explaining that "we [we]re faced with a situation in which physical or mental impairments that would previously [under the Rehabilitation Act] have been found to constitute disabilities [we]re not considered disabilities" and citing individuals with impairments such as amputation, intellectual disabilities, epilepsy, multiple sclerosis, diabetes, muscular dystrophy, and cancer as examples).

Of course, the impairments listed in subparagraph 1630.2(j)(3)(iii) may substantially limit a variety of other major life activities in addition to those listed in the regulation. For example, mobility impairments requiring the use of a wheelchair substantially limit the major life activity of walking. Diabetes may substantially limit major life activities such as eating, sleeping, and thinking. Major depressive disorder may substantially limit major life activities such as thinking, concentrating, sleeping, and interacting with others. Multiple sclerosis may substantially limit major life activities such as walking, bending, and lifting.

By using the term "brain function" to describe the system affected by various mental impairments, the Commission is expressing no view on the debate concerning whether mental illnesses are caused by environmental or biological factors, but rather intends the term to capture functions such as the ability of the brain to regulate thought processes and emotions.

Section 1630.2(j)(4) Condition, Manner, or Duration

The regulations provide that facts such as the "condition, manner, or duration" of an individual's performance of a major life activity may be useful in determining whether an impairment results in a substantial limitation. In the legislative history of the ADAAA, Congress reiterated what it had said at the time of the original ADA: "A person is considered an individual with a disability for purposes of the first prong of the definition when [one or more of] the individual's important life activities are restricted as to the conditions, manner, or duration under which they can be performed in comparison to most people." 2008 Senate Statement of Managers at 7 (citing 1989 Senate Report at 23). According to Congress: "We particularly believe that this test, which articulated an analysis that considered whether a person's activities are limited in condition, duration and manner, is a useful one. We reiterate that using the correct standard—one that is lower than the strict or demanding standard created by the Supreme Court in *Toyota*—will make the disability determination an appropriate threshold issue but not an onerous burden for those seeking accommodations * * *. At the same time, plaintiffs should not be constrained from offering evidence needed to establish that their impairment is substantially limiting." 2008 Senate Statement of Managers at 7.

Consistent with the legislative history, an impairment may substantially limit the "condition" or "manner" under which a major life activity can be performed in a number of ways. For example, the condition or manner under which a major life activity can be performed may refer to the way an individual performs a major life activity. Thus, the condition or manner under which a person with an amputated hand performs manual tasks will likely be more cumbersome than the way that someone with two hands would perform the same tasks.

Condition or manner may also describe how performance of a major life activity affects the individual with an impairment. For example, an individual whose impairment causes pain or fatigue that most people would not experience when performing that major life activity may be substantially limited. Thus, the condition or manner under which someone with coronary artery disease performs the major life activity of walking would be substantially limiting if the individual experiences shortness of breath and fatigue when walking distances that most people could walk without experiencing such effects. Similarly, condition or manner may refer to the extent to which a major life activity, including a major bodily function, can be performed. For example, the condition or manner under which a major bodily function can be performed may be substantially limited when the impairment "causes the operation [of the bodily function] to over-produce or under-produce in some harmful fashion." *See* 2008 House Judiciary Committee Report at 17.

"Duration" refers to the length of time an individual can perform a major life activity or the length of time it takes an individual to perform a major life activity, as compared to most people in the general population. For example, a person whose back or leg impairment precludes him or her from standing for more than two hours without significant pain would be substantially limited in standing, since most people can stand for more than two hours without significant pain. However, a person who can walk for ten miles continuously is not substantially limited in walking merely because on the eleventh mile, he or she begins to experience pain because most people would not be able to walk eleven miles without experiencing some discomfort. *See* 2008 Senate Statement of Managers at 7 (citing 1989 Senate Report at 23).

The regulations provide that in assessing substantial limitation and considering facts such as condition, manner, or duration, the non-ameliorative effects of mitigating measures may be considered. Such "non-ameliorative effects" could include negative side effects of medicine, burdens associated with following a particular treatment regimen, and complications that arise from surgery, among others. Of course, in many instances, it will not be necessary to assess the negative impact of a mitigating measure in determining that a particular impairment substantially limits a major life activity. For example, someone with end-stage renal disease is substantially limited in kidney function, and it thus is not necessary to consider the burdens that dialysis treatment imposes.

Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, the regulations include language which says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity.

Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population. As Congress emphasized in passing the Amendments Act, "[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be

substantially limited in activities such as learning, reading, writing, thinking, or speaking." 2008 Senate Statement of Managers at 8. Congress noted that: "In particular, some courts have found that students who have reached a high level of academic achievement are not to be considered individuals with disabilities under the ADA, as such individuals may have difficulty demonstrating substantial limitation in the major life activities of learning or reading relative to 'most people.' When considering the condition, manner or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who performs well academically or otherwise cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. As such, the Committee rejects the findings in *Price* v. *National Board of Medical Examiners, Gonzales* v. *National Board of Medical Examiners,* and *Wong* v. *Regents of University of California.* The Committee believes that the comparison of individuals with specific learning disabilities to 'most people' is not problematic unto itself, but requires a careful analysis of the method and manner in which an individual's impairment limits a major life activity. For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life. The Committee expects that individuals with specific learning disabilities that substantially limit a major life activity will be better protected under the amended Act." 2008 House Educ. & Labor Rep. at 10–11.

It bears emphasizing that while it may be useful in appropriate cases to consider facts such as condition, manner, or duration, it is always necessary to consider and apply the rules of construction in § 1630.2(j)(1)(i)–(ix) that set forth the elements of broad coverage enacted by Congress. 2008 Senate Statement of Managers at 6. Accordingly, while the Commission's regulations retain the concept of "condition, manner, or duration," they no longer include the additional list of "substantial limitation" factors contained in the previous version of the regulations (i.e., the nature and severity of the impairment, duration or expected duration of the impairment, and actual or expected permanent or long-term impact of or resulting from the impairment).

Finally, "condition, manner, or duration" are not intended to be used as a rigid three-part standard that must be met to establish a substantial limitation. "Condition, manner, or duration" are not required "factors" that must be considered as a talismanic test. Rather, in referring to "condition, manner, *or* duration," the regulations make clear that these are merely the types of facts that may be considered in appropriate cases. To the extent such aspects of limitation may be useful or relevant to show a substantial limitation in a particular fact pattern, some or all of them (and related facts) may be considered, but evidence relating to each of these facts may not be necessary to establish coverage.

At the same time, individuals seeking coverage under the first or second prong of the definition of disability should not be constrained from offering evidence needed to establish that their impairment is substantially limiting. *See* 2008 Senate Statement of Managers at 7. Of course, covered entities may defeat a showing of "substantial limitation" by refuting whatever evidence the individual seeking coverage has offered, or by offering evidence that shows an impairment does not impose a substantial limitation on a major life activity. However, a showing of substantial limitation is not defeated by facts related to "condition, manner, or duration" that are not pertinent to the substantial limitation the individual has proffered.

Sections 1630.2(j)(5) and (6) Examples of Mitigating Measures; Ordinary Eyeglasses or Contact Lenses

These provisions of the regulations provide numerous examples of mitigating measures and the definition of "ordinary eyeglasses or contact lenses." These definitions have been more fully discussed in the portions of this interpretive guidance concerning the rules of construction in § 1630.2(j)(1).

Substantially Limited in Working

The Commission has removed from the text of the regulations a discussion of the major life activity of working. This is consistent with the fact that no other major life activity receives special attention in the regulation, and with the fact that, in light of the expanded definition of disability established by the Amendments Act, this major life activity will be used in only very targeted situations.

In most instances, an individual with a disability will be able to establish coverage by showing substantial limitation of a major life activity other than working; impairments that substantially limit a person's ability to work usually substantially limit one or more other major life activities. This will be particularly true in light of the changes made by the ADA Amendments Act. *See, e.g., Corley* v. *Dep't of Veterans Affairs ex rel Principi,* 218 F. App'x. 727, 738 (10th Cir. 2007) (employee with seizure disorder was not substantially limited in working because he was not foreclosed from jobs involving driving, operating machinery, childcare, military service, and other jobs; employee would now be substantially limited in neurological function); *Olds* v. *United Parcel Serv., Inc.,* 127 F. App'x. 779, 782 (6th Cir. 2005) (employee with bone marrow cancer was not substantially limited in working due to lifting restrictions caused by his cancer; employee would now be substantially limited in normal cell growth); *Williams* v. *Philadelphia Hous. Auth. Police Dep't,* 380 F.3d 751, 763–64 (3d Cir. 2004) (issue of material fact concerning whether police officer's major depression substantially limited him in performing a class of jobs due to restrictions on his ability to carry a firearm; officer would now be substantially limited in brain function).[2]

In the rare cases where an individual has a need to demonstrate that an impairment substantially limits him or her in working, the individual can do so by showing that the impairment substantially limits his or her ability to perform a class of jobs or broad range of jobs in various classes as compared to most people having comparable training, skills, and abilities. In keeping with the findings and purposes of the Amendments Act, the determination of coverage under the law should not require extensive and elaborate assessment, and the EEOC and the courts are to apply a lower standard in determining when an impairment substantially limits a major life activity, including the major life activity of working, than they applied prior to the Amendments Act. The Commission believes that the courts, in applying an overly strict standard with regard to "substantially limits" generally, have reached conclusions with regard to what is necessary to demonstrate a substantial limitation in the major life activity of working that would be inconsistent with the changes now made by the Amendments Act. Accordingly, as used in this section the terms "class of jobs" and "broad range of jobs in various classes" will be applied in a more straightforward and simple manner than they were applied by the courts prior to the Amendments Act.[3]

Demonstrating a substantial limitation in performing the unique aspects of a single specific job is not sufficient to establish that

[2] In addition, many cases previously analyzed in terms of whether the plaintiff was "substantially limited in working" will now be analyzed under the "regarded as" prong of the definition of disability as revised by the Amendments Act. *See, e.g., Cannon* v. *Levi Strauss & Co.,* 29 F. App'x. 331 (6th Cir. 2002) (factory worker laid off due to her carpal tunnel syndrome not regarded as substantially limited in working because her job of sewing machine operator was not a "broad class of jobs"; she would now be protected under the third prong because she was fired because of her impairment, carpal tunnel syndrome); *Bridges* v. *City of Bossier,* 92 F.3d 329 (5th Cir. 1996) (applicant not hired for firefighting job because of his mild hemophilia not regarded as substantially limited in working; applicant would now be protected under the third prong because he was not hired because of his impairment, hemophilia).

[3] In analyzing working as a major life activity in the past, some courts have imposed a complex and onerous standard that would be inappropriate under the Amendments Act. *See, e.g., Duncan* v. *WMATA,* 240 F.3d 1110, 1115 (DC Cir. 2001) (manual laborer whose back injury prevented him from lifting more than 20 pounds was not substantially limited in working because he did not present evidence of the number and types of jobs available to him in the Washington area; testimony concerning his inquiries and applications for truck driving jobs that all required heavy lifting was insufficient); *Taylor* v. *Federal Express Corp.,* 429 F.3d 461, 463–64 (4th Cir. 2005) (employee's impairment did not substantially limit him in working because, even though evidence showed that employer's injury disqualified him from working in numerous jobs in his geographic region, it also showed that he remained qualified for many other jobs). Under the Amendments Act, the determination of whether a person is substantially limited in working is more straightforward and simple than it was prior to the Act.

a person is substantially limited in the major life activity of working.

A class of jobs may be determined by reference to the nature of the work that an individual is limited in performing (such as commercial truck driving, assembly line jobs, food service jobs, clerical jobs, or law enforcement jobs) or by reference to job-related requirements that an individual is limited in meeting (for example, jobs requiring repetitive bending, reaching, or manual tasks, jobs requiring repetitive or heavy lifting, prolonged sitting or standing, extensive walking, driving, or working under conditions such as high temperatures or noise levels).

For example, if a person whose job requires heavy lifting develops a disability that prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his or her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in working because he or she is substantially limited in performing the class of jobs that require heavy lifting.

Section 1630.2(k) Record of a Substantially Limiting Impairment

The second prong of the definition of "disability" provides that an individual with a record of an impairment that substantially limits or limited a major life activity is an individual with a disability. The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability. For example, the "record of" provision would protect an individual who was treated for cancer ten years ago but who is now deemed by a doctor to be free of cancer, from discrimination based on that prior medical history. This provision also ensures that individuals are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as having learning disabilities or intellectual disabilities (formerly termed "mental retardation") are protected from discrimination on the basis of that erroneous classification. Senate Report at 23; House Labor Report at 52–53; House Judiciary Report at 29; 2008 House Judiciary Report at 7–8 & n.14. Similarly, an employee who in the past was misdiagnosed with bipolar disorder and hospitalized as the result of a temporary reaction to medication she was taking has a record of a substantially limiting impairment, even though she did not actually have bipolar disorder.

This part of the definition is satisfied where evidence establishes that an individual has had a substantially limiting impairment. The impairment indicated in the record must be an impairment that would substantially limit one or more of the individual's major life activities. There are many types of records that could potentially contain this information, including but not limited to, education, medical, or employment records.

Such evidence that an individual has a past history of an impairment that substantially limited a major life activity is all that is necessary to establish coverage under the second prong. An individual may have a "record of" a substantially limiting impairment—and thus be protected under the "record of" prong of the statute—even if a covered entity does not specifically know about the relevant record. Of course, for the covered entity to be liable for discrimination under title I of the ADA, the individual with a "record of" a substantially limiting impairment must prove that the covered entity discriminated on the basis of the record of the disability.

The terms "substantially limits" and "major life activity" under the second prong of the definition of "disability" are to be construed in accordance with the same principles applicable under the "actual disability" prong, as set forth in § 1630.2(j).

Individuals who are covered under the "record of" prong will often be covered under the first prong of the definition of disability as well. This is a consequence of the rule of construction in the ADAAA and the regulations providing that an individual with an impairment that is episodic or in remission can be protected under the first prong if the impairment would be substantially limiting when active. *See* 42 U.S.C. 12102(4)(D); § 1630.2(j)(1)(vii). Thus, an individual who has cancer that is currently in remission is an individual with a disability under the "actual disability" prong because he has an impairment that would substantially limit normal cell growth when active. He is also covered by the "record of" prong based on his history of having had an impairment that substantially limited normal cell growth.

Finally, this section of the EEOC's regulations makes it clear that an individual with a record of a disability is entitled to a reasonable accommodation currently needed for limitations resulting from or relating to the past substantially limiting impairment. This conclusion, which has been the Commission's long-standing position, is confirmed by language in the ADA Amendments Act stating that individuals covered only under the "regarded as" prong of the definition of disability are not entitled to reasonable accommodation. *See* 42 U.S.C. 12201(h). By implication, this means that individuals covered under the first or second prongs are otherwise eligible for reasonable accommodations. *See* 2008 House Judiciary Committee Report at 22 ("This makes clear that the duty to accommodate . . . arises only when an individual establishes coverage under the first or second prong of the definition."). Thus, as the regulations explain, an employee with an impairment that previously substantially limited but no longer substantially limits, a major life activity may need leave or a schedule change to permit him or her to attend follow-up or "monitoring" appointments from a health care provider.

Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity

Coverage under the "regarded as" prong of the definition of disability should not be difficult to establish. *See* 2008 House Judiciary Committee Report at 17 (explaining that Congress never expected or intended it would be a difficult standard to meet). Under the third prong of the definition of disability, an individual is "regarded as having such an impairment" if the individual is subjected to an action prohibited by the ADA because of an actual or perceived impairment that is not "transitory and minor."

This third prong of the definition of disability was originally intended to express Congress's understanding that "unfounded concerns, mistaken beliefs, fears, myths, or prejudice about disabilities are often just as disabling as actual impairments, and [its] corresponding desire to prohibit discrimination founded on such perceptions." 2008 Senate Statement of Managers at 9; 2008 House Judiciary Committee Report at 17 (same). In passing the original ADA, Congress relied extensively on the reasoning of *School Board of Nassau County* v. *Arline*[4] "that the negative reactions of others are just as disabling as the actual impact of an impairment." 2008 Senate Statement of Managers at 9. The ADAAA reiterates Congress's reliance on the broad views enunciated in that decision, and Congress "believe[s] that courts should continue to rely on this standard." Id.

Accordingly, the ADA Amendments Act broadened the application of the "regarded as" prong of the definition of disability. 2008 Senate Statement of Managers at 9–10. In doing so, Congress rejected court decisions that had required an individual to establish that a covered entity perceived him or her to have an impairment that substantially limited a major life activity. This provision is designed to restore Congress's intent to allow individuals to establish coverage under the "regarded as" prong by showing that they were treated adversely because of an impairment, without having to establish the covered entity's beliefs concerning the severity of the impairment. Joint Hoyer-Sensenbrenner Statement at 3.

Thus it is not necessary, as it was prior to the ADA Amendments Act, for an individual to demonstrate that a covered entity perceived him as substantially limited in the ability to perform a major life activity in order for the individual to establish that he or she is covered under the "regarded as" prong. Nor is it necessary to demonstrate that the impairment relied on by a covered entity is (in the case of an actual impairment) or would be (in the case of a perceived impairment) substantially limiting for an individual to be "regarded as having such an impairment." In short, to qualify for coverage under the "regarded as" prong, an individual is not subject to any functional test. *See* 2008 Senate Statement of Managers at 13 ("The functional limitation imposed by an impairment is irrelevant to the third 'regarded as' prong."); 2008 House Judiciary Committee Report at 17 (that is, "the individual is not required to show that the perceived impairment limits performance of a major life activity"). The concepts of "major life activities" and "substantial limitation" simply are not relevant in evaluating whether an individual is "regarded as having such an impairment."

To illustrate how straightforward application of the "regarded as" prong is, if an employer refused to hire an applicant because of skin graft scars, the employer has regarded the applicant as an individual with a disability. Similarly, if an employer

[4] 480 U.S. at 282–83.

terminates an employee because he has cancer, the employer has regarded the employee as an individual with a disability.

A "prohibited action" under the "regarded as" prong refers to an action of the type that would be unlawful under the ADA (but for any defenses to liability). Such prohibited actions include, but are not limited to, refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

Where an employer bases a prohibited employment action on an actual or perceived impairment that is not "transitory and minor," the employer regards the individual as disabled, whether or not myths, fears, or stereotypes about disability motivated the employer's decision. Establishing that an individual is "regarded as having such an impairment" does not, by itself, establish liability. Liability is established only if an individual meets the burden of proving that the covered entity discriminated unlawfully within the meaning of section 102 of the ADA, 42 U.S.C. 12112.

Whether a covered entity can ultimately establish a defense to liability is an inquiry separate from, and follows after, a determination that an individual was regarded as having a disability. Thus, for example, an employer who terminates an employee with angina from a manufacturing job that requires the employee to work around machinery, believing that the employee will pose a safety risk to himself or others if he were suddenly to lose consciousness, has regarded the individual as disabled. Whether the employer has a defense (e.g., that the employee posed a direct threat to himself or coworkers) is a separate inquiry.

The fact that the "regarded as" prong requires proof of causation in order to show that a person is covered does not mean that proving a "regarded as" claim is complex. While a person must show, for both coverage under the "regarded as" prong and for ultimate liability, that he or she was subjected to a prohibited action because of an actual or perceived impairment, this showing need only be made once. Thus, evidence that a covered entity took a prohibited action because of an impairment will establish coverage and will be relevant in establishing liability, although liability may ultimately turn on whether the covered entity can establish a defense.

As prescribed in the ADA Amendments Act, the regulations provide an exception to coverage under the "regarded as" prong where the impairment on which a prohibited action is based is both transitory (having an actual or expected duration of six months or less) and minor. The regulations make clear (at § 1630.2(j)(2) and § 1630.15(f)) that this exception is a defense to a claim of discrimination. "Providing this exception responds to concerns raised by employer organizations and is reasonable under the 'regarded as' prong of the definition because individuals seeking coverage under this prong need not meet the functional limitation requirement contained in the first two prongs of the definition." 2008 Senate Statement of Managers at 10; *see* also 2008 House Judiciary Committee Report at 18 (explaining that "absent this exception, the third prong of the definition would have covered individuals who are regarded as having common ailments like the cold or flu, and this exception responds to concerns raised by members of the business community regarding potential abuse of this provision and misapplication of resources on individuals with minor ailments that last only a short period of time"). However, as an exception to the general rule for broad coverage under the "regarded as" prong, this limitation on coverage should be construed narrowly. 2008 House Judiciary Committee Report at 18.

The relevant inquiry is whether the actual or perceived impairment on which the employer's action was based is objectively "transitory and minor," not whether the employer claims it subjectively believed the impairment was transitory and minor. For example, an employer who terminates an employee whom it believes has bipolar disorder cannot take advantage of this exception by asserting that it believed the employee's impairment was transitory and minor, since bipolar disorder is not objectively transitory and minor. At the same time, an employer that terminated an employee with an objectively "transitory and minor" hand wound, mistakenly believing it to be symptomatic of HIV infection, will nevertheless have "regarded" the employee as an individual with a disability, since the covered entity took a prohibited employment action based on a perceived impairment (HIV infection) that is not "transitory and minor."

An individual covered only under the "regarded as" prong is not entitled to reasonable accommodation. 42 U.S.C. 12201(h). Thus, in cases where reasonable accommodation is not at issue, the third prong provides a more straightforward framework for analyzing whether discrimination occurred. As Congress observed in enacting the ADAAA: "[W]e expect [the first] prong of the definition to be used only by people who are affirmatively seeking reasonable accommodations or modifications. Any individual who has been discriminated against because of an impairment—short of being granted a reasonable accommodation or modification—should be bringing a claim under the third prong of the definition which will require no showing with regard to the severity of his or her impairment." Joint Hoyer-Sensenbrenner Statement at 6.

Section 1630.2(m) Qualified Individual

The ADA prohibits discrimination on the basis of disability against a qualified individual." * * *

* * * * *

Section 1630.2(o) Reasonable Accommodation

An individual with a disability is considered "qualified" if the individual can perform the essential functions of the position held or desired with or without reasonable accommodation. A covered entity is required, absent undue hardship, to provide reasonable accommodation to an otherwise qualified individual with a substantially limiting impairment or a "record of" such an impairment. However, a covered entity is not required to provide an accommodation to an individual who meets the definition of disability solely under the "regarded as" prong.

The legislative history of the ADAAA makes clear that Congress included this provision in response to various court decisions that had held (pre-Amendments Act) that individuals who were covered solely under the "regarded as" prong were eligible for reasonable accommodations. In those cases, the plaintiffs had been found not to be covered under the first prong of the definition of disability "because of the overly stringent manner in which the courts had been interpreting that prong." 2008 Senate Statement of Managers at 11. The legislative history goes on to explain that "[b]ecause of [Congress's] strong belief that accommodating individuals with disabilities is a key goal of the ADA, some members [of Congress] continue to have reservations about this provision." Id. However, Congress ultimately concluded that clarifying that individuals covered solely under the "regarded as" prong are not entitled to reasonable accommodations "is an acceptable compromise given our strong expectation that such individuals would now be covered under the first prong of the definition [of disability], properly applied"). Further, individuals covered only under the third prong still may bring discrimination claims (other than failure-to-accommodate claims) under title I of the ADA. 2008 Senate Statement of Managers at 9–10.

In general, an accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. There are three categories of reasonable accommodation. These are (1) accommodations that are required to ensure equal opportunity in the application process; (2) accommodations that enable the employer's employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable the employer's employees with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities. It should be noted that nothing in this part prohibits employers or other covered entities from providing accommodations beyond those required by this part.

* * * * *

Section 1630.4 Discrimination Prohibited

Paragraph (a) of this provision prohibits discrimination on the basis of disability against a qualified individual in all aspects of the employment relationship. The range of employment decisions covered by this nondiscrimination mandate is to be construed in a manner consistent with the regulations implementing section 504 of the Rehabilitation Act of 1973.

Paragraph (b) makes it clear that the language "on the basis of disability" is not intended to create a cause of action for an individual without a disability who claims that someone with a disability was treated more favorably (disparate treatment), or was

provided a reasonable accommodation that an individual without a disability was not provided. *See* 2008 House Judiciary Committee Report at 21 (this provision "prohibits reverse discrimination claims by disallowing claims based on the lack of disability"). Additionally, the ADA and this part do not affect laws that may require the affirmative recruitment or hiring of individuals with disabilities, or any voluntary affirmative action employers may undertake on behalf of individuals with disabilities. However, part 1630 is not intended to limit the ability of covered entities to choose and maintain a qualified workforce. Employers can continue to use criteria that are job related and consistent with business necessity to select qualified employees, and can continue to hire employees who can perform the essential functions of the job.

The Amendments Act modified title I's nondiscrimination provision to replace the prohibition on discrimination "against a qualified individual with a disability because of the disability of such individual" with a prohibition on discrimination "against a qualified individual on the basis of disability." As the legislative history of the ADAAA explains: "[T]he bill modifies the ADA to conform to the structure of Title VII and other civil rights laws by requiring an individual to demonstrate discrimination 'on the basis of disability' rather than discrimination 'against an individual with a disability' because of the individual's disability. We hope this will be an important signal to both lawyers and courts to spend less time and energy on the minutia of an individual's impairment, and more time and energy on the merits of the case—including whether discrimination occurred because of the disability, whether an individual was qualified for a job or eligible for a service, and whether a reasonable accommodation or modification was called for under the law." Joint Hoyer-Sensenbrenner Statement at 4; *see also* 2008 House Judiciary Report at 21 ("This change harmonizes the ADA with other civil rights laws by focusing on whether a person who has been discriminated against has proven that the discrimination was based on a personal characteristic (disability), not on whether he or she has proven that the characteristic exists.").

Section 1630.5 Limiting, Segregating and Classifying

This provision and the several provisions that follow describe various specific forms of discrimination that are included within the general prohibition of § 1630.4. The capabilities of qualified individuals must be determined on an individualized, case by case basis. Covered entities are also prohibited from segregating qualified employees into separate work areas or into separate lines of advancement on the basis of their disabilities.

* * * * *

Section 1630.9: Not Making Reasonable Accommodation

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Section 1630.9(e)

The purpose of this provision is to incorporate the clarification made in the ADA Amendments Act of 2008 that an individual is not entitled to reasonable accommodation under the ADA if the individual is only covered under the "regarded as" prong of the definition of "individual with a disability." However, if the individual is covered under both the "regarded as" prong and one or both of the other two prongs of the definition of disability, the ordinary rules concerning the provision of reasonable accommodation apply.

Section 1630.10 Qualification Standards, Tests, and Other Selection Criteria

Section 1630.10(a)—In General

The purpose of this provision is to ensure that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job. It is to ensure that there is a fit between job criteria and an applicant's (or employee's) actual ability to do the job. Accordingly, job criteria that even unintentionally screen out, or tend to screen out, an individual with a disability or a class of individuals with disabilities because of their disability may not be used unless the employer demonstrates that those criteria, as used by the employer, are job related for the position to which they are being applied and are consistent with business necessity. The concept of "business necessity" has the same meaning as the concept of "business necessity" under section 504 of the Rehabilitation Act of 1973.

Selection criteria that exclude, or tend to exclude, an individual with a disability or a class of individuals with disabilities because of their disability but do not concern an essential function of the job would not be consistent with business necessity.

The use of selection criteria that are related to an essential function of the job may be consistent with business necessity. However, selection criteria that are related to an essential function of the job may not be used to exclude an individual with a disability if that individual could satisfy the criteria with the provision of a reasonable accommodation. Experience under a similar provision of the regulations implementing section 504 of the Rehabilitation Act indicates that challenges to selection criteria are, in fact, often resolved by reasonable accommodation.

This provision is applicable to all types of selection criteria, including safety requirements, vision or hearing requirements, walking requirements, lifting requirements, and employment tests. *See* 1989 Senate Report at 37–39; House Labor Report at 70–72; House Judiciary Report at 42. As previously noted, however, it is not the intent of this part to second guess an employer's business judgment with regard to production standards. *See* § 1630.2(n) (Essential Functions). Consequently, production standards will generally not be subject to a challenge under this provision.

The Uniform Guidelines on Employee Selection Procedures (UGESP) 29 CFR part 1607 do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

Section 1630.10(b)—Qualification Standards and Tests Related to Uncorrected Vision

This provision allows challenges to qualification standards based on uncorrected vision, even where the person excluded by a standard has fully corrected vision with ordinary eyeglasses or contact lenses. An individual challenging a covered entity's application of a qualification standard, test, or other criterion based on uncorrected vision need not be a person with a disability. In order to have standing to challenge such a standard, test, or criterion, however, a person must be adversely affected by such standard, test or criterion. The Commission also believes that such individuals will usually be covered under the "regarded as" prong of the definition of disability. Someone who wears eyeglasses or contact lenses to correct vision will still have an impairment, and a qualification standard that screens the individual out because of the impairment by requiring a certain level of uncorrected vision to perform a job will amount to an action prohibited by the ADA based on an impairment. [*See* § 1630.2(l); Appendix to § 1630.2(l).)

In either case, a covered entity may still defend a qualification standard requiring a certain level of uncorrected vision by showing that it is job related and consistent with business necessity. For example, an applicant or employee with uncorrected vision of 20/100 who wears glasses that fully correct his vision may challenge a police department's qualification standard that requires all officers to have uncorrected vision of no less than 20/40 in one eye and 20/100 in the other, and visual acuity of 20/20 in both eyes with correction. The department would then have to establish that the standard is job related and consistent with business necessity.

Section 1630.15 Defenses

* * * * *

Section 1630.15(f) Claims Based on Transitory and Minor Impairments Under the "Regarded As" Prong

It may be a defense to a charge of discrimination where coverage would be shown solely under the "regarded as" prong of the definition of disability that the impairment is (in the case of an actual impairment) or would be (in the case of a perceived impairment) both transitory and minor. Section 1630.15(f)(1) explains that an individual cannot be "regarded as having such an impairment" if the impairment is both transitory (defined by the ADAAA as lasting or expected to last less than six months) and minor. Section 1630.15(f)(2) explains that the determination of "transitory and minor" is made objectively. For example, an individual who is denied a promotion because he has a minor back injury would be "regarded as" an individual with a disability if the back impairment lasted or was expected to last more than six months. Although minor, the impairment is not transitory. Similarly, if an employer discriminates against an employee based on the employee's bipolar disorder (an impairment that is not transitory and minor), the employee is "regarded as" having a

disability even if the employer subjectively believes that the employee's disorder is transitory and minor.

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LEAVE AS A REASONABLE ACCOMMODATION CHEAT SHEET

1. Policy Evaluation and Implementation

(a) Leave of absence for medical reasons should be provided regardless of FMLA eligibility.

(b) No automatic termination upon expiration of medical leave.

(c) No requirement of medical release to perform full duties upon expiration of medical leave.

(d) Reference that reasonable accommodations may be available to allow the performance of essential job functions.

(e) Reference specific contact information and the individuals responsible for addressing requests for and questions about reasonable accommodations.

2. Creation and Implementation of Practices

(a) Document at all points

(b) Create a guideline to follow when an employee approaches end of policy-granted leave

(i) Send a letter prior to policy-granted leave expires

(1) Inform of leave end date and obligation to contact company for accommodation/extension.

(2) Provide deadline for response and consequence of not responding.

(ii) Send a letter if the employee responds and requests an accommodation

(1) Include Health Care Certification Form and the employee's job description.

(2) Instruct the employee to have his or her doctor complete the form.

(3) The Health Care Certification Form should ask for the major life activities limited by the condition; the recommended accommodations which will enable to employee to perform the essential functions of the position; the duration for which the accommodation will be required; and if the accommodation is leave, the amount needed and anticipated return to work date.

(iii) Send a letter if the employee reaches the end of policy-granted leave and has not responded/does not return to work

(1) No automatic termination

(2) Remind the employee of the first letter.

(3) Inform the employee that leave has expired.

*Circumstances may require revision or modification of the above suggested practices.

(4) Provide a brief period of time to respond and discuss possible return to work/accommodations.

(5) State that termination will be effective absent a timely response

3. **Employees who request leave beyond what is provided for by policy**

(a) Consider length of request and require Health Care Certification Form completion

(b) Consider alternative accommodations which will allow the employee to return to work.

(c) Confirm why a particular amount of additional leave will allow the employee to return to work.

(d) Review the amount of additional leave granted in other cases.

(e) Engage in the interactive process while the employee is out, and send letters.

(f) Document discussions.

4. **Consider whether a job transfer or modification may be a viable alternative**

(a) Job descriptions: Must be updated, accurate and correctly reflect the essential functions of the position.

(b) Identify potential vacancies and whether the employee can fill them or is entitled to fill them.

(c) Determine whether the employee can perform the essential duties of a vacant position with or without reasonable accommodation.

(d) Document your investigation and discussions.

*Circumstances may require revision or modification of the above suggested practices.

B

Continuing Wage-Hour Drama: New Federal and New York Developments

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New Developments Under FLSA

FLSA Regulations

- "Clean-Up Regulations"
  - Fluctuating workweeks
  - Compensatory time for public employers
  - Tipped employees
  - Meal Credit
  - Youth opportunity wage
  - Commuting time

FLSA Retaliation

- Kasten v. Satin-Gobain Performance Plastics
  - Recent Supreme Court case
  - Oral complaint over timekeeping practices constitutes protected activity
  - No requirement that complaint be in writing
  - Statutory language protecting "any complaint"

FLSA – Treatment of Interns

- Solis v. Laurelbrook Sanitarium and School Inc., No. 09-6128 (6th Cir. 2011)
  - Rejected DOL's six-factor test for determining "employee" status
  - Affirmed use of "Primary Benefit Test," which ascertains which party derives the primary benefit from the relationship
- Second Circuit will still probably apply DOL test

The Wage Theft Prevention Act

The Wage Theft Prevention Act

- Effective April 9, 2011
- Written notification of compensation information
- Additional items on pay stubs

Written Notification of Compensation Information

- Required disclosures
  - Regular rate of pay
  - Overtime rate, if applicable
  - Whether paid by the hour, shift, salary, etc.
  - Allowances claimed as part of the minimum wage
  - Regular payday
  - Name of the employer, including any "doing business as" names
  - Physical address of employer's main office and mailing address if different
  - Telephone number of employer

continued

Written Notification of Compensation Information

- Time of hiring
- On or before February 1 of each year

continued

Written Notification of Compensation Information

- Signed and dated written acknowledgment
- English and primary language of employee
- Employee accurately identified primary language
- 6-year record keeping requirement

Information on Wage Payment Statements

- Name of employee and employer
- Address and phone number of employer
- Rate(s) of pay
- Whether paid by hour, shift, salary, etc.
- Dates of work covered by payment of wages
- Gross wages
- Deductions
- Allowances
- Net wages

continued

Information on Wage Payment Statements

- Non-exempt employees
  - Regular rate of pay
  - Overtime rate of pay
  - Number of hours worked
  - Number of overtime hours worked

DOL Templates

- English, Spanish, Chinese, Korean, Creole, Polish, Russian
- Employers can develop their own notices

Damages

- Failure to provide notice
  - If notice is not provided within 10 business days of the employee's first day of employment, employee may bring a civil action for damages of $50 for each workweek that the violation occurred, not to exceed $2,500, **together with costs and attorneys' fees**
  - Commission of Labor may bring independent civil action
- Failure to provide pay statements
  - Employees shall be awarded damages of $100 for each workweek the violation occurred, not to exceed $2,500, **together with costs and reasonable attorneys' fees**
  - Commission of Labor may bring independent civil action

Continuing Wage-Hour Drama:

New Federal and New York Developments

Lyle S. Zuckerman
Roy P. Salins

I. The DOL Issues Updated Regulations Under the FLSA

Effective May 5, 2011, the DOL issued "clean up regulations" designed to fill gaps in its regulations concerning overtime, fluctuating workweeks, tipped employees, and other matters. (A copy of the updated regulations are attached hereto.)

Tip-Credit Provision

Employers may pay a tipped employee less than minimum wage, so long as the wage and the tips are at least equivalent to the minimum wage. The DOL's final rule allows employers to take a tip credit of $5.12 per hour, which means that employers must pay their tipped employees at least $2.13 per hour under federal law. Employers taking tip credits are now required to provide the following notifications to its tipped employees:

- The amount of the cash wage that is to be paid to the tipped employee by the employer;
- The additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which may not exceed the value of the tips actually received by the employee;
- That all tips received by the employee must be retained by the employee, except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and
- That the tip credit shall not apply to any employee who has not been informed of these requirements.

Fluctuating Workweek

The DOL rejected a change in the manner in which employers pay non-exempt employees who work a fluctuating workweek. Employers are permitted to pay a fixed salary to a non-exempt employee who works a schedule with varying weekly hours, pay the employee their entire fixed salary for workweeks in which they work less than 40 hours, and then pay the employee time and a half for any overtime hours worked in the workweek. The new rule concluded that bonuses and premium pay (*i.e.* working a "graveyard shift") are incompatible with the fluctuating workweek method of computing overtime.

Youth Opportunity Wage

Employers may now pay employees under 20 years of age a reduced minimum wage of $4.25 per hour during the first 90 days of employment. Of course, the DOL forbids employers from displacing current workers in favor of an employee that can be paid $4.25 per hour.

Meal Credit Provision

The DOL rejected a proposed rule that would have permitted employers to take a meal credit even when the employee did not voluntarily accept the meal.

Pay for Commuting in Employer-Provided Car

The DOL chose not to amend FLSA regulations to include an example in which commuting to work in an employer-provided car would not be considered compensable time.

II. Supreme Court Continues Expansive Interpretation of Retaliation Claims

On March 22, 2011, the U.S. Supreme Court held that oral complaints are protected under the Fair Labor Standards Act's (FLSA) anti-retaliation provisions. In *Kasten v. Saint-Gobain Performance*, the Court resolved a split among the circuits as to whether the statutory term "filed a complaint" found in the FLSA encompasses oral, as well as written, complaints. A 6-2 majority found that, while the language of the statute may be ambiguous, the intent of the FLSA compelled the conclusion that oral complaints are indeed protected. This should come as no surprise to anyone, given how the Court has ruled in a number of cases involving retaliation over the past few years.

In *Kasten*, the employee claimed that he verbally "raised a concern" with his shift supervisor about the location of his employer's time clocks, which he felt prevented employees from being paid for time they spent donning and doffing protective gear in violation of the FLSA. Kasten also alleged that he told his lead operator that he was "thinking about starting a lawsuit about the placement of the time clocks" and he informed an HR employee that the company would lose if he challenged the location of the time clocks in court.

The company eventually terminated Kasten's employment, after repeated warnings, for failing to record his comings and goings on the company's time clocks. Kasten, not surprisingly, contended that he was discharged because he complained orally to company officials about the location of the time clocks.

The district court entered summary judgment in the company's favor, holding that the FLSA does not protect oral complaints, and the Seventh Circuit affirmed the decision.

The Supreme Court reversed the Seventh Circuit's ruling, holding that oral complaints are indeed protected. In arriving at this conclusion, the Court gave deference to the position taken by the Secretary of Labor that the phrase "filed a complaint" encompasses oral complaints, as well as written ones. The Department of Labor articulated this position in an enforcement action years ago, and it has reaffirmed this position in subsequent briefs.

Writing for the majority, Justice Breyer set forth the minimum requirements that an oral complaint must meet in order to protect the person who made it, namely that it "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 the protection." The Court held that this standard may be met by both oral and written complaints.

As noted above, the *Katsen* decision marks another expansion of the protections afforded to employees who come forward to report or complain about potential violations of the laws intended to protect them.

Most recently, in January 2011, the Supreme Court found in favor of a man who claimed that he was fired because his fiancé filed a sex discrimination claim against their mutual employer (*Thompson v. North American Stainless*). In a previous term, the Court held that an employee may bring a retaliation claim under Section 1981 (*CBOCS West, Inc. v. Humphries*) and that a federal employee may sue for retaliation under the Age Discrimination in Employment Act, despite the lack of the term "retaliation" in either statute (*Gomez-Perecz v. Potter*). The Court also found in favor of an employee who claimed that she was fired after answering questions relating to another employee's sex harassment claim (*Crawford v. Metropolitan Government of Nashville and Davidson County*) and held that retaliation under Title VII encompasses any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination" (*Burlington Northern & Santa Fe Railway Co. v. White*).

It is important that employers are aware of this trend toward expanding retaliation claims. Employers need to take all complaints seriously, whether communicated verbally or in writing. Oral complaints, however, are hard to handle because they often place the employer in the tricky position of having to prove a negative – i.e., that the employee did not complain. To combat this problem, prudent employers should articulate, in writing, where, how, when and to whom an employee should make an oral complaint within the company. It would also be wise for employers to include this procedure for making oral complaints in its employee handbook. Articulating the oral complaint process could provide an employer with a successful defense in the event that an employee makes a complaint outside the established process.

III. Unpaid Interns

On April 28, 2011, the Sixth Circuit rejected the DOL's longstanding test for determining whether unpaid interns or other student trainees are employees and, therefore, subject to the protections of the FLSA. In *Solis, Secretary of Labor v. Laurelbrook Sanitorium and School Inc.*, No. 09-6128 (6th Cir. Apr. 28, 2011), the Court affirmed the district court's dismissal of a DOL lawsuit against a religious school based on its contention that the individuals who participated in the school's student work program were "employees" under the FLSA.

Most significantly, the Sixth Circuit refused to apply the DOL's six-factor test for determining "employee" status. These factors are:

- the training, even though it includes actual operation of the facilities of the employer, is similar to that which would be given in a vocational school;
- the training is for the benefit of the trainees or students;
- the trainees or students do not displace regular employees, but work under their close observation;
- the employer that provides the training derives no immediate advantage from the activities of the trainees or students; and on occasion his operations may actually be impeded;

- the trainees or students are not necessarily entitled to a job at the conclusion of the training period; and

- the employer and the trainees or students understand that the trainees or students are not entitled to wages for the time spent in training.

The Department of Labor's longstanding position has been that all six criteria must apply before the agency will consider that a youth engaged in a career education program is not an employee for purposes of the FLSA. However, the Sixth Circuit ruled that there is no bright line rule concerning whether a student worker is an employee under the FLSA. Instead, the court applied the "primary benefit" test in making its determination, which focuses on whether the student or the employer derives the primary benefit from the working relationship. For example, if the student's presence provides no benefit to the employer (for example, the student is merely observing employees perform their jobs), the student will most likely not be considered an employee under the FLSA.

IV. New York Wage Theft Prevention Act

Employers with New York employees should be aware that the New York Wage Theft Prevention Act ("WTPA") has become effective. (A copy of the law is attached hereto.) The new law, which became effective April 9, 2011, imposes notice requirements on employers and imposes enhanced penalties for willful and non-willful violations of the wage-hour laws.

The WTPA generally requires that employers notify all newly hired employees and all current employees of the following: (i) the employee's rate of pay; (ii) whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or otherwise; (iii) any allowances claimed as part of the minimum wage such as tips, meal, or lodging allowance; (iv) the employee's regular pay day; and (v) the employer's name (including any DBAs), address and telephone number. Additionally, the WTPA codified several regulations concerning the information required to be included on the pay stubs given to employees with their paychecks.

The New York State Department of Labor ("NYSDOL") has posted sample notices on its website, which comply with the WTPA's notification requirements. Specifically, the DOL has issued notices for:

- Hourly rate employees;

- Multiple hourly rate employees;

- Employees paid a weekly rate or salary for a fixed number of hours fewer than 40 in a week;

- Employees paid a salary for varying hours, day rate, piece rate, flat rate, or other non-hourly pay;

- Employees paid under the Prevailing Rate; and

- Exempt Employees

(The NYSDOL's sample notices are attached hereto.) Significantly, the NYSDOL's sample notices include statements and sections that are not mentioned in the statute. For example, the DOL's sample notice to exempt employees adds a statement that "[m]ost workers in NYS must receive at least 1½ times their regular rate of pay for all hours worked over 40 in a workweek, with few exceptions. A limited number of employees must be paid overtime at 1½ times the minimum wage rate, or not at all." These notices, however, are merely samples, and employers may craft their own notices (as long as they are compliant with the terms of the WTPA).

In addition, the NYSDOL has issued FAQs that answer many important questions that were posed to the NYSDOL since passage of the WTPA. (The NYSDOL's FAQs are attached hereto.) Of particular note, the DOL has provided the following guidance:

Who Is Covered By The WTPA?

- All private sector employers must comply with the WTPA.
- The WTPA applies to charter schools, private schools, and not-for-profit corporations.

When And How Are Notices To Be Provided?

- Notices are required at the time of hire, and yearly between January 1 and February 1. Employers may not give a notice at other times of the year.
- Notices must be given each year even if none of the information has changed.
- Notices may be included as part of letters or employment agreements given to new hires as long as the notice is on its own form.
- Notices may be given electronically, but only if the employee can acknowledge receipt of the notice and print out a copy for their file.

Must Commission-based Employees and Unionized Employees Receive the Notices?

- Commission-based Employees: Under Labor Law § 191.1c, commission salespeople are required to sign a written commission agreement. The DOL advises that the commission agreement be attached to the pay notice each year.
- Unionized Employees: Since collective bargaining agreements may cover multiple job titles that are paid multiple wage rates, individual employees must receive notices of their applicable wage rates.

Are Notices Required for Changes to Wage Rates?

- Employers in the hospitality industry must provide a new notice each time a wage rate changes.

- For employers not in the hospitality industry, notice is not required where there is an increase in a wage rate and that increase is reflected on the next wage payment statement.

- For any reduction in a wage rate, the employee must be notified in writing before the reduction is implemented.

In What Languages Will Employers Be Required to Provide Notices?

- Sample notices will be available in English, Spanish, Chinese, Korean, Creole, Polish, and Russian.

- Employers must provide notices to employees in their primary language if the NYSDOL provides notice templates in that language. Otherwise, the employer is only required to provide the notice in English.

Wage Theft Prevention Act Frequently Asked Questions (FAQ)

The Wage Theft Prevention Act, which goes into effect April 9, 2011, amends the notice of wage rate requirements and expands the civil and criminal remedies that are available when employers fail to comply with these provisions.

Section 195 of the Labor Law, as amended by the Act, requires that employers provide notice to employees of their rate(s) of pay, designated pay day, the employer's intent to claim allowances (like tip or meal allowances) as part of the minimum wage, and the basis of wage payment (whether paying by hour, shift, day, week, piece, etc.). The law requires that the notice contain the employer's "doing business as" names, and that it be provided at the time of hiring, annually on or before February 1st of each year of employment, and within 7 days of a change if the change is not listed on the employee's pay stub for the following pay period. The notice must be provided in the employee's primary language, as identified by the employee, through translated notices provided by the Department of Labor. Those notice templates are below. The Act also amends the recordkeeping and statutory payroll record and paystub requirements to include information currently required pursuant to regulation, and requires employers to maintain copies of payroll records for six years (as is currently required by regulation).

The Act clarifies and expands the Department of Labor's authority to enforce the Labor Law, and expands an employee's ability to bring complaints and private actions for such violations. The protection against prohibited retaliation is strengthened by closing loopholes on what actions constitute retaliation and expands the remedies available to employees.

Based upon inquiries received by the Department in anticipation of the Act's effective date, the following are frequently asked questions regarding the Notice requirements of the Wage Theft Prevention Act:

1. **Q: What is the Wage Theft Prevention Act?**

   A: A new law, effective April 9, 2011, gives greater protection to workers, and makes changes in the way they are notified of their pay rates and receive wage statements.

2. **Q: Who is covered by the law?**

   A: All private sector employers are covered. If you have employees who work in other states they are not covered. Federal, state and local government employers are also not covered, but it is important to note that charter schools, private schools, and not-for-profit corporations are covered, as they are not public entities.

3. **Q: What does the law require?**

   A: Workers have to receive yearly pay notices, proper wage statements, and be free from retaliation for complaining about possible violations of the Labor Law.

4. **Q: What is required in the pay notice given to workers?**

   A: The Notice must contain the following information:

   - The employee's rate(s) of pay;
   - The basis of the employee's rate(s) of pay (e.g. by the hour, shift, day, week, salary, piece, commission, or other);
   - Whether the employer intends to claim allowances as part of the minimum wage, including tip, meal, or lodging allowances, and the amount of those allowances;
   - The employee's regular pay day designated by the employer in accordance with the frequency of pay requirements in the Labor Law[1];
   - The name of the employer and any "doing business as" names used by the employer;
   - The physical address of the employer's main office or principal place of business, and a mailing address if different;
   - The telephone number of the employer;
   - Any "such other information as the commissioner deems material and necessary."

5. **Q: What if a worker's primary language is not English?**

   A: Notices need to be given in a worker's primary language if the Department of Labor provides notice templates in that language. Otherwise the notice need only be provided in English. Those template are available on our website, below.

6. **Q: For what languages will the Department provide templates?**

   A: Templates will be available in English, Spanish, Chinese, Korean, Creole, Polish and Russian. They will cover a number of likely situations companies may face. You can choose the one which meets your needs.

7. **Q: Do I have to use the Department's templates?**

   A: No, employers can develop their own notices so long as they contain all the information required by the law.

8. **Q: When are pay notices required?**

   A: Notices are required at the time of hire, yearly between January 1 and February 1,

[1] Section 191 of the New York State Labor Law regulates how frequently an employee must be paid. Under that Section, "manual workers" must be paid on a weekly basis, "clerical and other workers," must be paid according to the terms of their employment agreement and "not less frequently than semi-monthly on regular pay days designated in advance by the employer," "railroad workers" must be paid on or before Thursday of each week the wages earned during the seven-day period ending in Tuesday of the preceding week; "commission salespersons" must be paid in accordance with their agreed terms of employment but not less frequently than once in each month and not later than the last day of the month following the month in which the wages are earned; and employees employed in a "bona fide executive, administrative or professional capacity whose earnings are in excess of nine hundred dollars a week" must be paid according to the terms of their employment contract.

and when there are changes in the information on the pay notices.

9. **Q: When is the first yearly notice required to be given?**

   A: Between January 1 and February 1 of 2012.

10. **Q: Can I give a notice at other times of the year to satisfy the yearly requirement?**

    A: No.

11. **Q: May the notice be included in letters and/or employment agreements provided to new hires?**

    A: Yes, but must be on its own form.

12. **Q: I have a seasonal business. If a worker is on layoff between January 1 and February 1, when is the annual notice required?**

    A: As soon as the worker first returns from layoff. Only one annual notice needs to be given.

13. **Q: Can a worker waive the notice requirement?**

    A: No.

14. **Q: Can the notice be given electronically?**

    A: Yes, but their needs to be a system where the worker can acknowledge the receipt of the notice and print out a copy of the notice.

15. **Q: What if a worker refuses to sign the notice?**

    A: The employer should still give the notice to the worker and note the worker's refusal on its copy of the notice.

16. **Q: Do employers have to keep a copy of the notice?**

    A: Yes. Notices must be kept for six years and be available to the Department upon request.

17. **Q: Do I have to give a new notice every time a wage rate changes?**

    A: Except for the employers in the hospitality industry, notice is not required where there is an increase in a rate and the new rate is shown on the next payment of wages. For any reduction of wage rate, an employee must be notified in writing prior to the reduction being implemented. Employers in the hospitality industry currently

need to give a new notice every time a wage rate changes.

18. Q: What procedures should be followed if an employee has multiple pay rates?

A: An employer must put all pay rates on the wage statement.

19. Q: Does a new notice need to be given each year even if none of the information has changed?

A: Yes.

20. Q: Do workers exempt from state overtime requirements still need to get a pay notice?

A: Yes.

21. Q: Does the employer have to identify the specific state exemption for workers exempt from overtime requirements?

A: No.

22. Q: What should we do if the worker has multiple hourly or piece rates?

A: The purpose of the notice is to inform workers of the wage rates that apply to them. Multiple rates need to be identified either on the notice or on a separate sheet attached to the notice. Only the rates used to determine a worker's pay need be shown on the wage statement for that period.

23. Q: What about salespersons whose wages are all or partially based on commissions?

A: Labor Law section 191.1c already requires commission salespersons to receive and sign for a copy of their commission agreement. This agreement should be attached to the pay notice and a copy of each document kept by the employer.

24. Q: What if I have a bonus or incentive plan on a weekly or less frequent time period?

A: So long as the employee initially was given a description or it is clearly shown on the wage statement for the period in which it is paid, no additional notice is required.

25. Q: What about retroactive wage increases?

A: The amounts need to be noted separately on the wage statement for the period in which it is paid.

26. Q: Does the notice requirement apply to workers covered by a union contract?

A: Yes. Union contracts may cover wage rates for multiple titles and not give the specific pay date or other information required by the law. Individual workers need to have notices of the wage rates that apply to them.

27. Q: Are exempt employees, including professionals, executives, or administrators, excluded from the notice requirements?

A: No. Since Section 195 does not contain any exclusions or exemptions from the notice requirements, the notice requirements in Section 195 apply to all employees regardless of their exempt status.

28. Q: What is the penalty for not giving proper notice?

A: Employers can be assessed damages by the Department of $50.00 per week per worker if proper notice is not given.

29. Q: Can a worker sue for damages on his/her own?

A: Yes, but the maximum amount an individual worker can recover is $2,500.00.

30. Q: How often must wage statements be given?

A: A statement must be given with each payment of wages.

31. Q: In addition to those items previously required on wage statements such as wage rates, hours worked, gross wages, allowances and deductions taken and net wages paid are there any new requirements?

A: Yes. The statement has to show the name, address and phone number of the employer as well as the beginning and ending date for the period covered by that payment.

32. Q: Can wage statements be provided electronically?

A: Yes, but workers must be able to access their statements on a computer provided by the employer and be able to print a copy for their records.

33. Q: Will the Department of Labor provide a model wage statement for employers to use?

A: Because wage statement entries will vary greatly from employer to employer, the Department will prepare a sample statement showing types of entries which may be

necessary.

34. Q: What is the penalty for not providing a proper wage statement?

A: Employers can be assessed changes by the Department of $100.00 per week per worker if proper wage statements are not given.

35. Q: Can a worker sue for not receiving a proper wage statement?

A: Yes, but damages are capped at $2,500.00 per worker.

36. Q: What is retaliation?

A: Any action which negatively affects workers such as discharge, suspension, transfer to another shift, reduction in wages or hours, which is done because a worker has engaged in a protected activity. Even threatening an employee can be considered retaliation.

37. Q: What are some of these protected activities?

A: Employees have the right to complain to their employer, the Department of Labor, or the Attorney General about a possible violation of the Labor Law and regulations issued under it. They can file a complaint about these possible violations and give information about their conditions of employment to the Department or Attorney General and testify at hearings or other proceedings.

38. Q: Does there really have to be a violation for the worker to be protected?

A: No. If the worker has a good faith belief that there is a problem in the workplace, their activities are protected.

39. Q: What happens if I am accused of retaliation?

A: The Department will discuss the accusation with you and give you a chance to prove that the negative action was not a result of the workers exercising their rights.

40. Q: What are the penalties for retaliation?

A: Employers or their agents can be fined up to $10,000 and assessed another $10,000 in liquidated damages. The Department can also request reinstatement of the worker and/or compensation for lost wages. There are also potential criminal penalties but those would be prosecuted by an agency other than DOL.

41. Q: What if I have any other questions about the Wage Theft Prevention Act?

A: You can email your questions to labor.sm.ls.ask@labor.ny.gov We will address your concerns in a timely manner.

WAGE THEFT AND PREVENTION ACT

LS 53

Instructions: Model Notices of Pay Rates and Pay Days under Section 195.1

New York State Department of Labor, Division of Labor Standards

Instructions: Templates for Notice of Pay Rates, Pay Days and Employee Acknowledgement Under Section 195.1 of the NYS Labor Law

The Department of Labor provides templates for several common types of pay agreements including dual language notices and acknowledgements in Chinese, Haitian-Creole, Korean, Polish, Russian and Spanish. Employers may create their own notices, use or adapt the Labor Department forms, as long as the:

- Required information appears in English and the employee's primary language (if template available)
- Employee receives a copy
- Employee signs an acknowledgment of receipt, and identifies their primary language to the employer
- Employer keeps a copy of the notice and acknowledgement for 6 years

Below are instructions for choosing among the templates. For details or help, see the Guidelines (LS 52) or contact the Division of Labor Standards.

LS 54 Notice for Hourly Rate Employees
This form is for hourly employees who are not exempt from coverage under the applicable State and Federal overtime provisions. For example, use for an employee whose regular rate of pay is $10 per hour and overtime rate is $15 per hour.

LS 55 Notice for Multiple Hourly Rate Employees
This form is for employees who are paid more than one rate for different types of work or different shifts. For example, use this form for an employee who is paid $10 per hour for work as a janitor and $12 per hour for work as a landscaper, or an employee who is paid one rate for working the day shift and another rate for the night shift.

LS 56 Notice for Employees Paid a Weekly Rate or a Salary for a Fixed Number of Hours (40 or Fewer in a Week)*
This form is for employees who receive a weekly rate or a salary for a fixed number of hours (40 or fewer in a workweek).

- The employee's regular rate is the weekly rate or salary divided by the number of hours it is intends compensate.
- The overtime rate is 1½ times the regular rate.

Except in very limited circumstances, it is illegal to pay a fixed (unchanging) weekly rate for work weeks that vary over 40 hours. Even where there is a standard work week, there are usually occasions when work hours vary. For this reason, we have not provided a template for weekly rates for workweeks of over 40 hours. To avoid overtime violations, the Department strongly recommends that employers pay an hourly rate to overtime eligible employees whose standard workweek is over 40 hours.

LS 57 Notice for Employees Paid a Salary for Varying Hours, Day Rate, Piece Rate, Flat Rate, or Other Non-Hourly Basis*
This form is for non-exempt employees who are paid a salary for varying hours of work, a daily rate, piece rates, flat rates, or any other pay that is not based on actual hours worked. In each overtime week, the employer must:

- Calculate the regular rate (total regular pay divided by total hours worked)
- Calculate the overtime premium (1/2 the regular rate)
- Multiply the overtime premium by the number of overtime hours and
- Pay the overtime premium in addition to the salary, day rate, piece rate, flat rate, or other pay

LS 58 Notice for Prevailing Rate and Other Jobs
Use this form when the employee:

- Works on public work projects (i.e., projects covered by the prevailing wage provisions in State and Federal Law) or
- Does mixed prevailing rate and non-prevailing rate work

There is space on the form for the employer to enter the regular and overtime rates to be paid for the other (non-prevailing wage) work. The form explains to the employee that any premium pay received on prevailing wage jobs in a week will be credited toward any overtime premium due for working over 40 hours in the week.

LS 59 Notice for Exempt Employees *
Use this form for employees who are exempt from premium overtime pay under either State regulations or the Federal Fair Labor Standards Act. The employer should identify the overtime exemption or, if an employee is outside of the definition of the term "employee" in Article 19 of the New York State Labor Law, the employer should identify the minimum wage exemption.

* Employers in the Hospitality Industry may not pay a non-exempt employee a non-hourly rate, except for commissioned salespeople.

WAGE THEFT AND PREVENTION ACT

LS 54

Pay Notice for Hourly Rate Employees

Notice and Acknowledgement of Pay Rate and Payday
Under Section 195.1 of the New York State Labor Law
Notice for Hourly Rate Employees

1. Employer Information

Name:

Doing Business As (DBA) Name(s):

FEIN (optional):

Physical Address:

Mailing Address:

Phone:

2. Notice given:

- ☐ At hiring
- ☐ On or before February 1
- ☐ Before a change in pay rate(s), allowances claimed or payday

3. Employee's rate of pay:

$ _____ per hour

4. Allowances taken:

- ☐ None
- ☐ Tips _____ per hour
- ☐ Meals _____ per meal
- ☐ Lodging _____
- ☐ Other _____

5. Regular payday: _____

6. Pay is:

- ☐ Weekly
- ☐ Bi-weekly
- ☐ Other

7. Overtime Pay Rate:

$ _____ per hour (This must be at least 1½ times the worker's regular rate, with few exceptions.)

8. Employee Acknowledgement:

On this day I have been notified of my pay rate, overtime rate (if eligible), allowances, and designated payday on the date given below. I told my employer what my primary language is.

Check one:

- ☐ I have been given this pay notice in English because it is my primary language.
- ☐ My primary language is _____. I have been given this pay notice in English only, because the Department of Labor does not yet offer a pay notice form in my primary language.

_____
Employee Signature

_____
Date

_____
Preparer's Name and Title

The employee must receive a signed copy of this form. The employer must keep the original for 6 years.

LS 54 (03/11)

WAGE THEFT AND PREVENTION ACT

LS 55

Pay Notice for Multiple Hourly Rates

Notice and Acknowledgement of Pay Rate and Payday

Under Section 195.1 of the New York State Labor Law
Notice for Multiple Hourly Rate Employees

1. Employer Information

Name:

Doing Business As (DBA) name(s):

FEIN (optional):

Physical Address:

Mailing Address:

Phone:

2. Notice given:

- ☐ At hiring
- ☐ On or before February 1
- ☐ Before a change in pay rate (s), allowances claimed or payday

3. Employee's rate(s) of pay for each type of work or shift:

$_____per hour for _____

$_____per hour for _____

$_____per hour for _____

4. Allowances taken:

- ☐ None
- ☐ Tips _____ per hour
- ☐ Meals _____ per meal
- ☐ Lodging _____
- ☐ Other _____

5. Regular payday: _____

6. Pay is:

- ☐ Weekly
- ☐ Bi-weekly
- ☐ Other

7. Overtime Pay Rate(s) for each type of work or shift:

This must be at least 1½ times the worker's weighted average of the multiple rates of pay for the week, with few exceptions. The weighted average is the total regular pay divided by the total hours worked in the week. The overtime rate may vary from week to week depending on how many hours you worked at each rate of pay. The overtime rate may vary from week to week.

8. Employee Acknowledgement:

On this day I have been notified of my pay rate, overtime rate (if eligible), allowances, and designated payday on the date given below.
I told my employer what my primary language is.

Check one:

- ☐ I have been given this pay notice in English because it is my primary language.
- ☐ My primary language is _____. I have been given this pay notice in English only, because the Department of Labor does not yet offer a pay notice form in my primary language.

_____
Employee Signature

_____
Date

_____
Preparer Name and Title

The employee must receive a signed copy of this form. The employer must keep the original for 6 years.

WAGE THEFT AND PREVENTION ACT

LS 56

Pay Notice for Employees Paid a Weekly Rate or Salary for a Fixed Number of Hours (40 or fewer in a week)

Notice and Acknowledgement of Pay Rate and Payday
Under Section 195.1 of the New York State Labor Law
Notice for Employees Paid a Weekly Rate or a Salary for a Fixed Number of Hours (40 or Fewer in a Week)

1. Employer Information

Name:

Doing Business As (DBA) Name(s):

FEIN (optional):

Physical Address:

Mailing Address:

Phone:

2. Notice given:

- ☐ At hiring
- ☐ On or before February 1
- ☐ Before a change in pay rate(s), allowances claimed or payday

3. Employee's Pay Rate:

$ _____ per _____

Weekly hours _____ (Specify the number of hours for which the weekly rate or salary will be paid.)

Employers may not pay a non-hourly rate to a non-exempt employee in the Hospitality Industry, except for commissioned salespeople.

4. Allowances taken:

- ☐ None
- ☐ Tips _____ per hour
- ☐ Meals _____ per meal
- ☐ Lodging _____
- ☐ Other _____

5. Regular payday: _____

6. Pay is:

- ☐ Weekly
- ☐ Bi-weekly
- ☐ Other

7. Overtime Pay Rate:

$ _____ per hour (This must be at least 1½ times the worker's regular rate, with few exceptions.)

8. Employee Acknowledgement:

On this day, I have been notified of my pay rate, overtime rate (if eligible), allowances, and designated payday. I told my employer what my primary language is.

Check one:

☐ I have been given this pay notice in English because it is my primary language.

☐ My primary language is_____. I have been given this pay notice in English only, because the Department of Labor does not yet offer a pay notice form in my primary language.

_____
Employee Signature

_____
Date

_____
Preparer Name and Title

The employee must receive a signed copy of this form. The employer must keep the original for 6 years.

LS 56 (03/11)

WAGE THEFT AND PREVENTION ACT

LS 57

Pay Notice for Employees Paid a Salary for Varying Hours, Day Rate, Piece Rate, Flat Rate or Other Non-Hourly Pay

Notice and Acknowledgement of Pay Rate and Payday Under Section 195.1 of the New York State Labor Law
Notice for Employees Paid Salary for Varying Hours, Day Rate, Piece Rate, Flat Rate or Other Non-Hourly Pay

1. Employer Information

Name:

Doing Business As (DBA) Name(s):

FEIN (optional):

Physical Address:

Mailing Address:

Phone:

2. Notice given:

☐ At hiring

☐ On or before February 1

☐ Before a change in pay rate(s), allowances claimed or payday

3. Regular payday: _____

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4. Employee's Pay Rate:

$_____ per _____

Specify the basis for the rate paid, i.e. salary for varying hours, day rate, etc.

Employers may not pay a non-hourly rate to a non-exempt employee in the Hospitality Industry, except for commissioned salespeople.

5. Allowances taken:

☐ None
☐ Tips _____ per hour
☐ Meals _____ per meal
☐ Lodging _____
☐ Other _____

6. Pay is:

☐Weekly
☐Bi-weekly
☐Other

7. Overtime Pay Rate:

In most cases the overtime rate will be 1½ times the regular rate of pay for the week. The regular rate of pay is the total weekly pay divided by the hours worked in the week.

In most cases, it is illegal to pay a fixed weekly rate for varying hours worked over 40 per week. The Department of Labor strongly discourages weekly rates for non-exempt employees, since underpayments often result.

8. Employee Acknowledgement:

On this day, I received notice of my pay rate, overtime rate (if eligible), allowances, and designated payday. I told my employer what my primary language is.

Check one:

☐ I have been given this pay notice in English because it is my primary language.

☐ My primary language is _____.

I have been given this pay notice in English only, because the Department of Labor does not yet offer a pay notice form in my primary language.

_____
Employee Signature

_____
Date

_____
Preparer Name and Title

The employee must receive a signed copy of this form. The employer must keep the original for 6 years.

WAGE THEFT AND PREVENTION ACT

LS 58

Pay Notice for Prevailing Rate and Other Jobs

Notice and Acknowledgement of Pay Rate and Payday
Under Section 195.1 of the New York State Labor Law
Notice for Prevailing Rate and Other Jobs

1. Employer Information

Name:

Doing Business As (DBA) Name(s):

FEIN (optional):

Physical Address:

Mailing Address:

Phone:

2. Notice given:

☐ At hiring

☐ On or before February 1

☐ Before a change in pay rate(s), allowances claimed or payday

3. Regular payday: _____

LS 58 (03/11)

4. Prevailing Rate Jobs Pay Rate(s): Your rate of pay will be the posted rate for the occupation(s).

Occupation: _____

5. Prevailing Rate Jobs Overtime Pay Rate: Your overtime rate(s) are payable after 8 hours in a day and after 5 days in a week, or as noted in the applicable prevailing wage schedule. Overtime rates will be those posted for the occupation.

6. Non-Prevailing Rate Jobs Pay Rate:
$ _____ per hour.

7. Non-Prevailing Rate Jobs Overtime Pay Rate: $ _____ per hour.

8. Overtime for Prevailing Rate and Non-Prevailing Rate Jobs in the Same Week: For most employees in NYS the overtime rate will be 1 ½ times the regular pay rate for the work you are performing for hours over 40 in a workweek. Any overtime premium earned on a prevailing rate job during the same week can be credited toward non-prevailing rate overtime pay.

9. Allowances taken:

☐ None
☐ Tips _____ per hour
☐ Meals _____ per meal
☐ Lodging _____
☐ Other _____

10. Pay is:

☐ Weekly
☐ Bi-weekly
☐ Other: _____

11. Employee Acknowledgement:
On this date, I have been notified of my pay rate, overtime rate (if eligible), allowances, and designated payday. I told my employer what my primary language is.

Check one:

☐ I have been given this pay notice in English only, because it is my primary language.

☐ My primary language is _____. I have been given this pay notice in English only, because the Department of Labor does not yet offer a pay notice form in my primary language.

_____
Employee Signature

_____
Date

_____
Preparer Name and Title

The employee must receive a signed copy of this form. The employer must keep the original for 6 years.

WAGE THEFT AND PREVENTION ACT

LS 59

Pay Notice for Exempt Employees

Notice and Acknowledgement of Pay Rate and Payday Under Section 195.1 of the New York State Labor Law
Notice for Exempt Employees

1. Employer Information

Name:

Doing Business As (DBA) Name(s):

FEIN (optional):

Physical Address:

Mailing Address:

Phone:

2. Notice given:

- ☐ At hiring
- ☐ On or before February 1
- ☐ Before a change in pay rate(s), allowances claimed, or payday

3. Employee's pay rate(s): State if pay is based on an hourly, salary, day rate, piece rate, or other basis.

_____

Employers may not pay a non-hourly rate to a non-exempt employee in the Hospitality Industry, except for commissioned salespeople.

4. Allowances taken:

- ☐ None
- ☐ Tips _____ per hour
- ☐ Meals _____ per meal
- ☐ Lodging _____
- ☐ Other _____

5. Regular payday: _____

6. Pay is:

- ☐ Weekly
- ☐ Bi-weekly
- ☐ Other: _____

7. Overtime Pay Rate:
Most workers in NYS must receive at least 1½ times their regular rate of pay for all hours worked over 40 in a workweek, with few exceptions. A limited number of employees must only be paid overtime at 1½ times the minimum wage rate, or not at all.

This employee is exempt from overtime under the following exemption (optional): _____

_____

8. Employee Acknowledgement:
On this day, I received notice of my pay rate, overtime rate (if eligible), allowances, and designated payday. I told my employer what my primary language is.

Check one:

☐ I have been given this pay notice in English because it is my primary language.

☐ My primary language is _____. I have been given this pay notice in English only, because the Department of Labor does not yet offer a pay notice form in my primary language.

_____
Employee Signature

_____
Date

_____
Preparer Name and Title

The employee must receive a signed copy of this form. The employer must keep the original for 6 years.

LS 59 (03/11)

LABOR LAW
ARTICLE 6. PAYMENT OF WAGES

Go to the New York Code Archive Directory

NY CLS Labor § 195 (2011)

§ 195. Notice and record-keeping requirements

Every employer shall:

1. (a) [fig 1] provide his or her employees, in writing in English and in the language identified by each employee as the primary language of such employee, at the time of hiring [fig 2] , and on or before February first of each subsequent year of the employee's employment with the employer, a notice containing the following information: the rate or rates of pay and [fig 3] basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; allowances, if any, claimed as part of the minimum wage, including tip, meal, or lodging allowances; the regular pay day designated by the employer in accordance with section one hundred ninety-one of this article [fig 4] ; the name of the employer; any "doing business as" names used by the employer; the physical address of the employer's main office or principal place of business, and a mailing address if different; the telephone number of the employer; plus such other information as the commissioner deems material and necessary. Each time the employer provides such notice to an employee, the employer shall obtain from the employee a signed and dated written acknowledgement [fig 5] , in English and in the primary language of the employee, of receipt of this notice, which the employer shall preserve and maintain for six years. Such acknowledgement shall include an affirmation by the employee that the employee accurately identified his or her primary language to the employer, and that the notice provided by the employer to such employee pursuant to this subdivision was in the language so identified or otherwise complied with paragraph (c) of this subdivision, and shall conform to any additional requirements established by the commissioner with regard to content and form. For all employees who are [fig 6] not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the notice must state the regular hourly rate and overtime rate of pay;

(b) The commissioner shall prepare templates that comply with the requirements of paragraph (a) of this subdivision. Each such template shall be dual-language, including English and one additional language. The commissioner shall determine, in his or her discretion, which languages to provide in addition to English, based on the size of the New York state population that speaks each language and any other factor that the commissioner shall deem relevant. All such templates shall be made available to employers in such manner as determined by the commissioner;

(c) When an employee identifies as his or her primary language a language for which a template is not available from the commissioner, the employer shall comply with this subdivision by providing that employee an English-language notice or acknowledgment;

(d) An employer shall not be penalized for errors or omissions in the non-English portions of any notice provided by the commissioner;

(e) The commissioner shall have discretion to waive or alter requirements of paragraph (a) of this subdivision for

temporary help firms as defined in section nine hundred sixteen of this chapter.

2. notify his or her employees in writing of any changes to the information set forth in [fig 1] subdivision one of this section, at least seven calendar days prior to the time of such changes, unless such changes are reflected on the wage statement furnished in accordance with subdivision three of this section;

3. furnish each employee with a statement with every payment of wages, listing the following: the dates of work covered by that payment of wages; name of employee; name of employer; address and phone number of employer; rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages [fig 1] ; deductions; allowances, if any, claimed as part of the minimum wage; and net wages [fig 2] . For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the statement shall include the regular hourly rate or rates of pay; the overtime rate or rates of pay; the number of regular hours worked, and the number of overtime hours worked. For all employees paid a piece rate, the statement shall include the applicable piece rate or rates of pay and number of pieces completed at each piece rate. Upon the request of an employee, an employer shall furnish an explanation in writing of how such wages were computed;

3-a. in addition, every railroad corporation shall furnish each employee with a statement with every payment of wages listing accrued total earnings and taxes to date and further furnish said employee at the same time with a separate listing of his daily wages and how they were computed;

4. establish, maintain and preserve for not less than [fig 1] six years contemporaneous, true, and accurate payroll records showing for each week worked the hours worked [fig 2] ; the rate or rates of pay and basis thereof, whether paid by the hour, shift, day, week, salary, piece, commission, or other; gross wages [fig 3] ; deductions; allowances, if any, claimed as part of the minimum wage; and net wages for each employee. For all employees who are not exempt from overtime compensation as established in the commissioner's minimum wage orders or otherwise provided by New York state law or regulation, the payroll records shall include the regular hourly rate or rates of pay, the overtime rate or rates of pay, the number of regular hours worked, and the number of overtime hours worked. For all employees paid a piece rate, the payroll records shall include the applicable piece rate or rates of pay and number of pieces completed at each piece rate;

5. notify his employees in writing or by publicly posting the employer's policy on sick leave, vacation, personal leave, holidays and hours.

6. notify any employee terminated from employment, in writing, of the exact date of such termination as well as the exact date of cancellation of employee benefits connected with such termination. In no case shall notice of such termination be provided more than five working days after the date of such termination. Failure to notify an employee of cancellation of accident or health insurance subjects an employer to an additional penalty pursuant to section two hundred seventeen of this chapter.

Add, L 1966, ch 548, § 2, eff Oct 1, 1966; amd, L 1977, ch 615, § 1, eff Jan 1, 1978, L 1981, ch 256, § 1, eff Dec 12, 1981, L 1989, ch 524, § 1, eff Aug 15, 1989, L 2009, ch 270, § 1, eff Oct 26, 2009 (see 2009 note below), L 2010, ch 564, § 3, eff April 9, 2011 (see 2010 note below).

NOTES:

Former Section

Former § 195, add, L 1921, ch 50, with substance transferred from § 10; amd, L 1935, ch 235, L 1951, ch 445; repealed, L 1966, ch 548, § 1, eff Oct 1, 1966, with substance transferred to § 192.

DEPARTMENT OF LABOR

Office of the Secretary

29 CFR Part 4

Wage and Hour Division

29 CFR Parts 516, 531, 553, 778, 779, 780, 785, 786, and 790

RIN 1215–AB13, 1235–AA00

Updating Regulations Issued Under the Fair Labor Standards Act

AGENCY: Wage and Hour Division, Department of Labor.

ACTION: Final rule.

SUMMARY: In this final rule, the Department of Labor (Department or DOL) revises regulations issued pursuant to the Fair Labor Standards Act of 1938 (FLSA) and the Portal-to-Portal Act of 1947 (Portal Act) that have become out of date because of subsequent legislation. These revisions conform the regulations to FLSA amendments passed in 1974, 1977, 1996, 1997, 1998, 1999, 2000, and 2007, and Portal Act amendments passed in 1996.

DATES: *Effective Date:* These rules are effective on May 5, 2011.

FOR FURTHER INFORMATION CONTACT: Montaniel Navarro, Wage and Hour Division, U.S. Department of Labor, Room S–3502, 200 Constitution Avenue, NW., Washington, DC 20210; *telephone:* (202) 693–0067 (this is not a toll-free number). Copies of this final rule may be obtained in alternative formats (Large Print, Braille, Audio Tape or Disc), upon request, by calling (202) 693–0023 (not a toll-free number). TTY/TDD callers may dial toll-free (877) 889–5627 to obtain information or request materials in alternative formats.

Questions of interpretation and/or enforcement of regulations issued by this agency may be directed to the nearest Wage and Hour Division (WHD) District Office. Locate the nearest office by calling our toll-free help line at (866) 4USWAGE ((866) 487–9243) between 8 a.m. and 5 p.m. in your local time zone, or log onto the WHD's Web site for a nationwide listing of Wage and Hour District and Area Offices at: *http://www.dol.gov/esa/contacts/whd/america2.htm.*

SUPPLEMENTARY INFORMATION: The Regulatory Information Number (RIN) identified for this rulemaking changed with the publication of the 2010 Spring Regulatory Agenda due to an organizational restructuring. The old RIN was assigned to the Employment Standards Administration, which no longer exists. A new RIN has been assigned to the WHD.

I. Overview of Changes

The FLSA requires covered employers to pay their nonexempt employees a Federal minimum wage and overtime premium pay of time and one-half the regular rate of pay for hours worked in excess of forty (40) in a work week. The FLSA also contains a number of exemptions from the minimum wage and overtime pay requirements.

Over the years, Congress has amended the FLSA to refine or to add to these exemptions and to clarify the minimum wage and overtime pay requirements. A 1974 amendment to section 13(b)(10) of the FLSA, 29 U.S.C. 213(b)(10), extended an overtime exemption to include any salesman primarily engaged in selling boats and eliminated the overtime exemption for partsmen and mechanics servicing trailers or aircraft. Congress also in 1974 revised aspects of the FLSA's tip credit provisions, 29 U.S.C. 203(m) and (t), which were further revised by amendments enacted in 1977 and 1996. As part of the Small Business Job Protection Act of 1996, Congress amended section 4(a) of the Portal Act, 29 U.S.C. 254(a), to define circumstances under which pay is not required for employees who use their employer's vehicle for home-to-work commuting purposes. The 1996 Act also created a youth opportunity wage of $4.25 per hour under section 6(g) of the FLSA, 29 U.S.C. 206(g). In 1997, Congress amended section 13(b)(12) of the FLSA, 29 U.S.C. 213(b)(12), to expand the exemption from overtime pay for workers on ditches, canals, and reservoirs when 90% (rather than 100%) of the water is used for agricultural purposes. In 1998, Congress added section 3(e)(5) to the FLSA, 29 U.S.C. 203(e)(5), to provide that the term "employee" does not include individuals who volunteer to private non-profit food banks solely for humanitarian purposes and who receive groceries from those food banks. In 1999, Congress added section 3(y) to the FLSA, 29 U.S.C. 203(y), to define an employee who is engaged in "fire protection activities." In 2000, Congress added section 7(e)(8) to the FLSA, 29 U.S.C. 207(e)(8), that treats stock options meeting certain criteria as an additional type of remuneration that is excludable from the computation of the regular rate. As part of the U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Congress increased the FLSA minimum wage in three steps: to $5.85 per hour effective July 24, 2007; to $6.55 per hour effective July 24, 2008; and to $7.25 per hour effective July 24, 2009.

Additionally, a number of courts have examined the interpretation of the FLSA's compensatory time provisions in section 7(o)(5) concerning public agency employers' obligation to grant employees' requests to use "comp time" within a "reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency." 29 U.S.C. 207(o)(5). Finally, the regulations governing the "fluctuating workweek" method of computing half-time overtime pay for salaried nonexempt employees, who work variable or fluctuating hours from week to week need updating to delete outmoded examples.

The Department published a notice of proposed rulemaking (NPRM) in the **Federal Register** on July 28, 2008 (73 FR 43654 (Jul. 28, 2008)), inviting comments on revisions to the regulations to implement these statutory amendments and to address the issues raised by the courts. Comments were due on or before September 11, 2008. In response to a number of requests for an extension of the time period for filing written comments, the Department on August 22, 2008 (73 FR 49621 (Aug. 22, 2008)) extended the deadline 15 days to September 26, 2008. The Department received approximately 30 substantive comments in response to the NPRM from a variety of sources, including labor unions and other employee representatives, employees, employer organizations, governmental representatives, Members of Congress, and law firms. Comments may be viewed at *http://www.regulations.gov*, by searching for docket id: WHD–2008–0003.

The comments reflected a wide variety of views on the merits of particular sections of the proposed regulations. Many included substantive analyses of the proposed revisions. The Department acknowledges that there are strongly held views on several of the issues presented in this rulemaking, and it has carefully considered all of the comments, analyses, and arguments made for and against the proposed changes in developing this final rule. The Department has narrowed the scope of this final rule to address those sections which require change to reflect statutory enactment or outdated examples contained in the regulations and therefore is not proceeding with some of the changes proposed in the NPRM including proposed changes to regulations regarding compensatory time, the fluctuating workweek, and

meal credits. The Department is also not proceeding with the proposed rule that service managers, service writers, service advisors, and service salesman are exempted from the overtime provision. We have also further clarified the tip credit provision to reflect long-standing and settled WHD policy concerning the ownership of tips.

II. Summary of Comments

This section presents a topical summary of the major comments received on the proposed revisions, together with a discussion of the changes that have been made in the final regulatory text in response to the comments received.

1. 2007 Amendment to the FLSA Minimum Wage

The U.S. Troop Readiness, Veterans' Care, Katrina Recovery, and Iraq Accountability Appropriations Act, 2007, Public Law 110–28, 121 Stat. 112 (May 25, 2007), included an amendment to the FLSA that increased the applicable Federal minimum wage under section 6(a) of the FLSA in three steps: to $5.85 per hour effective July 24, 2007; to $6.55 per hour effective July 24, 2008; and to $7.25 per hour effective July 24, 2009. This legislation did not change the definition of "wage" in section 3(m) of the FLSA for purposes of applying the tip credit formula in determining the wage paid to a qualifying tipped employee. Thus, the minimum required cash (or "direct") wage for a tipped employee under the FLSA remains $2.13 per hour. The maximum allowable tip credit for Federal purposes under the FLSA increased as a result of the 2007 legislation, and is determined by subtracting $2.13 from the applicable minimum wage provided by section 6(a)(1) of the FLSA. *See* 29 U.S.C. 203(m).

The Department proposed changes in several of the FLSA's implementing regulations that cite to the applicable minimum wage to reflect these statutory changes, including at 29 CFR 516.28, 531.36, 531.37, 778.110, 778.111, 778.113, and 778.114, as well as changes to the McNamara-O'Hara Service Contract Act regulations to eliminate outdated references to the FLSA minimum wage in 29 CFR 4.159 and 4.167. The Department did not receive any comments specifically addressing these non-substantive conforming updates, although several commenters did commend the Department generally for its effort to update the regulations. *See, e.g.,* Littler Mendelson, P.C., Chamber of Commerce, International Public Management Association for Human Resources (IMPA–HR), the International Municipal Lawyers Association (IMLA), and the National League of Cities (NLC). Therefore, the final rule adopts the technical updates in these sections as proposed.

2. Small Business Job Protection Act of 1996

On August 20, 1996, Congress enacted the Small Business Job Protection Act of 1996 (SBJPA), Public Law 104–188, 100 Stat. 1755. SBJPA amended the Portal Act to define circumstances under which pay is not required for employees who use their employer's vehicle for home-to-work commuting purposes. It also amended the FLSA by creating a youth opportunity wage and modifying the allowable tip credit.

A. Employee Commuting Flexibility Act of 1996

Sections 2101 through 2103 of Title II of SBJPA, entitled the "Employee Commuting Flexibility Act of 1996," amended section 4(a) of the Portal Act, 29 U.S.C. 254(a). The amendment, effective upon enactment, provides that

> The use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

Employee Commuting Flexibility Act of 1996, Section 2102, 29 U.S.C. 254(a).

The House Committee Report states that the purpose of the amendment is to clarify how the Portal Act applies to "employee use of employer-provided vehicles for commuting at the beginning and end of the workday." H.R. Rep. No. 104–585, at 6 (1996). It states that such travel time is to be considered noncompensable if the use of the vehicle is "conducted under an agreement between the employer and the employee or the employee's representative." *Id.* at 4. The agreement may be a formal written agreement, a collective bargaining agreement, or an understanding based on established industry or company practices. *Id.; see Rutti* v. *LoJack Corp., Inc.,* 596 F.3d 1046, 1052 (9th Cir. 2010). In addition, "the work sites must be located within the normal commuting area of the employer's establishment." H.R. Rep. No. 104–585, at 4. Activities that are merely incidental to the use of the vehicle for commuting at the start or end of the day are similarly noncompensable, such as communication between the employee and employer to obtain assignments or instructions, or to report work progress or completion. *Id.* at 5.

This statutory amendment to the Portal Act affects certain regulations in 29 CFR parts 785 and 790 issued pursuant to the FLSA and the Portal Act. Current section 785.9(a) explains the statutory provisions that exclude from work time certain "preliminary" and "postliminary" activities performed prior to or subsequent to the workday. The NPRM proposed to add to that section a new provision that activities incidental to the use of an employer-provided vehicle for commuting are not considered principal activities, and are not compensable, when they meet the requirements of the 1996 amendment. Current § 785.34 discusses the effect of section 4 of the Portal Act on determining whether time spent in travel is working time. The NPRM proposed to add a reference to the statutory conditions under which commuting in an employer-provided vehicle will not be considered part of the employee's principal activities and therefore not compensable. The NPRM also proposed to revise §§ 785.50 and 790.3 to incorporate the 1996 amendment into the quotation of section 4 of the Portal Act.

A number of commenters addressed this proposal. Several commenters noted that the proposal simply quotes the statutory text in the regulation, and they stated that the proposal therefore does not provide adequate guidance regarding the limited impact of this amendment. *See* National Employment Lawyers Association ("NELA"), American Federation of Labor and Congress of Industrial Organizations ("AFL–CIO"), National Employment Law Project ("NELP"), and Comments from Members of United States Congress. A variety of commenters representing employees suggested that the Department should emphasize the narrow nature of this amendment by stating that, under the continuous workday principle, it does not affect the compensability of hours worked within the workday (the time between when an employee commences a principal activity and the time the employee ceases a principal activity). *See, e.g.,* NELA, NELP, North Carolina Justice Center, and Service Employees International Union ("SEIU"). They also suggested that the Department should include clarifying language, such as the statement that "otherwise non-compensable [traveling] is not compensable merely because the

employee uses his employer's vehicle * * * Likewise, otherwise compensable travel time does not become non-compensable simply through the use of an employer-owned vehicle." *See, e.g.,* NELP (quoting *Burton* v. *Hillsborough County,* 181 Fed. Appx. 829, 835 (11th Cir. 2006) (unpublished)), NELA, North Carolina Justice Center, and Greater Boston Legal Services. They also emphasized that the amendment did not change the analysis of what constitutes a "principal" work activity that is compensable. *See* NELP, SEIU, and NELA. These commenters cited court decisions addressing commuting time issues, some of which they thought were correctly decided and some of which they thought were wrong. Many of the commenters suggested that the Department should withdraw its proposal and reissue a new NPRM that would provide concrete examples of what constitutes an activity that is "incidental" to commuting and what activities are compensable. *See, e.g.,* AFL–CIO, SEIU, NELP, and NELA.

Commenters representing employers approved of the addition of language to the regulations to conform them to the Employee Commuting Flexibility Act. *See* Chamber of Commerce, Littler Mendelson, P.C., Society for Human Resource Management ("SHRM"), and National Automobile Dealers Association. Both the Chamber of Commerce and Littler Mendelson stated that it would be helpful for the Department to provide further guidance regarding issues such as what types of activities are incidental to the use of a vehicle for commuting, how the normal commuting area of the employer's business is determined, and what constitutes an agreement regarding the use of an employer-provided vehicle. Both commenters cited court decisions addressing these issues (holding, for example, that transporting tools and equipment during a commute is incidental; that normal commuting area is determined on a case-by-case basis; and that a formal written agreement is not necessary).

SHRM also suggested that the final rule should state that employees should not incur any out-of-pocket expenses related to commuting, such as for gas, tolls, parking or maintaining the employer's vehicle. The Department notes that the House Committee Report similarly stated that "[i]t is the intent of the Committee that the employee incur no out-of-pocket or direct cost for driving, parking or otherwise maintaining the employer's vehicle in connection with commuting in employer-provided vehicles." H.R. Rep. No. 104–585, at 5. While the Department has not added language to this effect to the final rule, it notes that its longstanding interpretation of the amendment comports with both the Committee report and SHRM's comment. *See* Wage and Hour Opinion Letter 2001–11 (April 18, 2001).

As the comments from both employee and employer representatives show, the question of the compensability of employees' commuting time is an important issue. Therefore, the Department does not believe that it would be helpful or appropriate to leave the regulations inconsistent with the statute while it simply starts the NPRM process anew, as a number of employee representatives suggested. Rather, in order to avoid confusion and needless litigation, the Department continues to believe that it is important to update the regulations to reflect the current state of the law by incorporating the statutory provisions of the Employee Commuting Flexibility Act into the regulations. Furthermore, the cases that both employee and employer representatives cited show that issues related to the compensability of driving time and other activities are very fact-specific and must be resolved on a case-by-case basis, in light of all the factors present in the particular situation. As a result, the Department does not believe that it would be useful to include examples in the regulatory text. The Department will consider providing additional guidance at a later date on these and other issues, such as commuting distance, costs, incidental activities, and the nature of the agreement through non-regulatory means. Similarly, because the regulations in 29 CFR part 790 already fully address issues related to the continuous workday principle and principal activities, the Department does not believe it is necessary to add to those regulations. The Department does observe, however, that nothing in the Employee Commuting Flexibility Act or this regulation alters or supersedes continuous workday principles. Only commuting time that occurs before the first principle activity or after the last principle activity in the workday is excluded from compensable time. Therefore, the final rule adopts the changes to §§ 785.9(a), 785.34, 785.50 and 790.3 as proposed.

B. Youth Opportunity Wage

Section 2105 of the SBJPA amended the FLSA by adding section 6(g), which provides that "[a]ny employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than $4.25 an hour." 29 U.S.C. 206(g)(1). This subminimum wage "shall only apply to an employee who has not attained the age of 20 years." 29 U.S.C. 206(g)(4). The amendment also protects current workers by prohibiting employers from taking action to displace employees, including reducing hours, wages, or employment benefits, for the purpose of hiring workers at the opportunity wage. 29 U.S.C. 206(g)(2). It also states that any employer violating this subsection shall be considered to have violated the anti-discrimination provisions of section 15(a)(3) of the FLSA. 29 U.S.C. 206(g)(3).

The NPRM proposed to add a new subpart G to 29 CFR part 786 to set forth the provisions of the youth opportunity wage. The Department received one comment regarding this update. The National Automobile Dealers Association stated that it supported the proposal. The final rule adopts the new subpart G as proposed but changes the title to "Miscellaneous Exemptions and Exclusions from Coverage."

C. Tip Credit Amendments of 1996

Section 2105 of Title II of the SBJPA also amended section 3(m) of the FLSA, 29 U.S.C. 203(m), by providing that

> In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on the date of the enactment of this paragraph; and (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 6(a)(1). The additional amount on account of tips may not exceed the value of the tips actually received by an employee. The preceding 2 sentences shall not apply with respect to any tipped employee unless such employee has been informed by the employer of the provisions of this subsection, and all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Public Law 104–188, § 2105(b) (1996). Prior to the 1996 amendments, section 3(m) of the FLSA required an employer to pay its tipped employees a cash wage equal to 50 percent of the minimum wage (then $4.25 an hour). *See* Public Law 101–157, § 5 (1989). As amended, section 3(m)(1) provides that an employer's minimum cash wage obligation to its tipped employees is the minimum cash wage required on August 20, 1996, the date of the SBJPA enactment. Thus, section 3(m)(1)

established an employer's minimum cash wage obligations to tipped employees at the pre-SBJPA amount: 50 percent of the then-minimum wage of $4.25 per hour, or $2.13 per hour. *See* 29 U.S.C. 203(m)(1).

Subsection (2) of the 1996 amendments bases an employer's maximum allowable tip credit on a specific formula in relation to the applicable minimum wage, stating that an employer may take a tip credit equal to the difference between the required minimum cash wage specified in paragraph 3(m)(1) ($2.13) and the minimum wage ($7.25 effective July 24, 2009). Thus, the maximum Federal tip credit that an employer currently is permitted to claim under the FLSA is $7.25 minus $2.13, or $5.12 per hour.

As explained in the NPRM, this 1996 amendment affects certain regulations in 29 CFR part 531. Current § 531.50(a) quotes section 3(m) of the FLSA as it appeared in 1967, when the regulation was published. To incorporate the 1996 amendment, the NPRM proposed to replace the old statutory language with the current statutory provision. Current §§ 531.56(d), 531.59, and 531.60 refer to the pre-1996 statutory language setting the tip credit at 50 percent of the minimum wage. The proposed rule deleted or changed these references to reflect the current statutory requirements (maximum tip credit equaling the difference between the minimum wage required by section 6(a)(1) of the FLSA and the $2.13 required cash wage). Additional changes related to tipped employees are discussed in this preamble at sections 7B and 8, *infra*.

The Department received many comments relating to tipped employees; however, those comments generally addressed the issues discussed *infra* in sections 7B and 8 of this preamble, not the technical changes to the formula for computing the tip credit addressed here. The Chamber of Commerce and Littler Mendelson, P.C., stated that they supported these changes to the regulations to conform them to the statutory amendments, thereby clarifying that employers are only required to pay $2.13 per hour in cash wages regardless of what the minimum wage is. The Chamber of Commerce also noted that there was a typographical error in § 531.59(b); the cross-reference to § 531.31 should have referred to § 531.54. Because the Department received no other substantive comments relating to these issues, and having the regulations consistent with the statute will help to eliminate confusion, the final rule adopts the changes to §§ 531.50(a), 531.56(d), 531.59 and 531.60 related to the statutory tip credit calculation as proposed, except for the correction of a typographical error in 531.50(a) and the cross-reference in § 531.59.

3. Agricultural Workers on Water Storage/Irrigation Projects

Section 105 of The Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act, Public Law 105–78, 111 Stat. 1467 (Nov. 13, 1997), amended section 13(b)(12) of the FLSA, 29 U.S.C. 213(b)(12), which provides an overtime exemption for agricultural employees and employees employed in connection with the operation or maintenance of certain waterways used for supply and storing of water for agricultural purposes. The 1997 amendment deleted "water for agricultural purposes" and substituted "water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year." Thus, this amendment makes the exemption from overtime pay requirements applicable to workers on water storage and irrigation projects when at least 90 percent of the water is used for agricultural purposes, rather than when the water is used exclusively for agricultural purposes.

The NPRM proposed to update the regulations in 29 CFR part 780, Subpart E to incorporate the statutory amendment. Thus, proposed § 780.400 correctly quoted the statute, including the amendment. Proposed § 780.401 provided an updated general explanatory statement of the history of the exemption. Proposed § 780.406 deleted the last sentence of the current rule, which refers to the 1966 amendments, as no longer necessary. Proposed § 780.408 was updated to describe the "at least 90 percent" requirement for using the water for agricultural purposes.

The Department received one comment addressing this proposal. The AFL–CIO noted that current § 780.408 states that if a small amount of water is used by the farmer for domestic purposes, this does not prevent the application of the exemption. The AFL–CIO stated that the "[t]olerance for a 'small amount' of water that is used for domestic purposes may have made sense under the old statutory provision, which required exclusive use of the water for agricultural purposes. However, now that Congress has amended the exemption to permit 10 percent of the water for non-agricultural purposes, there is no longer any justification for this exception. Any water that is used for 'domestic purposes' (that is, non-agricultural purposes) should count toward the new statutory 10 percent tolerance."

The Department agrees that, in light of the 10 percent tolerance for water used for non-agricultural purposes, there is no longer any need for the specific tolerance of domestic use by a farmer. Therefore, the final rule further modifies proposed § 780.408 to delete the three sentences relating to domestic use on farms. The final rule adopts §§ 780.400, 780.401 and 780.406 as proposed.

4. Certain Volunteers at Private Non-Profit Food Banks

Section 1 of the Amy Somers Volunteers at Food Banks Act, Public Law 105–221, 112 Stat. 1248 (Aug. 7, 1998), amended section 3(e) of the FLSA, 29 U.S.C. 203(e), by adding section (5) to provide that the term "employee" does not include individuals volunteering solely for humanitarian purposes at private non-profit food banks and who receive groceries from those food banks. 29 U.S.C. 203(e)(5). The proposed rule renamed 29 CFR part 786 "Miscellaneous Exemptions and Exclusions From Coverage" and added subpart H to set forth this exclusion from FLSA coverage. The Department did not receive any comments specifically addressing this section of the NPRM. The final rule adopts subpart H as proposed.

5. Employees Engaged in Fire Protection Activities

In 1999, Congress amended section 3 of the FLSA, 29 U.S.C. 203, by adding section (y) to define "an employee in fire protection activities." This amendment states that an "employee in fire protection activities" means

> an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous material worker, who—(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk.

Public Law 106–151, 113 Stat. 1731 (1999); 29 U.S.C. 203(y). Such employees may be covered by the partial overtime exemption allowed by § 7(k) or the overtime exemption for public agencies with fewer than five employees in fire protection activities pursuant to § 13(b)(20). 29 U.S.C. 207(k); 213(b)(20).

The NPRM proposed to make several revisions to 29 CFR part 553, subpart C,

to incorporate this amendment. In the first sentence of proposed § 553.210(a), the statutory amendment language was substituted for the current four-part regulatory definition of the term "any employee * * * in fire protection activities." The proposed rule also deleted the last sentence of current § 553.210(a) stating that, "[t]he term would also include rescue and ambulance service personnel if such personnel form an integral part of the public agency's fire protection services," and it deleted the cross-reference to § 553.215. The "integral part" test for the public agency employees is no longer needed because the new statutory standards define when such rescue and ambulance personnel qualify as employees in fire protection activities. Section 553.215(a) of the current rule discusses ambulance and rescue service employees who are employees of a public agency other than a fire protection or law enforcement agency. The section 3(y) amendment, however, specifically states that one of the requirements to be an "employee in fire protection activities" is that the employee is employed by a fire department of a municipality, county, fire district, or State. The proposed rule, therefore, deleted § 553.215(a) because it permits non-fire department public agencies to treat their ambulance and rescue service employees as employees engaged in fire protection activities, contrary to the new statutory provision. The proposed rule also deleted §§ 553.215(b) (stating that rescue service employees of hospitals and nursing homes cannot qualify for the exemption) and 553.215(c) (stating that ambulance and rescue service employees of private organizations do not come within the exemption) as unnecessary in light of the clear statutory requirement for employment by a fire department. Finally, in §§ 553.221, 553.222, 553.223, and 553.226, the Department proposed to substitute "employee in fire protection activities" or "employees in fire protection activities," respectively, wherever the terms "firefighter" or "firefighters" appeared.

The Department reexamined other regulations in part 553, Subpart C, in light of the section 3(y) amendment to assess whether any other changes were appropriate. Current § 553.210 characterizes as exempt work-related incidental activities, such as equipment maintenance, lecturing and fire prevention inspections. Current § 553.210 also recognizes that employees can be included within the exemption whether their status is "trainee," "probationary," or "permanent," and regardless of their particular specialty or job title or assignment to certain support activities. The Department stated its belief in the NPRM that these provisions are consistent with statutory intent and remain the appropriate interpretation of the new statutory definition and, thus, the Department proposed no further changes to § 553.210.

Current § 553.212 recognizes that exempt employees may engage in some nonexempt work, such as firefighters who work for public forest conservation agencies and who plant trees and perform other conservation activities unrelated to their firefighting duties during slack times, and set a 20% tolerance for such work. As explained in the NPRM, the Department reexamined this regulation, particularly in light of *McGavock* v. *City of Water Valley,* 452 F.3d 423, 427–28 (5th Cir. 2006), in which the appellate court concluded that the 20% tolerance for nonexempt work in § 553.212 was rendered "obsolete and without effect" by the statutory amendment. 73 FR 43658 (Jul. 28, 2008); *see also Huff* v. *DeKalb County, Ga.,* 516 F.3d 1273, 1278 (11th Cir. 2008) (agreeing that new section 3(y) is a streamlined definition that made existing provisions in §§ 553.210 and 553.212 obsolete). The proposed rule therefore deleted § 553.212 as unnecessary in light of these court decisions and the new statutory definition of "employee[s] in fire protection activities" in section 3(y) of the Act.

The Department received several comments addressing these issues. The National Public Employment Labor Relations Association ("NPELRA") stated that the removal of the 20 percent test was "an important clarification" because it was obsolete and yet some people still believe that it applies. This commenter suggested that the rules should go further in describing the terms "legal authority and responsibility to engage in fire suppression" (as meaning that the employee who has been trained may engage in such tasks) and "is engaged in the prevention, control or extinguishment of fires" (because a fire department at an airport may extinguish a fire only once per year or less). The IMPA–HR, IMLA, and NLC stated that it was important to distinguish between the section 3(y)(1) tests relating to "the status of employees who are trained in fire suppression—that they have the legal authority and responsibility to engage in fire suppression and be employed by a public fire department"—and the disjunctive test in section 3(y)(2) relating to the duties of an employee, which require "that the employee either be engaged in firefighting or respond to emergencies." They agreed with the court's statement in *McGavock* that "emergency personnel trained as firefighters could be exempt even if they 'spend one hundred percent of their time responding to medical emergencies.'" They suggested that the Department add a sentence in § 553.210 providing that emergency medical personnel who are employed by a fire department and trained in fire suppression will be exempt as long as they either are engaged in firefighting or respond to emergency situations.

On the other hand, William Pincus, an attorney representing firefighters, stated that the 20% test was not obsolete because, even after the section 3(y) amendment, it is still necessary to distinguish between exempt and nonexempt activities. The 20 percent test defines when employees who perform work that is nonexempt fall outside the exemption. This commenter cited a pre-amendment court decision holding that without the rule a public agency would be free to assign a firefighter to do any kind of work (road repair, sanitation, parks and recreation) without fear of losing the exemption, and stated that nothing in the amendment changes this analysis. The International Association of Fire Fighters ("IAFF") commented that the second sentence of proposed § 553.210(a) would create confusion because, by using the wording "the term includes", the proposal implies that employees engaged in incidental nonfirefighting functions such as equipment maintenance, attending community fire drills and inspecting homes for fire hazards are exempt even if they do not satisfy the section 3(y) statutory criteria. The IAFF also stated that the third sentence of this section is overbroad because is suggests that the term includes all "trainees." The IAFF stated that "trainees who have not completed requisite training and have no certification in fire suppression are neither 'trained,' nor have the 'legal authority * * * to engage,' in fire suppression." The commenter thus distinguished between a ten-year firefighter sent to a training course in hazardous materials who remains exempt and an untrained individual in an introductory fire suppression course before certification. This commenter further suggested that the third sentence, relating to employees assigned to support activities, is incorrect because "[w]here employees have been assigned to other jobs in which they do not have the authority or responsibility

to engage in fire suppression and/or they do not engage in fire protection activities or response to emergency situations, the employees do not fit the statutory definition." Finally, the IAFF stated that existing § 553.210(b) is obsolete, and the Department should remove it or explain why it is retained.

After careful review of the comments received on this issue and reexamining the legislative history of the section 3(y) amendment, it is the Department's view that the statutory definition of an "employee in fire protection activities" requires no further regulatory guidance at this time; however, the Department may provide additional guidance in the future, as appropriate. As a result, this final rule implements the proposed change to § 553.210(a) substituting the statutory amendment language for the current four-part regulatory definition of the term "any employee * * * in fire protection activities." In addition, the Department is deleting the remainder of paragraph (a) as unnecessary due to the statutory definition. This change also removes language from the rule that commenters identified as confusing or inconsistent with FLSA section 3(y). Likewise, current paragraph (b) is deleted from this final rule because it is no longer necessary. Current paragraph (c) of § 553.210 will be redesignated as paragraph (b) in this final rule.

With regard to the 20 percent test, the Department continues to believe that Congress defined, without further limitation, the particular criteria for when an employee qualifies as "an employee in fire protection activities" in section 3(y). Thus, an employee who performs the described duties under the circumstances and the conditions set forth in section 3(y) is "an employee in fire protection activities" without regard to the 20 percent tolerance for nonexempt work contained in § 553.212 of the current rule. The specific definition adopted by Congress renders the 20 percent tolerance for nonexempt work applied under the former regulatory definition obsolete. However, § 553.212 also applies to employees engaged in law enforcement activities, and the definition of "an employee in fire protection activities" in section 3(y) does not impact those employees. Therefore, the final rule does not delete § 553.212(a) in its entirety; instead, it deletes from § 553.212(a) only the reference to employees engaged in "fire protection". The 20 percent tolerance for nonexempt work for employees engaged in law enforcement activities in section 553.212(a) will remain in effect. Likewise, since section 3(y) did not impact the applicability of section 7(p)(2)'s rule regarding the occasional or sporadic employment of public agency employees, including fire protection and law enforcement personnel, the final rule also retains § 553.212(b), which discusses this statutory provision. Section 553.212(b) does contain a reference to the 20 percent tolerance for nonexempt work, and the final rule makes a slight modification to that section to make clear that the 20 percent tolerance is only applicable to law enforcement personnel.

With regard to the IAFF comments, the current regulation at § 553.214 directly addresses the status of trainees, and it clarifies that a trainee qualifies for exemption "only when the employee meets all the applicable tests described in § 553.210." The Department is not aware of instances of the exemption being claimed for trainees who have not gained certification and therefore do not have the legal authority or responsibility to engage in fire suppression, or of confusion surrounding this issue since passage of the section 3(y) amendment. Moreover, the Department believes that the statutory terms, such as legal authority and responsibility, should continue to be interpreted and applied on a case-by-case basis, based upon the specific facts in each situation, as reflected in Wage and Hour Opinion Letter FLSA 2006–20 (June 1, 2006). Therefore, no additional changes are required to implement this statutory provision.

6. Stock Options Excluded From the Computation of the Regular Rate

The Worker Economic Opportunity Act, Public Law 106–202, 114 Stat. 308 (May 18, 2000), amended §§ 7(e) and 7(h) of the FLSA. 29 U.S.C. 207(e), (h). In § 7(e), a new subsection (8) adds to the types of remuneration that are excluded from the computation of the regular rate when determining overtime pay "[a]ny value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program" meeting particular criteria. In § 7(h), the amendment clarifies that the amounts excluded under § 7(e) may not be counted toward the employer's minimum wage requirement under section 6, and that extra compensation excluded pursuant to the new subsection (8) may not be counted toward overtime pay under § 7.

The proposed rule incorporated the amendments made by the Worker Economic Opportunity Act by adding to the regulatory provisions which simply quote the statute in § 778.200(a) and (b). Section 778.208 was also revised simply to update from "seven" to "eight" the number of types of remuneration excluded in computing the regular rate.

Only two commenters addressed this section of the proposed rule. SHRM stated that "[t]his addition to the existing regulations is appropriate, and we encourage DOL to include it as proposed in its final rule." The AFL–CIO stated that the Department should do more than just restate the statutory language, specifically noting the need to clarify how an employer must communicate to employees the "terms and conditions" of stock benefit programs and under what "other circumstances" an employee may exercise a stock option or stock appreciation right in less than six months. The AFL–CIO did not offer any regulatory language or suggested solutions that it thought would be helpful, but only stated that the Department should withdraw the proposal and reissue a new NPRM providing further guidance.

The Department does not believe that it would be helpful or appropriate to leave the regulations inconsistent with the statute while it starts the NPRM process anew. Rather, in order to avoid confusion, the Department continues to believe that it is important to update the regulations to reflect the current state of the law by incorporating the Worker Economic Opportunity Act into the regulations. Therefore, the final rule adopts the changes to § 778.200 with minor editorial edits and § 778.208 as proposed. The Department will consider offering further guidance on the issues raised in the comments and other issues through non-regulatory means.

7. Fair Labor Standards Act Amendments of 1974

A. Service Advisors Working for Automobile Dealerships and Boat Salespersons

On April 7, 1974, Congress enacted an amendment to section 13(b)(10) of the FLSA, 29 U.S.C. 213(b)(10). Public Law 93–259, 88 Stat. 55 (1974). This amendment added an overtime exemption for salespersons primarily engaged in selling boats (in addition to the pre-existing exemption for sellers of trailers or aircraft). This amendment also eliminated the overtime exemption for partsmen and mechanics servicing trailers or aircraft. The proposed rule revised 29 CFR part 779, Subpart D—Exemptions for Certain Retail or Service Establishments—to conform the regulations to this 1974 amendment. Section 779.371(a) was revised to reflect the amendment's addition of boat salespersons to the exemption. Proposed § 779.372(a) clarified that "any

salesman, partsman, or mechanic" primarily engaged in selling or servicing automobiles, trucks, or farm implements are covered by the exemption; and that salespersons primarily engaged in selling trailers, boats, or aircraft are also exempt, but not partsmen or mechanics for such vehicles. Portions of § 779.372(b) and (c) were also changed accordingly.

Section 13(b)(10)(A) of the FLSA provides that "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers" shall be exempt from the overtime requirements of the Act. 29 U.S.C. 213(b)(10)(A). The current regulation at 29 CFR 779.372(c)(4) states that an employee described as a service manager, service writer, service advisor, or service salesman who is not primarily engaged in the work of a salesman, partsman, or mechanic is not exempt under section 13(b)(10)(A).

As discussed in the preamble to the proposed rule, three appellate courts have held that service advisors are exempt under section 13(b)(10)(A) because they are "salesmen" who are primarily engaged in servicing automobiles. 73 FR 43658 (Jul. 28, 2008). Based upon the two earliest court decisions, the Wage and Hour Division in 1978 recognized in an Administrator-issued opinion letter that in certain circumstances service advisors or writers "can be properly regarded as engaged in selling activities." *See* Wage and Hour Opinion Letter WH–467, 1978 WL 51403 (July 28, 1978). The opinion letter noted, however, that this "would not be true in the case of warranty work, since the selling of the warranty is done by the vehicle salesman when the vehicle is sold, not by the service writer." Therefore, the NPRM proposed to change § 779.372(c), titled "Salesman, partsman, or mechanic," to follow the courts' holdings that employees performing the duties typical of service advisors are within the section 13(b)(10)(A) exemption. Section 779.372(c)(1) was revised to include such an employee as a salesman primarily engaged in servicing automobiles. Section 779.372(c)(4) was rewritten to clarify that such employees qualify for the exemption.

A number of commenters addressed this issue. The National Automobile Dealers Association stated that the retail automobile and truck dealership industry has relied upon the Administrator's 1978 opinion letter and that it supported the proposed clarification that such employees are exempt. Littler Mendelson, P.C., similarly stated that it supported the change, because it "will eliminate confusion resulting from the inconsistency between the [Field Operations Handbook] and the current regulatory guidance, and is not a change in the law."

Other commenters disagreed with the proposed rule. The AFL–CIO stated that the proposal ignored congressional intent "to carve a narrow exemption for salesmen who work at automobile dealerships." The AFL–CIO, NELA, and NELP traced the legislative history, focusing on the addition of the requirement that the salesman must be "primarily engaged in selling or servicing such vehicles." These commenters disagreed with the court decisions interpreting the exemption, stating that service advisors merely coordinate between customers and the mechanics who actually perform the services, and that the exemption should not be extended to employees outside its plain language simply because they are "functionally similar" to an exempt employee. The AFL–CIO concluded that "neither integration with exempt employees nor the performance of functions related to those of exempt employees qualifies an employee as one who is *primarily engaged in either selling or servicing vehicles.*" (Emphasis in original). NELA concluded that the exemption "requires an employee to either primarily service the vehicle or 'sell' the vehicle—not sell the service of the vehicle, as *Walton* concluded." Comments submitted by Members of the United States Congress similarly opposed the Department's proposal, stating that the 1966 exemption only exempts salesmen who sell automobiles and mechanics who service automobiles, and not salesmen who sell services. They stated that the Department's proposal "would abandon its longstanding and correct interpretation of Section 13(b)(10)," and would ignore the Supreme Court's command to construe FLSA exemptions narrowly. *Id.*

The AFL–CIO stated that, if the Department does treat service writers as salesmen primarily engaged in servicing vehicles, then it urged the Department to exclude any time spent in "selling" warranty work from the determination of whether the writer has spent the majority of his time in selling, since that right to free parts and service has already been sold by the salesman of the vehicle. NELA stated that the proposed regulatory text was confusing because it appears to exempt service writers only if they are selling the servicing of vehicles that the dealership sells, which would be difficult for both the employee and the employer to know. Both NELP and the North Carolina Justice Foundation commented that the proposal exempts service writers based upon their job title alone, rather than based upon an analysis of their actual job duties, which is contrary to the requirement to look at the circumstances of the whole activity.

Upon further consideration of the issue, the Department has decided not to adopt the proposed change to § 779.372(c)(4) to specifically include service managers, service writers, service advisors, or service salesmen as qualifying for exemption. As commenters point out, the statute does not include such positions and the Department recognizes that there are circumstances under which the requirements for the exemption would not be met. The Department notes that current § 779.372(c)(1) is based on its reading of 13(b)(10)(A) as limiting the exemption to salesmen who sell vehicles and partsmen and mechanics who service vehicles. The Department believes that this interpretation is reasonable and disagrees with the Fourth Circuit's conclusion in *Walton* v. *Greenbrier Ford, Inc.*, 370 F.3d 446, 452 (4th Cir. 2004), that the regulation impermissibly narrows the statute. Therefore, the Department has concluded that current 779.372(c) sets forth the appropriate approach to determining whether employees in such positions are subject to the exemption. However, the final rule adopts § 779.372(a)–(b) as proposed.

B. Tipped Employees

Section 3(m) of the FLSA defines the term "wage." The FLSA was amended in 1966 to include hotels and restaurants within the scope of its coverage for the first time. In order to alleviate these industries' new minimum wage obligations, the 1966 amendments also provided for the first time, within section 3(m)'s definition of a "wage," that an employer could utilize a limited amount of its employees' tips as a credit against its minimum wage obligations to those employees through a so-called "tip credit." The Department's current tip credit regulations were promulgated in 1967, one year after the tip credit was first introduced, and prior to the 1974 amendments to the FLSA, which amended the tip credit provision in section 3(m) by providing that an employer could not take a tip credit unless:

(1) [its] employee has been informed by the employer of the provisions of this subsection and (2) all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips.

Public Law 93–259, § 13(e), 88 Stat. 55 (1974). Thus, as amended in 1974, section 3(m) required that the employer inform its employees about the tip credit prior to utilizing it, required that a tipped employee retain all of his or her tips, and limited employer-imposed, mandatory tip pools to employees who "customarily and regularly receive tips."

The section 3(m) requirement that the employer "inform" its tipped employees of the provisions of section 3(m) prior to taking a tip credit has been strictly enforced by the Department and by the courts. Courts have disallowed the use of the tip credit for lack of notice even "where the employee has actually received and retained base wages and tips that together amply satisfy the minimum wage requirements," remarking that "[i]f the penalty for omitting notice appears harsh, it is also true that notice is not difficult for the employer to provide." *Reich* v. *Chez Robert, Inc.*, 28 F.3d 401, 404 (3d Cir. 1994) (citing *Martin* v. *Tango's Restaurant*, 969 F.2d 1319, 1323 (1st Cir. 1992)).

Prior to the 1974 amendments, the compensation of tipped employees was often a matter of agreement. Tipped employees could agree, for example, that an employer was only obligated to pay cash wages when an employee's tips were less than the minimum wage, or that the employee's tips would be turned over to the employer, who could then use the tips to pay the full minimum wage. *See Usery* v. *Emersons Ltd.*, 1976 WL 1668, at *2 (E.D. Va. 1976), *vacated and remanded on other grounds sub. nom. Marshall* v. *Emersons Ltd.*, 593 F.2d 565 (4th Cir. 1979). The 1974 section 3(m) amendments were intended to prohibit such agreements. *See* S. Rep. No. 93–690, at 43 (1974) ("The [retention requirement] is added to make clear the original Congressional intent that an employer could not use the tips of a 'tipped employee' to satisfy more than 50 percent of the Act's applicable minimum wage."). The Department's current regulations, which were in effect prior to the 1974 amendments and allowed an employer to require employees to turn over all their tips to the employer, were therefore superseded by the statutory amendment to the extent that they permitted employers to utilize employees' tips to satisfy more than 50% of their minimum wage obligation.

Under the 1974 amendments to section 3(m), an employer's ability to utilize an employee's tips is limited to taking a credit against the employee's tips as permitted by section 3(m). Section 3(m) provides the only method by which an employer may use tips received by an employee. An employer's only options under section 3(m) are to take a credit against the employee's tips up to the statutory differential, or to pay the entire minimum wage directly. *See* Wage and Hour Opinion Letter WH–536, 1989 WL 610348 (October 26, 1989) (defining when an employer does not claim a tip credit as when the employer does not retain any tips and pays the employee the minimum wage).

As amended in 1996, section 3(m) provides that the "wage" of a tipped employee equals the sum of the cash wage paid by the employer, which is fixed at a minimum of $2.13 an hour, and the amount it claims as a tip credit. The maximum permissible tip credit under section 3(m) is calculated using the current Federal minimum wage. Thus, in a situation in which an employee earns $10 an hour in tips and the employer pays $2.13 an hour in cash wages and claims the statutory maximum as a tip credit, the employee has received only the minimum wage because tips in excess of the maximum tip credit are not considered "wages" under 3(m). Using the current minimum wage of $7.25 an hour as an example, the maximum permissible tip credit is $7.25 minus $2.13, which permits the employer to take a tip credit against its minimum wage obligation of $5.12 an hour, provided it has informed its tipped employees of the tip credit provision and has permitted the employees to retain all of their tips.

Since the amount of tips the employee receives in excess of the allowable tip credit are not considered "wages" paid by the employer, any deductions by the employer from the employee's tips would result in a violation of the employer's minimum wage obligation because the employer has only paid the employee the minimum wage (cash wage of $2.13 plus the tip credit up to $7.25). A deduction from the employee's tips would be subtracted from the $7.25 minimum wage payment and would bring the employee below the minimum wage.

The NPRM proposed to update the regulations to incorporate the 1974 amendments, the legislative history, subsequent court decisions, and the Department's interpretations. Proposed §§ 531.52, 531.55(a), 531.55(b), and 531.59 eliminated references to employment agreements providing either that tips are the property of the employer or that employees will turn tips over to their employers, and clarified that the availability of the tip credit provided by section 3(m) requires that all tips received must be paid out to tipped employees in accordance with the 1974 amendments. Section 531.55(a), which describes compulsory service charges, also was updated by changing the example of such a charge from 10 percent to 15 percent to reflect more current customary industry practices.

The 1974 amendments also clarified that section 3(m)'s statement that employees must retain their tips does not preclude the practice of tip pooling "among employees who customarily and regularly receive tips." 29 U.S.C. 203(m). The Department's regulation on the subject provides that "the amounts received and retained by each individual [through a tip pooling arrangement] as his own are counted as his tips for purposes of the Act." 29 CFR 531.54.

Wage and Hour has interpreted the tip pooling clause more fully in opinion letters and in its Field Operations Handbook ("FOH"). The FOH provides, for example, that a tip pooling arrangement cannot require employees to contribute a greater percentage of their tips to the tip pool than is "customary and reasonable." FOH section 30d04(b). The agency expanded upon this position, in its opinion letters and in litigation, that "customary and reasonable" equates to 15 percent of an employee's tips or two percent of daily gross sales. *See, e.g.*, Wage and Hour Opinion Letter WH–468, 1978 WL 51429 (Sept. 5, 1978). Several courts have rejected the agency's maximum contribution percentages, however, "because neither the statute nor the regulations mention [the requirement stated in the agency interpretation] and the opinion letters do not explain the statutory source for the limitation that they create." *Kilgore* v. *Outback Steakhouse of Fla., Inc.*, 160 F.3d 294, 302–03 (6th Cir. 1998); *see Davis* v. *B&S, Inc.*, 38 F. Supp. 2d 707, 718 n.16 (N.D. Ind. 1998) (citing *Dole* v. *Continental Cuisine, Inc.*, 751 F. Supp. 799, 803 (E.D. Ark. 1990) ("The Court can find no statutory or regulatory authority for the Secretary's opinion [articulated in an opinion letter] that contributions in excess of 15% of tips or 2% of daily gross sales are excessive."). In light of these court decisions, the NPRM proposed to update § 531.54 to clarify that section 3(m) of the FLSA does not impose a maximum tip pool contribution percentage. Moreover, the NPRM proposed to state that the

employer must inform each employee of the required tip pool contribution.

The 1974 amendments also revised another aspect of section 3(m). Prior to the 1974 amendments, section 3(m) of the FLSA provided that an employee could petition the Wage and Hour Administrator to review the tip credit claimed by an employer. *See* Public Law 89–601, 80 Stat. 830 (1966) ("[I]n the case of an employee who (either himself or acting through his representative) shows to the satisfaction of the Secretary that the actual amount of tips received by him was less than the amount determined by the employer as the amount by which the wage paid him was deemed to be increased * * * the amount paid such employee by his employer shall be deemed to have been increased by such lesser amount."). The 1974 amendments eliminated the review clause to clarify that the employer, not the employee, bears the ultimate burden of proving "the amount of tip credit, if any, [he] is entitled to claim." S. Rep. No. 93–690, at 43. Two outdated regulatory provisions promulgated in 1967, however, still purport to permit petitions to the Wage and Hour Administrator for tip credit review despite the fact that the statute no longer provides for this review. *See* 29 CFR 531.7, 531.59.

Consistent with the 1974 amendments, the NPRM proposed to delete § 531.7, which permits employees to petition the Wage and Hour Administrator for tip credit review. References to the Administrator's review in § 531.59 also were deleted, and the language was updated to reflect the burden on the employer to prove the amount of the tip credit to which it is entitled.

Numerous commenters addressed the issues relating to tipped employees.

i. Ownership of Employee Tips

Commenters representing employees expressed concern with several of the Department's proposed revisions. First, a variety of commenters stated that they were opposed to the Department's reference in § 531.52 to the fact that an employer is prohibited from using an employee's tips for any reason other than to make up the difference between the required cash wage paid and the minimum wage where "an employee is being paid wages no more than the minimum wage." *See, e.g.,* NELA, AFL–CIO, Bruckner Burch PLLC, and NELP. These commenters further noted that the preamble addresses the converse situation where an employer does pay more than the minimum wage in cash, and the preamble states that such an employer "would be able to make deductions so long as they did not reduce the direct wage payment below the minimum wage." 73 FR 43659 (Jul. 28, 2008). They objected to these statements, based upon the legislative history of the tip credit provisions.

These commenters pointed out that section 3(m) first was amended in 1966, following a Supreme Court decision that concluded that employers could use employees' tips to satisfy the entire minimum wage. That amendment provided that employers could credit tips toward 50 percent of the minimum wage. After the Wage and Hour Division issued regulations concluding that an employer could still require employees to turn over all their tips, effectively achieving a tip credit equal to 100 percent of the minimum wage, Congress again amended the statute in 1974 to provide that all tips received by an employee must be retained by the employee (except for valid, or bona fide, tip pooling). The commenters noted that the legislative history clarifies that Congress wanted in 1974 "to make clear [its] original * * * intent that an employer could not use the tips of a 'tipped employee' to satisfy more than 50 percent of the Act's applicable minimum wage." S. Rep. No. 93–690, at 43. Congress also made it clear in 1974 that "[a]ll tips received [by tipped employees were to] be paid out to tipped employees." *Id.,* at 42. The commenters cited Wage and Hour opinion letters, the FOH and Fact Sheet #15 issued thereafter, which concluded that the 1974 Amendments clarified Congress' determination that tips are the property of the employees who receive them, not the employer, and that any agreement requiring an employee to turn over tips to the employer is, therefore, illegal.

Based upon this history, NELP stated that the proposed rule and the preamble language provides "misleading guidance on tips" and "threaten[s] to increase confusion in this already high-violation industry." NELP asserted that it would be unlawful for an employer to pay a worker a cash wage of $1.00 in excess of the full minimum wage and then withhold $1.00 per hour of a worker's tips, and that the Department "lacks the authority to create this exception to the general rule against tip stealing." NELP further concluded that the proposed regulations include misleading guidance that is "confusing and encourages abuse that would adversely impact both tipped workers and their employers." Employers would hire workers for a wage that appeared to exceed the minimum wage, but then would lower their pay back to the minimum wage, and such action would expose "employers to significant liability because it is out of step with the many state laws prohibiting this action." *See also* North Carolina Justice Center.

NELA similarly stated that the proposed regulations "create confusion with respect to the ownership of tips" because they suggest that if an employer pays a direct (or cash) wage slightly in excess of the minimum wage, it can "thereby obtain unfettered access to its employees' tips." NELA stated that the confusion "is particularly dangerous given that some courts wrongly permit employers to pocket the tips of employees who are 'paid' at least the minimum wage." Therefore, NELA suggested that the Department should clarify that tips are the property of the employee who receives them and that the tip retention requirement applies even if the employer pays a wage in excess of the minimum wage.

The AFL–CIO similarly commented that the Department's regulatory "language—whether intended by the Department or the result of poor drafting—seems to permit employers to take the employee's tips if they are paid the minimum wage or greater * * * [which] was barred by Congress in 1974." *See also* Members of United States Congress. The AFL–CIO cited numerous opinion letters and court decisions for the conclusion that, whether or not an employer claims any tip credit, the employee must retain all tips (asserting the few court decisions that hold to the contrary are incorrect). Therefore, the AFL–CIO concluded that proposed § 531.52 would "turn the 1974 amendment on its head" by allowing employers to require employees to surrender their tips when the amendment bars such agreements; the commenter further stated that the proposal conflicts with proposed § 531.59, which states that section 3(m) requires employers to permit employees to retain all tips received with the exception of a valid, or bona fide, tip pool. Bruckner Burch commented that the final rule could incorporate examples from the Department's opinion letters, such as Wage Hour Opinion Letter WH–536, 1989 WL 610348 (Oct. 26 1989) (cited in the preamble), explaining when deductions may be made from the tips of employees who are paid in excess of the minimum wage, but that the rule as proposed created confusion.

The Chamber of Commerce stated that it supported the elimination of the references in current § 531.52 and other regulations to agreements between employers and employees that would make tips the property of the employer or require employees to turn over their

tips to employers. The commenter stated that "Congress amended the FLSA in 1974 to clarify that employers are not permitted to retain employee tips. References within the current regulations to agreements that could permit employers to do so were misleading and confusing, within the context of the congressional amendment."

The Department agrees with the analysis in the comments that tips are the property of the employee, and that Congress deliberately amended the FLSA's tip credit provisions in 1974 to clarify that section 3(m) provides the only permitted uses of an employee's tips—through a tip credit or a valid tip pool among only those employees who customarily and regularly receive tips. This has been the Department's longstanding position since the 1974 amendments. The Department has also taken the position since the 1974 amendments that these protections against the use of an employee's tips apply irrespective of whether the employer has elected the tip credit.

The legislative history of the Act, as well as caselaw and opinion letters published shortly after the 1974 amendments, support the Department's position that section 3(m) provides the only permissible uses of an employee's tips regardless of whether a tip credit is taken. As noted *supra*, the tip credit provision permitting an employer to use an employee's tips to satisfy 50 percent of the employer's minimum wage obligation was originally enacted in 1966. Public Law 89–601, § 101(a), 80 Stat. 830 (1966). In 1974, when the Act was amended, a Senate Report stated that the amendment was intended to "requir[e] that all tips received be paid out to tipped employees." S. Rep. No. 96–690, at 42 (1974). The same Report further observed that the amendments required employees to retain all of their tips (except to the extent that they are used in a valid tip pool) and clarified that an employer could not use its employees' tips to satisfy more than 50 percent of its minimum wage obligations. *Id.* at 42–43 (quoting 29 CFR 531.52). In 1977, a Senate Report from the Committee on Human Resources considering further amendments to the FLSA indicated that the role of tips in the calculation of an employer's minimum wage obligations to its tipped employees had been resolved by the 1974 amendments:

> Tips are not wages, and under the 1974 amendments tips must be retained by the employees—which can include employees who are in an appropriate tip pool—and cannot be paid to the employer or otherwise used by the employer to offset his wage obligation, except to the extent permitted by section 3(m).

S. Rep. No. 95–440, at 25 (1977). In support of this statement, the Report cites to two cases, *Richard* v. *Marriott Corp.*, 549 F.2d 303 (4th Cir. 1977), and *Usery* v. *Emersons Ltd.*, 1976 WL 1668 (E.D. Va. 1976), both of which recognized shortly after the 1974 amendments that while section 3(m) is not entirely clear, it had the effect of limiting an employer's use of its employees' tips to the extent provided in the statute. In *Marriott Corp.*, the Fourth Circuit concluded that tips belonged to the tipped employee, and that it was "nonsense" to argue after the 1974 amendments "that compliance with the statute results in one-half credit, but that defiance of the statute results in 100 percent credit." 549 F.2d at 305. In *Emersons Ltd.*, the district court stated that "[w]hile [section 3(m)] could have been worded more clearly, it is apparent, at least as a result of the 1974 amendment, that Congress intended to give the employer the benefits of tips received by the employee, but only to a limited extent." 1976 WL 1668, at *4.

The Ninth Circuit recently held that section 3(m)'s limitations on an employer's use of an employee's tips apply only when the tip credit is taken, and that when a tip credit is not taken, tips are only the property of the employee absent an agreement to the contrary. *Cumbie* v. *Woody Woo, Inc. d/b/a Vita Café*, 596 F.3d 577 (9th Cir. 2010); *see also Platek* v. *Duquesne Club*, 961 F. Supp. 835, 839 (W.D. Pa. 1995), *aff'd without opinion*, 107 F.3d 863 (3d Cir.) (Table), *cert. denied*, 522 U.S. 934 (1997). The Department respectfully believes that *Woody Woo* was incorrectly decided. The issue in *Woody Woo* was whether section 3(m)'s limitation on mandatory tip pools to those employees who "customarily and regularly" receive tips applies when an employer does not take a tip credit. In that case, tipped employees were required to turn over the majority of their tips to a tip pool that included employees, such as cooks and dishwashers, who are not "customarily and regularly" tipped employees, and received a small portion of their tips back from the tip pool. The employer was precluded from taking a tip credit by State law and paid its tipped employees the full State minimum wage, which exceeded the Federal minimum wage.

The Ninth Circuit started its analysis in *Woody Woo* with a statement from the 1942 Supreme Court decision in *Williams* v. *Jacksonville Terminal Co.*, 315 U.S. 386 (1942), that "'[i]n businesses where tipping is customary, the tips, *in the absence of an explicit contrary understanding*, belong to the recipient. Where, however, such an arrangement is made * * *, *in the absence of statutory interference, no reason is perceived for its invalidity.*'" *Woody Woo*, 596 F.3d at 579 (quoting *Jacksonville Terminal*, 315 U.S. at 397) (emphasis added by the Ninth Circuit). Thus, the Ninth Circuit stated that *Jacksonville Terminal* established a "default rule that an arrangement to turn over or to redistribute tips is presumptively valid," and that the question before the court was whether the FLSA, as amended, "imposes any 'statutory interference' that would invalidate Woo's tip-pooling arrangement." *Id.* After "unpacking" what it characterized to be "dense statutory language" in section 3(m), the court concluded that it is "clear" that the current statutory language disrupts the *Jacksonville Terminal* default rule only when a tip credit is taken, because the language in the last sentence of section 3(m), providing that an employer cannot take a tip credit unless it has provided notice and permits employees to retain all of their tips (except for a valid tip pool), "imposes *conditions* on taking a tip credit and does not state freestanding *requirements* pertaining to all tipped employees." *Id.* at 581. The Ninth Circuit therefore did not read section 3(m) as imposing any limitations on the use of an employee's tips when a tip credit is not taken. The court thus rejected the Department's position in its *amicus curiae* brief that Woody Woo made improper deductions from the cash wage paid when it required its employees to contribute their tips to an invalid tip pool, and that this improper deduction resulted in a minimum wage violation because the tipped employees did not receive the full minimum wage plus all tips received.

The Department believes the Ninth Circuit incorrectly concluded that the 1974 amendments to the FLSA did not alter what it characterized as *Jacksonville Terminal's* default rule. The fact that section 3(m) does not expressly address the use of an employee's tips when a tip credit is *not* taken leaves a "gap" in the statutory scheme, which the Department has reasonably filled through its longstanding interpretation of section 3(m). *See Barnhart* v. *Walton*, 535 U.S. 212, 218 (2002) ("[S]ilence, after all, normally creates ambiguity. It does not resolve it."); *see also Senger* v. *City of Aberdeen, SD*, 466 F.3d 670, 672 (8th Cir. 2006) (recognizing Department's

authority to fill a "gap" in the FLSA's regulatory scheme). The Ninth Circuit's "plain meaning" construction is unsupportable. Congress would not have had to legislatively permit employers to use their employees' tips to the extent authorized in section 3(m) unless tips were the property of the employee in the first instance. In other words, if tips were not the property of the employee, Congress would not have needed to specify that an employer is only permitted to use its employees' tips as a partial credit against its minimum wage obligations in certain prescribed circumstances because an employer would have been able to use all of its employees' tips for any reason it saw fit. If, as the Ninth Circuit held, the FLSA places limitations on an employer's use of its employees' tips only in the context of a tip credit, an employer could simply eschew the tip credit and use a greater part of its employees' tips toward its minimum wage obligations than permitted under section 3(m). This would stand the 1974 amendment "on its head" and would mean it has "accomplished nothing." *Emersons Ltd.*, 1976 WL 1668, at *4. If an employer could avail itself of this loophole, it would have no reason to ever elect the tip credit because, instead of using only a portion of its employees' tips to fulfill its minimum wage obligation, it could use all of its employees' tips to fulfill its entire minimum wage obligation to the tipped employees or other employees. This is essentially what the panel's decision permits, because if there are no restrictions on an employer's use of its employees' tips when it does not utilize a tip credit, the employer can institute a mandatory tip pool that requires employees to contribute all of their tips regardless of how much they receive back, or mandate that employees turn over all of their tips and use those tips to pay the minimum wage or for any other purpose.

For example, if an employer is subject to the current Federal minimum wage of $7.25 an hour and its tipped employees receive $10 an hour in tips, an employer who uses the maximum tip credit against its minimum wage obligation has to pay a cash wage of $2.13 and can "use" $5.12 of an employee's tips as a credit toward the rest of the minimum wage payment. The employee thus receives $2.13 in cash wages and keeps all of her $10 in tips, for a total of $12.13. *Woody Woo*, however, permits an employer who eschews the tip credit to pay $7.25 to its tipped employees in cash wages to satisfy its minimum wage obligation and require an employee to turn over all $10 of the employee's tips. The employee now receives only $7.25 an hour, rather than $12.13. And the employer, while it pays $7.25, gains $10.00 that it can direct for its own purposes (in essence realizing a $2.75 profit from the employee's tips). Thus, under the Ninth Circuit's "plain language" reading of section 3(m), an employer that does not utilize a tip credit is permitted to use its employee's tips to a greater extent than an employer that does utilize such credit. This yields an absurd result and makes the 1974 amendment superfluous.

As noted *supra*, the Department stated publicly immediately after the 1974 amendments that its tip credit regulations permitting employers to take control of employee tips through agreements were outdated, and indicated that new regulations were forthcoming. *See* Wage and Hour Opinion Letter WH–310, 1975 WL 40934, at *1 (Feb. 18, 1975). The Department also explicitly stated that the 1974 amendments superseded *Jacksonville Terminal*, explaining that "the situation of a tipped employee is far different" than it was in 1942. Wage and Hour Opinion Letter WH–321, 1975 WL 40945, at *1 (Apr. 30, 1975). As also noted *supra*, a number of commenters voiced concern that the proposed regulatory text in § 531.52 was confusing on this point, and did not make the Department's position clear. In order to codify its longstanding interpretation of section 3(m) in its regulations, and in response to these commenters, the Department is amending § 531.52 in the final rule to make clear that tips are the property of the employee, and that section 3(m) sets forth the only permitted uses of an employee's tips—either through a tip credit or a valid tip pool—whether or not the employer has elected the tip credit.

The inclusion of the text in proposed § 531.52 reading "Where an employee is being paid wages no more than the minimum wage" was intended to convey the fact that the Department only has authority under the FLSA to enforce, *inter alia*, the minimum wage provisions of that Act. *See, e.g.*, 29 U.S.C. 216, 217. Thus, if an employer pays the employee a direct wage in excess of the minimum wage—and thus did not claim a credit against any portion of the employee's tips and did not utilize the employee's tips in any way—the employer would be able to make deductions but only from the cash wage amount paid directly by the employer and only to the extent that the deductions did not reduce the employer's direct wage payment to an amount below the minimum wage. *See* Wage and Hour Opinion Letter WH–536, 1989 WL 610348 (Oct. 26, 1989). In such a situation, the deduction would be viewed as coming from the employer's direct wage payment that exceeds the minimum wage. This is consistent with the Department's position regarding impermissible deductions in the non-tip context. *See* Wage and Hour Opinion Letter FLSA 2006–21, 2006 WL 1910966 (June 9, 2006) (explaining that no FLSA action lies against an employer who makes impermissible deductions from cash wages paid if those wages are in excess of the minimum wage and the deductions do not reduce the employee's pay below the minimum wage). However, the Department agrees with the commenters that the payment of tipped employees under the FLSA and State laws is a very complex issue, and that retention of this language from the proposed rule could result in unintended confusion among the regulated community. Consequently, the text in proposed § 531.52 is revised to delete the introductory phrase in the fourth sentence of that section that reads: "Where an employee is being paid wages no more than the minimum wage," to clarify under the final rule that an employer in all cases is prohibited from using an employee's tips for any reason other than as a tip credit to make up the difference between the required cash wage paid and the minimum wage or in furtherance of a valid tip pool.

ii. Required Employer Notice

Commenters representing employees also objected to the Department's proposal in § 531.59(b) and the accompanying preamble providing that employers only have to "inform" employees orally that they will treat tips as satisfying part of the employer's minimum wage obligation, but do not have to "explain" the tip credit or provide anything in writing. For example, NELP commented that the legislative history "makes clear that informing workers is no mere formality, but that the employer must indeed *explain* the tip credit." NELP quoted S. Rep. 93–690 at 43 (1974), which provides that the employer is responsible for informing a tipped employee how the wage was calculated and that "the employer must explain the tip provision of the Act to the employee and that all tips received by such employee must be retained by the employee." NELP stated that many tipped employees are low-wage and immigrant employees working in high-violation industries, and they do not understand the complicated tip credit rules. NELP suggested that requiring

employers to provide a clear written explanation to employees upon hire would help them understand the rules and would help employers because it "would enable them to protect themselves from litigation claiming that they failed to provide adequate notice and therefore cannot take the tip credit." *See also* North Carolina Justice Center, Greater Boston Legal Services (simply informing an employee that it will use the tip credit would be "jargon that would be meaningless to many workers, especially those with limited English proficiency or immigrant workers with limited experience with wages in this country * * * Having the explanation in writing, moreover, is especially important to those workers who may want or need to seek additional assistance, outside the workplace, to understand the information they are being provided."); Members of United States Congress (the regulation should require employers to explain the tip credit rules so that employees understand "how their wages are calculated, as a matter of fairness and as a way of enforcing the law * * * To satisfy these goals, the Department should require employers to provide written notice * * * Written notice will also prevent unnecessary litigation, by improving employees' understanding of their rights.").

The AFL–CIO submitted similar comments and stated that the proposed regulation "fails to satisfy the plain language of the statute, which requires not just that the employer 'inform' the employee that it is taking a tip credit, but that 'the employer [inform the employee] of the provisions of this subsection.'" NELA also submitted similar comments and stated that, given the increasing importance of employee tips vis-à-vis the minimum wage, the tip credit regulations should ensure the fair operation of the tip credit provisions.

Because the FLSA poster (Publication 1088) provides only a limited description of the tip credit rules and recognizes that "other conditions must also be met," several commenters suggested that the regulation should set forth a sample notice providing the required explanation in full. NELA, the AFL–CIO, and Bruckner Burch PLLC stated that employers must tell employees not only that the employer will be using the tip credit, but also that a minimum wage is required by law, the amount of the minimum wage, how the tip credit works—that the employer must pay $2.13 and the balance of the full minimum wage required by the Act can come from the tip credit but that the employer must make up the difference if the employee does not receive sufficient tips, that the employee will retain all of his or her tips, and the formula for any tip pooling arrangement. These commenters stated that the Department should not rely on *Kilgore* v. *Outback Steakhouse of Florida, Inc.*, 160 F.3d 294 (6th Cir. 1998), the case cited in the preamble to the proposed rule, because it was wrongly decided on the notice issue in that it did not take into account the legislative history or the statutory language requiring employees to be informed of the provisions of section 3(m). These commenters pointed, instead, to other decisions that held employers could not utilize the tip credit where they had not adequately informed employees of the law's requirements. Finally, NELA objected to the suggestion that paychecks received after the work is performed or prior work history can provide the requisite notice, because the statute requires an employer to provide notice of the tip credit provisions prior to taking any tip credit.

Epstein Becker commented that the notice provision of section 3(m) does not require an employer to communicate its intent to use the tip credit; rather, it requires an employer to communicate the provisions of the section. Epstein Becker stated that the cases that require an employer to communicate its intent to treat tips as satisfying part of the minimum wage obligation do so without analysis of the statutory language and are incorrect. Epstein Becker further asserted that the information that would be useful to employees and required by section 3(m) is that the employer must supplement an employee's tips if they are insufficient to raise the wage level to the minimum wage, that the cash wage must be at least $2.13, and all tips earned must be retained by the employee absent a valid tip pooling arrangement (and perhaps information regarding the required information as to the tip pool, although this is "difficult to reconcile with the statute's language"). The commenter stated that the proposed regulation, requiring communication of the employer's intent to use the tip credit, does little to advance the purpose of the statute because virtually all employees know their employer intends to pay them a reduced tip wage based on prior work in the industry and any misunderstanding would be resolved with the first paycheck. Finally, Epstein Becker stated that the information on the FLSA poster (Publication 1088) is concise and understandable, and that the poster should contain all information that employers are required to communicate.

The Chamber of Commerce and Littler Mendelson, P.C., agreed with the proposal regarding what an employer must communicate to employees and stated that it can be oral. They stated the proposal is a positive step in clarifying employer obligations and, thus, it should reduce the litigation on this issue by clearly articulating the required content of the notice.

Section 3(m)(2) of the Act provides that the tip credit provisions "shall not apply with respect to any tipped employee unless *such* employee has been informed by the employer of the *provisions of this subsection*, and all tips received by such employee have been retained by such employee [except for] pooling of tips among employees who customarily and regularly receive tips." 29 U.S.C. 203(m)(2) (emphasis added). The "provisions of this subsection" include how to determine the wage an employer is required to pay a tipped employee, which is "the amount paid such employee by the employee's employer" (an amount that cannot be less than the cash wage required to be paid to a tipped employee on August 20, 1996, which was $2.13), and "the additional amount on account of the tips received by such employee" (an amount equal to the difference between the actual cash wage paid and the full minimum wage in effect under section 6(a)(1) of the Act). A Senate Report accompanying the 1974 amendments stated that the amendment "modifies Section 3(m) of the [FLSA] by requiring *employer explanation* to employees of the tip credit provisions, and by requiring that all tips received be paid out to tipped employees. * * * The tip credit provision of S. 2747 is designed to insure employer responsibility for proper computation of the tip allowance and to make clear that the employer is responsible for informing the tipped employee of how such employee's wage is calculated. Thus, the bill specifically requires that the employer must explain the provision of the Act to the employee and that all tips received by such employee must be retained by the employee." S. Rep. No. 93–690 at 42–43 (1974) (emphasis added).

As discussed in the preamble to the proposed rule, the courts have disagreed over the level of notice required to "inform" a tipped employee about section 3(m). Thus, in *Kilgore* v. *Outback Steakhouse of Florida, Inc.*, 160 F.3d 294, 298 (6th Cir. 1998), the Sixth Circuit held that while an employer must "inform its employees of its intent to take a tip credit toward the

employer's minimum wage obligation," it was not required to "explain" the tip credit. In *Martin* v. *Tango's Restaurant, Inc.*, on the other hand, the First Circuit interpreted section 3(m)'s notice provision to require, "at the very least notice to employees of the employer's intention to treat tips as satisfying part of the employer's minimum wage obligations," and stated that the provision "could easily be read to require more." 969 F.2d 1319, 1322 (1st Cir. 1992); *see Reich* v. *Chez Robert, Inc.*, 821 F. Supp. 967, 977 (D. N.J. 1993) (an employer does not meet its obligation to "inform" under section 3(m) when it tells its tipped employees that they will be paid a specific wage but does not explain that that wage is below the minimum wage and that it is permitted by law based on the employees' tips), *rev'd on other grounds*, 28 F.3d 401 (3d Cir. 1994)). In *Pellon* v. *Business Representation Int'l, Inc.*, 528 F. Supp. 2d 1306, 1310–11 (S.D. Fla. 2007), *aff'd*, 291 Fed. Appx. 310 (11th Cir. 2008), the district court held that the employer in that case had fulfilled its duty to "inform" its tipped employees of the provisions of section 3(m) by posting the FLSA poster and verbally notifying the employees that they would be paid $2.13 an hour plus tips, but noted that "a prominently displayed poster containing all of the relevant tip credit information" would also constitute sufficient notice. In *Bonham* v. *Copper Cellar Corp.*, 476 F. Supp. 98 (E.D. Tenn. 1979), on the other hand, the court held that vague references to the minimum wage and a poster that was not prominently displayed did not meet the requirement to "inform."

The Department has concluded that notice of the specific provisions of 3(m) is required to adequately inform the employee of the requirements of the tip credit. To the extent that the Sixth Circuit and other courts have reached different results, the Department notes that those courts generally failed to consider the important legislative developments underlying the FLSA's tip credit provisions and we choose to not be guided by those decisions in this revision of the regulations. Accordingly, based on the express provisions of the statute and the supporting legislative history, the Department agrees with the commenters stating that an employer must inform a tipped employee before it utilizes the tip credit, of the following: (1) The direct cash wage the employer is paying a tipped employee, which can be more than, but cannot be less than, $2.13 per hour; (2) the additional amount the employer is using as a credit against tips received, which cannot exceed the difference between the minimum wage specified in section 6(a)(1) of the FLSA and the actual cash wage paid by the employer to the employee; (3) that the additional amount claimed by the employer on account of tips as the tip credit may not exceed the value of the tips actually received by the employee; (4) that the tip credit shall not apply with respect to any tipped employee unless the employee has been informed of the tip credit provisions of section 3(m) of the Act; and (5) that all tips received by the tipped employee must be retained by the employee except for the pooling of tips among employees who customarily and regularly receive tips. Furthermore, the current FLSA recordkeeping regulation, at 29 CFR 516.28(a)(3), expressly requires that the amount per hour that the employer takes as a tip credit shall be reported to the employee in writing each time it is changed from the amount per hour taken in the preceding week.

Upon careful reexamination of the terms of the statute, its legislative history, and a review of the public comments, the Department is revising its interpretation from the NPRM of the level of explanation that employers must provide when informing tipped employees about the tip credit pursuant to section 3(m). Accordingly, the text of the second and third sentences in proposed § 531.59(b) are combined and revised in the final rule to provide:

> * * * Pursuant to section 3(m), an employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit of the provisions of section 3(m) of the Act, *i.e.:* The amount of the cash wage that is to be paid to the tipped employee by the employer; the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and that the tip credit shall not apply to any employee who has not been informed of these requirements in this section. * * *

Many commenters urged the Department to require employers to provide written notice to its tipped employees that explain section 3(m)'s tip credit provision. Although the Department is not requiring in this rule that the employer "inform" its tipped employees of section 3(m)'s requirements in writing, employers may wish to do so, since a physical document would, if the notice is adequate, permit employers to document that they have met the requirements in section 3(m) and the Department's regulations to "inform" tipped employees of the tip credit provision. Finally, the Final Rule changes the word "bona fide" in the last sentence in proposed § 531.59(b) to "valid"; although both terms in this context refer to a tip pool that includes only those employees who customarily and regularly receive tips, the term "valid" is used in those regulations pertaining to tips for consistency.

iii. Tip Pools

Commenters also addressed issues relating to tip pooling. As noted, the NPRM proposed to add two new sentences to § 531.54 ("Tip pooling") to explain that the FLSA does not set a maximum cap on the percentage of an employee's tips that may be contributed to a valid tip pool, but that an employer must notify its tipped employees of any required tip pool contribution amount. 73 FR 43667 (Jul. 28, 2008). UNITE HERE stated its belief that tip pooling must be voluntary, as indicated by current § 531.54 stating that an employer may redistribute tips to employees "upon some basis to which they have mutually agreed among themselves," and concluded that an employer should not be able to require employees to participate in a tip pool because the rules the employer created might not be fair. It particularly saw a mandatory pool as a concern if it actually involved mandatory tip splitting, because then the employer could reduce the tipped employee to the minimum wage and use the tips "to augment the cash compensation of other employees, thereby allowing the employer to reduce its own expenditures." It stated that the requirement that an employee retain all tips "would be swallowed up by the exception" in this situation. Therefore, UNITE HERE objected to the new language in § 531.54 referring to "any required tip pool contribution amount" and stated that employers should not be permitted to require tipping out or tip pooling. It also stated that where tip pooling is voluntary, there is no need for a percentage limitation and the common practice is for employees to contribute all tips. UNITE HERE further commented that, if the Department allows mandatory tip pooling, the regulations should ensure that the pool is valid or "bona fide" such as by clarifying that employers may not retain any of the tips, tips may only go to employees who regularly and customarily receive tips (not employees such as cooks, dishwashers and

janitors), and employers may only take credit for the amount each employee actually ultimately receives.

NELP objected to the proposed rule's statement that the FLSA does not impose a maximum contribution percentage on tip pools, stating that not having a cap "makes it easier for employers to skim tips for themselves." It suggested that the rule impose a "customary and reasonable" standard, which it concluded may reasonably be read into the FLSA. *See also* North Carolina Justice Center and AFL–CIO.

The Chamber of Commerce and Littler Mendelson, P.C. stated that they supported the elimination of the cap on "the amount employers could require tipped employees to 'tip out' to other tipped employees," noting that the rule requires an employer to notify employees of the amount they will be required to contribute to a tip pool. They stated that the tip credit rules ensure that employees will retain a sufficient proportion of their tips to satisfy minimum wage. Accordingly, Littler Mendelson, P.C., concluded that "no employee will be harmed in any way even if a higher percentage of their tips are contributed to a tip pool."

In response to the comments, the Department has modified the two proposed new sentences at the end of § 531.54 to read:

* * * Section 3(m) does not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, an employer must notify its employees of any required tip pool contribution amount, 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.

Other aspects of tip pooling are discussed in the section on ownership of tips, *supra*.

8. Fair Labor Standards Act Amendments of 1977

On November 1, 1977, Congress amended section 3(t) of the FLSA, 29 U.S.C. 203(t). Public Law 95–151, § 3(a), 91 Stat. 1245. Section 3(t) of the FLSA defines the phrase "tipped employee." Prior to the 1977 amendment, the definition encompassed "any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips." The 1977 amendment raised the threshold in section 3(t) to $30 a month in tips. The proposed rule changed the references in 29 CFR 531.50(b), 531.51, 531.56(a)–(e), 531.57, and 531.58 from $20 to $30. The commenters did not specifically address these technical updates to conform to the statute. Therefore, the final rule adopts the proposed changes to these regulations.

9. Meal Credit Under Section 3(m)

The NPRM proposed to amend § 531.30 to incorporate the Department's longstanding enforcement position regarding the acceptance of meals furnished as a credit towards the minimum wage. A "wage" paid pursuant to section 3(m) of the FLSA may include "the reasonable cost * * * to the employer of furnishing * * * board, lodging, or other facilities * * * customarily furnished by such employer to his employees." 29 U.S.C. 203(m). "Facilities" include employer-provided meals. *See* 29 CFR 531.32. The Department's regulation at 29 CFR 531.30, however, provides that an employer's ability to take credit for a facility is limited to those instances where an employee's acceptance was "voluntary and uncoerced." In other words, an employer could not take a wage credit for employees who did not choose to accept the meal.

After a number of courts rejected the agency's position on this point with regard to credit for meals, the agency adopted an enforcement position providing that an employer can take a meal credit even if an employee does not voluntarily accept the meal. *See* FOH section 30c09(b) ("WH no longer enforces the 'voluntary' provision with respect to meals."); *see also Davis Bros., Inc.* v. *Donovan*, 700 F.2d 1368, 1370 (11th Cir. 1983); *Donovan* v. *Miller Properties, Inc.*, 711 F.2d 49, 50 (5th Cir. 1983) (per curiam).

Thus, under the agency's current enforcement policy articulated in the FOH, an employer may require an employee to accept a meal provided by the employer as a condition of employment, and may take credit for no more than the actual cost of that meal even if the employee's acceptance is not voluntary. The NPRM proposed to amend 29 CFR 531.30 to reflect previous court decisions and the agency's current enforcement posture on meal credits.

Several commenters addressed this issue. Littler Mendelson, P.C., stated that it supported the proposal providing that an employee does not have to voluntarily accept a meal, stating that this was "not a change in the law" because it merely incorporates the Wage and Hour Division's current policy and court decisions into the regulations.

Commenters representing employees expressed a variety of views. The AFL–CIO stated that it opposed the change because it will make it easier for employers to deduct from workers' pay, "whether or not such meals are adequate, and whether or not the employer is only deducting the reasonable cost of such meals." It also stated that it disadvantages employees who are unable to eat a meal because of dietary or health restrictions. Therefore, it concluded that the Department should issue guidance on the circumstances when an employer can claim a meal credit. NELP similarly stated that workers should not be required to pay for meals that they cannot eat. NELP stated that workers sometimes are not given an opportunity to eat a mid-shift meal, and yet an employer may automatically make a deduction for that meal. The meal provided may also consist of inferior ingredients or other dishes that cannot be offered for sale. *See also* North Carolina Justice Center. Comments by Members of United States Congress also stated that they opposed the change because "employees may not even be able to consume employer-provided meals, because of dietary restrictions associated with their health, religion, personal preference, or the lack of time to eat the meals." The SEIU recognized that the proposed change to reflect the court cases and the FOH policy was "unremarkable" and that whether an employee accepted a meal voluntarily had not been a pressing issue for 25 years. The SEIU commented that the real issue was employees not being given the time to eat the meal for which they were charged or given notice of how the cost of the meal is calculated. Therefore, the SEIU suggested that the regulation require that employers using a meal credit "maintain timekeeping records to indicate that the workers subject to the meal credit deduction actually had the time and opportunity to consume the meal" and that they must provide employees with written notice that the meal cost will be deducted and an explanation as to how the cost was calculated.

As explained *supra*, the former requirement that employee acceptance of a meal must be voluntary was rejected in the early 1980s by two courts of appeals. *Davis Bros.* v. *Donovan*, 700 F.2d 1368 (11th Cir. 1983); *Donovan* v. *Miller Properties, Inc.*, 711 F.2d 49 (5th Cir. 1983) (per curiam). The Department's enforcement position adopted after those rulings provided that where an employee is required to accept a meal as a condition of employment, the Department would take no enforcement action *provided* the employer takes credit for no more than the actual cost incurred. FOH 30c09(b). It should be noted that the employer in *Davis Bros.* deducted from employees'

wages no more than the actual or reasonable cost of the food provided, and allowed exceptions for employees who for medical reasons could not eat the food offered. There was no allegation of minimum wage violations based on the *amount* of the credit claimed, but simply that the employee's *acceptance* was made mandatory and not voluntary in contravention of § 531.30. 700 F.2d at 1369–70. The Eleventh Circuit failed to discern any basis for the Department's construction in section 3(m) of "customarily furnished" by the employer to mean "voluntarily accepted" by the employees. *Id.* at 1370. In the *Miller Properties* case, the Fifth Circuit affirmed a lower district court ruling in the employer's favor in a very brief decision that did not analyze the particular facts but simply stated it was affirming based on the reasoning of the Eleventh Circuit in *Davis Bros. Donovan* v. *Miller Properties, Inc.,* 711 F.2d at 50.

The proposed revisions to § 531.30 did not modify or otherwise excuse compliance with other applicable requirements that limit an employer's credit for the reasonable or actual costs to the employer of furnishing the employee with board, lodging, or other facilities (if customarily furnished) under Section 3(m) of the Act (*see* 29 CFR 531.3). Section 3(m) of the Act prescribes certain limitations and safeguards that control the payment of wages in other than cash or its equivalent. Special recordkeeping requirements must also be met as provided in 29 CFR part 516 (*see* § 516.27), the provisions of which also were not modified by the revisions proposed in the NPRM.

After careful consideration of the comments, the Department has determined that further study is warranted to assess the extent to which dietary or religious restrictions prevent employees from consuming employer-provided meals and whether adequate time is allowed for the employee to eat. The Department therefore is not adopting the proposal, but may provide guidance on this issue in the future.

10. Section 7(o) Compensatory Time Off

Section 7 of the FLSA requires that a covered employee receive compensation for hours worked in excess of 40 in a workweek at a rate not less than one and one-half times the regular rate of pay at which the employee is employed. 29 U.S.C. 207(a). In 1985, subsequent to the U.S. Supreme Court's decision in *Garcia* v. *San Antonio Metropolitan Transit Authority,* 469 U.S. 528 (1985), which held that the FLSA may be constitutionally applied to State and local governments, Congress added section 7(o), 29 U.S.C. 207(o), to the FLSA to permit public agencies (*i.e.,* States, local governments, and interstate agencies) to grant employees compensatory time off in lieu of cash overtime compensation pursuant to an agreement with the employees or their representatives. The purpose of this exception to the Act's usual requirement of cash overtime pay was "to provide flexibility to State and local government employers and an element of choice to their employees regarding compensation for statutory overtime hours." H.R. Rep. No. 99–331 (1985).

Section 7(o) provides a detailed scheme for the accrual and use of compensatory time off. Subsection 7(o)(1) authorizes the provision of compensatory time off in lieu of overtime pay. Subsection 7(o)(2) specifies how a public employer creates a compensatory time off plan. Subsection 7(o)(3) establishes limits for the amount of compensatory time off that an employee may accrue. Section 7(o)(4) provides the requirements for cashing out compensatory time upon an employee's termination.Section 7(o)(5) governs a public employee's use of accrued compensatory leave. That section states:

> An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. 207(o)(5)(A), (B).

In 1987, after notice and comment, the Department issued final regulations implementing section 7(o) (29 CFR 553.20–.28). Section 553.25 of the regulations implements section 7(o)(5)'s requirements regarding the use of compensatory time off. Section 553.25(c) provides:

> (1) Whether a request to use compensatory time has been granted within a "reasonable period" will be determined by considering the customary work practices within the agency based on the facts and circumstances in each case. Such practices include, but are not limited to (a) the normal schedule of work, (b) anticipated peak workloads based on past experience, (c) emergency requirements for staff and services, and (d) the availability of qualified substitute staff.
>
> (2) The use of compensatory time in lieu of cash payment for overtime must be pursuant to some form of agreement or understanding between the employers and the employee (or the representative of the employee) reached prior to the performance of the work. (*See* § 553.23). To the extent that the []conditions under which an employee can take compensatory time off are contained in an agreement or understanding as defined in § 553.23, the terms of such agreement or understanding will govern the meaning of "reasonable period".

Section 553.25(d) states:

> When an employer receives a request for compensatory time off, it shall be honored unless to do so would be "unduly disruptive" to the agency's operations. Mere inconvenience to the employer is an insufficient basis for denial of a request for compensatory time off. (*See* H. Rep. 99–331, p. 23.) For an agency to turn down a request from an employee for compensatory time off requires that it should reasonably and in good faith anticipate that it would impose an unreasonable burden on the agency's ability to provide services of acceptable quality and quantity for the public during the time requested without the use of the employee's services.

The Department has consistently interpreted its regulations as requiring that an employee's request for compensatory time on a specific date must be granted unless doing so would unduly disrupt the agency's operations. Wage and Hour Opinion Letter 1994 WL 1004861 (Aug. 19, 1994); *DeBraska* v. *City of Milwaukee,* 131 F. Supp. 2d 1032, 1034–35 (E.D. Wis. 2000) (deferring to the Department's interpretation of its regulations as requiring that the specific compensatory time requested must be granted absent undue disruption). As discussed in the NPRM, however, the Ninth Circuit in *Mortensen* v. *County of Sacramento,* 368 F.3d 1082 (9th Cir. 2004), and the Fifth Circuit in *Houston Police Officers Union* v. *City of Houston,* 330 F.3d 298 (5th Cir.), *cert. denied,* 540 U.S. 879 (2003), both declined to defer to the Department's regulations because they found the plain language of section 7(o)(5)(B) to require only that an employee be allowed to use compensatory time within a "reasonable period" of the date requested for such leave unless doing so would "unduly disrupt" the agency. *Cf., Aiken* v. *City of Memphis,* 190 F.3d 753 (6th Cir. 1999), *cert. denied,* 528 U.S. 1157 (2000) (finding no FLSA violation where the city and the plaintiffs-police officers had agreed that "the reasonable period for requesting the use of banked compensatory time begins thirty days prior to the date in question and ends when the number of officers requesting the use of compensatory time on the given date would bring the precinct's staffing levels to the minimum level necessary for efficient operation").

Based on these appellate decisions, the NPRM proposed to revise section

553.25(c) to add a sentence that states that section 7(o)(5)(B) does not require a public agency to allow the use of compensatory time on the day specifically requested, but only requires that the agency permit the use of the time within a reasonable period after the employee makes the request unless the use would unduly disrupt the agency's operations. Additionally, the phrase "within a reasonable period after the request" was added to the final sentence of proposed § 553.25(d) and the phrase "during the time requested" was replaced with "during the time off" to clarify the employer's obligation.

Many commenters addressed the compensatory time off issue. NPELRA stated that it "wholeheartedly supports the proposed regulatory change." It commented that its member agencies have been so concerned about litigation regarding this issue that they have eliminated all FLSA compensatory time off, but that the proposed rules will ensure consistency throughout the country, thereby "reducing any incentives for public employers to eliminate FLSA compensatory time off, which benefits both employers and employees." NPELRA suggested that the Department revise § 553.25(d) to "state that the term 'unduly disrupt' may be defined in the collective bargaining process in the same manner as the term 'reasonable period' may be defined," stating that this would allow the parties to address circumstances unique to their particular organization and would result in less litigation. Finally, NPELRA commented that having to pay an employee overtime to fill in for an employee who is off creates an undue disruption and defeats the purpose of compensatory time off, as the *Mortensen* court found. Therefore, it suggested that the regulations specify that this is a factor an employer can consider in deciding whether to grant time off.

The IPMA–HR, IMLA, and NLC also commended the Department for the proposed change, stating that it would be "of great assistance to localities that must have adequate staff in order to provide services to citizens." They also urged the Department to provide that employers are not required to grant compensatory time off if it would mean that the employer would incur overtime expenses. Littler Mendelson, P.C., and SHRM also stated that they supported the proposed change, which appropriately conformed the regulation to the cited appellate court decisions.

Commenters representing employees strongly opposed the proposal. *See* American Federation of State, County and Municipal Employees (AFSCME), American Federation of Government Employees (AFGE), International Union of Police Associations (I.U.P.A.), International Association of Fire Fighters, and AFL–CIO. AFSCME urged the Department to withdraw the proposal, stating that allowing an employer to deny an employee's requested day off without demonstrating that it creates an undue hardship would "make a drastic change to the scope of the statute." AFSCME stated that there is no uniformity in the courts mandating the change, stating that a number of district court decisions have upheld the Department's current regulation. AFSCME also asserted that the Supreme Court's decision in *Christensen* v. *Harris County,* 529 U.S. 576, 583–85 (2000), provides additional support for the conclusion that an employer cannot deny the specific date requested for reasons other than those set forth in section 7(o)(5), because the Court stated that the section "imposes a restriction upon an employer's efforts to prohibit the use of compensatory time when employees request to do so." Therefore, AFSCME concluded "that, at best, there are conflicting interpretations of the language of the statute and the implementing regulation." *Id.* Because employees request specific dates for "milestones such as children's birthdays, family and friends' weddings, funerals, scheduled vacations and other date specific activities," it would harm employees to allow employers to deny the date requested absent undue disruption. Thus, absent consistent court interpretations, it stated it would be unwise public policy to change the regulation. *See also* AFGE (the current regulations "strike the proper balance between the public sector employer's interest in assuring that its mission is carried out and the employee's interest in being able to use compensatory time in a meaningful manner"); I.U.P.A. (the current rule appropriately balances agencies' needs and the interests of employees, while the proposal "would upset that balance, placing all of the burden on the employees, and allowing the employer to reap all the benefits"); and James D. Sewell ("When an officer or fireman needs to be off for a particular date, they need to be off that day, not a day the employer decides for them.").

The AFL–CIO made similar comments, stating that section 7(o)(5) is ambiguous and is best read as requiring an employer to act on an employee's request within a reasonable period after the request is made and to approve the specific day requested absent undue disruption. It noted that the Department had agreed with this interpretation in the current regulation, an *amicus* brief and an opinion letter, and it disputed that there was unanimity even among the appellate courts compelling a change. It cited the decision in *Beck* v. *City of Cleveland,* 390 F.3d 912 (6th Cir. 2004), which it stated found "*Aiken* to have been effectively overruled by the Supreme Court's decision in *Christensen,*" and it emphasized that neither the Fifth Circuit (in *City of Houston*) nor the Ninth Circuit (in *Mortensen*) considered the Supreme Court's decision in reaching their conclusions. The AFL–CIO emphasized that the current regulation is consistent with the legislative history, citing Senate Report 99–159, which stated that when an employer receives a comp time request, "that request should be honored unless to do so would be unduly disruptive." It argued that the proposal "would render meaningless the 'unduly disrupt' language" because it would likely never come into play if an employer can simply substitute a date that it wants for the date the employee requested.

The I.U.P.A. also referred to the legislative history (House Report 99–331 (1985)), which states that compensatory time off "was intended to give 'freedom and flexibility' to public employees and 'additional options' to employers." The union therefore stated that the "reasonable period" is better read as referring to the time between the date the employees submit their requests and the dates requested for time off, so that "requests cannot provide such short notice that the employer would be scrambling to find a replacement." The I.U.P.A. commented that the rationale the Department offered for the change—that the courts uniformly interpreted the statutory language as unambiguous—does not hold up because several district courts have held that the statute is ambiguous and agreed with the Department's current regulation. It stated that if the Department's rationale is correct, then the regulations are unnecessary; it is only if the Department's rationale is incorrect, and a court agrees that the statute is ambiguous, that the regulations will have an impact because the court will defer to the regulations for assistance in interpreting the statute. Therefore, the I.U.P.A. stated that the proposal would place "responsibility squarely on the shoulders of the Department" because a court that found the statute ambiguous would defer to the regulation in denying police officers their chosen days off. *Id.*

Comments by Members of United States Congress also opposed the Department's proposal, stating that it "will undermine the ability of nearly 20

million public employees to use their accrued compensatory time off." They stated that the current rule is correct and consistent with the legislative history, and that the proposal upsets the careful balance that Congress struck. They also noted that only three of 13 courts of appeals have addressed this issue, and "just two of them have expressed disapproval of the Department's longstanding view." Moreover, they noted that a number of district courts have upheld the current rule so the "issue is unsettled in the federal courts."

The IAFF stated that the "proposal is nonsensical in that it essentially eviscerates the purposes for which comp time usage is requested." The IAFF noted that under the proposed rule an employer would have authority to deny a comp time request for no reason whatsoever, so long as some alternative date within a reasonable period were offered. It also stated that, in many fire departments, employees request time off weeks or months in advance, which aids departments in maintaining adequate staffing by allowing them time to fill vacancies. However, the IAFF stated that the proposal leads to an illogical conclusion, because the more lead time an employee provides, the less likely it is that the employee will receive statutory protection of the right to use the requested time off. The IAFF concluded that, as the Department acknowledged in the NPRM, some fire fighters will simply not accept compensatory time in lieu of cash if the proposal is adopted. "Such an outcome would depart from the plain Congressional intent in enacting this statutory provision. It also would likely impose a substantial financial burden on local government departments that rely on compensatory time, rather than cash overtime * * *"

Since the publication of the NPRM, another appellate court has addressed the issue of whether an employee's specific request to use compensatory time must be granted unless it unduly disrupts the agency's operation. In *Heitmann* v. *City of Chicago,* 560 F.3d 642 (7th Cir. 2009), the plaintiffs-police officers argued that the need to consider whether a request for leave created an "undue disruption" presupposed a particular time for the leave and that employees were therefore entitled to leave on the date and time of their choosing unless it would result in an undue disruption to the city. For its part, the city argued that it was required only to offer leave within a "reasonable time" of the employee's request for leave. The court noted that the city's position was supported by *Houston* and *Mortensen,* while the plaintiffs' view was supported by *Beck* v. *Cleveland,* 390 F.3d 912 (6th Cir. 2004), and section 553.25 of the Department's regulations. The court rejected the Fifth and Ninth Circuit's plain language reading of 7(o)(5), stating that section 7(o)(5) "is anything but clear."

> Words such as "reasonable" and "undue" are open-ended. They need elaboration, and the relation between these requirements needs explication. Here the agency has added vital details and its work prevails * * * unless it represents an implausible resolution.

560 F.3d at 646. The court found that the Department's interpretation of the requirements of section (7)(o)(5) in its regulations, which "makes compensatory leave more attractive to workers and hence a more adequate substitute for money," was reasonable and entitled to deference. *Id.* The court found that section 553.25(d) requires the employer to grant leave on the date and time requested unless doing so would create an undue disruption (in which case the employer would be able to defer the requested leave for a reasonable time). *Id.* at 647.

The Seventh Circuit's *Heitmann* decision, which finds support in the Sixth Circuit's decision in *Beck,* indicates that the appellate courts are not as uniform in their reading of section 7(o)(5) as the Department understood them to be at the time of the NPRM. The Department now views the courts of appeals as being split on the proper interpretation of 7(o)(5), with the Sixth and Seventh Circuits requiring agencies to grant the specific leave requested absent undue disruption, and the Fifth and Ninth Circuits requiring agencies to grant leave within a reasonable time of the leave requested unless doing so would create an undue disruption. The Department believes that the better reading of section 7(o)(5) is that it requires employers to grant compensatory time on the specific date requested unless doing so would unduly disrupt the agency. The statutory reading set forth in *Houston* and *Mortensen,* which requires that the employer grant compensatory time within a reasonable period of the date requested, essentially nullifies the "unduly disrupt" provision of 7(o)(5). *See Beck* v. *City of Cleveland,* 390 F.3d 912, 925 (6th Cir. 2005) ("to grant the City the unlimited discretion to deny compensatory leave requests relieves the city of establishing the undue disruption requirement imposed by Congress"); *DeBraska* v. *City of Milwaukee,* 131 F. Supp. 2d 1032, 1037 (E.D. Wis. 2000). Accordingly, in light of the recent appellate decision, and in consideration of the extensive comments received on this section, the Department has decided not to finalize the proposed revision to section 553.25(c) and (d) and to leave the current regulation unchanged consistent with its longstanding position that employees are entitled to use compensatory time on the date requested absent undue disruption to the agency. In response to comments concerning whether the payment of overtime is a consideration in determining whether the use of compensatory time off is unduly disruptive, the Department does not believe that any regulatory change is warranted. The Department maintains its longstanding position that the fact that overtime may be required of one employee to permit another employee to use compensatory time off is not a sufficient reason for the employer to claim that the compensatory time off request is unduly disruptive. *See* Wage and Hour Opinion Letter 1994 WL 1004861 (Aug. 19, 1994); 52 FR 2012, 2017 (Jan. 16, 1987) ("The Department recognizes that situations may arise in which overtime may be required of one employee to permit another employee to use compensatory time off. However, such a situation, in and of itself, would not be sufficient for an employer to claim that it is unduly disruptive.").

11. Fluctuating Workweek Method of Computing Overtime Under 29 CFR 778.114

The NPRM proposed to modify the Department's regulation at 29 CFR 778.114 addressing the fluctuating workweek method of computing overtime compensation for salaried nonexempt employees to permit the payment of non-overtime bonuses and incentives without invalidating the guaranteed salary criterion required for the half-time overtime pay computation. The current regulation provides that an employer may use the fluctuating workweek method for computing half-time overtime compensation if an employee works fluctuating hours from week to week and receives, pursuant to an understanding with the employer, a fixed salary as straight-time compensation "(apart from overtime premiums)" for whatever hours the employee is called upon to work in a workweek, whether few or many. In such cases, an employer satisfies the overtime pay requirement of section 7(a) of the FLSA if it compensates the employee, in addition to the salary amount, at least one-half of the regular rate of pay for the hours worked in excess of 40 hours in each workweek.

Because the employee's hours of work fluctuate from week to week, the regular rate must be determined separately each week based on the number of hours actually worked each week.

Paying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for employees. The NPRM proposed that bona fide bonus or premium payments would not invalidate the fluctuating workweek method of compensation, but that such payments (as well as "overtime premiums") must be included in the calculation of the regular rate unless they are excluded by FLSA sections 7(e)(1)-(8). The proposal also added an example to § 778.114(b) to illustrate these principles where an employer pays an employee a nightshift differential in addition to a fixed salary.

The Department's view, at that time, was that the proposed modification clarified the rule and was consistent with the Supreme Court's decision in *Overnight Transportation Co.* v. *Missel,* 316 U.S. 572 (1942), on which the existing regulation is patterned. *See* 73 FR 43662 (Jul. 28, 2008). The Department's proposed modification was intended to allow employers to pay additional bona fide premium payments.

The NPRM also proposed to increase the numerical values in the examples of overtime computations in § 778.114(b) so the rates of pay would be no less than the current minimum wage. Frank Dean commented that the term "approximately" in two places carried over from the current regulatory language is potentially misleading and confusing and should be eliminated to make it clear that the calculation of statutorily mandated overtime is exacting. Mr. Dean recommended changing one of the weekly hour totals from 44 to 37.5 so that there would be an exact regular rate calculation in each instance, thereby eliminating the need to use "approximately." We agree with this analysis and have incorporated his suggested revision into the final rule.

Wage and Hour Consulting Services commented that the statement limiting the weekly hours worked in the example to "never in excess of 50 hours in a workweek" in proposed § 778.114(b)(1) was confusing and redundant and should be deleted as unnecessary because it is clearly explained elsewhere in the section that the wage rate of an employee paid under the fluctuating workweek method cannot fall below the minimum wage. This phrase was carried over from the current regulation and we believe that it does not cause confusion and is needed to establish in the example the concept that the employee's regular rate will not fall below the minimum wage. We have, therefore, retained the concept but have made minor wording changes to clarify the example.

Beyond these two minor editorial comments, the comments were sharply divided on the substance of the proposed revisions to the fluctuating workweek provisions. In general, commenters representing employers favored the revisions while commenters representing employees strongly opposed the revisions.

SHRM noted that it is common practice to pay a nonexempt salaried employee a bonus or premium as an incentive for various reasons, such as working less desirable hours. SHRM commented that other payment methods, such as hourly, piece rates, day rates, and job rates, contemplate that an employee may receive a bonus or other premium payments in addition to normal pay and asserted that it was logical and consistent to permit such payments under the fluctuating workweek method of compensation.

The Chamber of Commerce also favored the revisions but sought further clarifications as to when and how bonuses should be included in regular rate calculations, particularly when bonuses (1) cover more than one workweek, (2) are not paid in the same workweek when the work was performed to which the bonus applies, and (3) are not allocable among workweeks in proportion to the amount of bonus actually earned each week. Littler Mendelson, P.C., also supported the proposed revisions, but suggested further revisions to add cross-references to other sections in part 778 regarding how to include bonuses in the regular rate to clarify that all the rules regarding bonuses for nonexempt employees apply equally whether the nonexempt employee is paid by the hour, on a salary basis or under the fluctuating workweek method. Because we believe the principles for including bonuses in the regular rate discussed in other sections of the regulations are clear, we do not find that further clarifications or additional cross-references are necessary in this section.

Fisher & Phillips LLP noted that part 778 is an interpretative rule and similarly noted that § 778.114 "is simply one in a series of *examples* of how the regular-rate principles of Section 778.109 apply in different situations." The commenter recommended revisions to clarify that the half time overtime calculation in section 778.114 applies regardless of whether the employee's hours fluctuate. The Department disagrees with this comment and notes that the application of section 778.114 is properly limited to situations where the employee's hours fluctuate. *See Flood* v. *New Hanover County,* 125 F.3d 249, 253 (4th Cir. 1997); FOH section 32b04b.

Comments expressing strong opposition to the proposed revisions were mostly based on two primary criticisms. First, that receipt of premium and bonus payments is inconsistent with payment of a fixed salary. *See* NELP, SEIU, NELA, AFL–CIO, Members of United States Congress, and North Carolina Justice Center. Second, that the proposed revisions will encourage employers to schedule additional overtime for employees paid under the fluctuating workweek method or otherwise disadvantage workers by expanding its use to a larger portion of the workforce. *See* NELP, North Carolina Justice Center, NELA, AFL–CIO, and Members of United States Congress. A number of these comments opposing the revisions questioned the Department's authority for making the revisions and asserted they would administratively overturn uniform, well-settled case law without justification and urged the Department to withdraw them. Commenters stating that premium and bonus payments are inconsistent with the concept of a fixed salary generally asserted that the proposed revisions are inconsistent with the Supreme Court's decision in *Missell,* in which the Court approved the use of the fluctuating workweek method requiring payment of only the additional half-time premium for hours worked over 40 per week for an employee paid a fixed weekly wage who worked weekly hours that fluctuated. Based on the Court's ruling and the language of current § 778.114(a), which provides that "[a]n employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid him pursuant to an understanding with his employer that he will receive such fixed amount as straight time pay for whatever hours he is called upon to work in a workweek, whether few or many," these commenters asserted that employees paid under the fluctuating workweek method must receive fixed weekly pay that does not vary. The proposal departs from this fundamental concept, the commenters asserted. These commenters also took issue with the statement in the NPRM that the current regulation has presented challenges in the courts, asserting that courts applying the fluctuating workweek method of payment have uniformly concluded that

paying additional "non-overtime" premiums violates section 779.114. *See* NELA (citing *O'Brien* v. *Town of Agawam,* 350 F.3d 279 (1st Cir. 2003); *Dooley* v. *Liberty Mutual Ins. Co.,* 369 F. Supp. 2d 81 (D. Mass. 2005); *Ayers* v. *SGS Control Services, Inc.,* 2007 WL 646326 (S.D.N.Y. 2007)), SEIU, AFL–CIO, NELP, Members of United States Congress, and North Carolina Justice Center.

Several commenters also noted that the proposal would permit employers to reduce employees' fixed weekly salaries and shift the bulk of the employees' wages to bonus and premium pay. *See* NELP, NELA, SEIU, and North Carolina Justice Center. These commenters argued that this would harm employees because it would lead to significant variations in weekly wages based on the hours worked. They stated that such variations in pay are inconsistent with the purpose of the fluctuating workweek. They further objected to the proposal because it would expand the use of the fluctuating workweek method to industries in which bonus and premium payments are common. *See* NELA, Members of United States Congress, SEIU, and North Carolina Justice Center. Comments submitted by Members of the United States Congress urged that instead of modifying this section to expand its use, the Department should consider narrowing the scope of the section to prevent employers from abusing this method to lower workers' pay.

The Department has carefully considered all of the comments submitted on this section. While the Department continues to believe that the payment of bonus and premium payments can be beneficial for employees in many other contexts, we have concluded that unless such payments are overtime premiums, they are incompatible with the fluctuating workweek method of computing overtime under section 778.114. As several commenters noted, the proposed regulation could have had the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of employees' compensation into bonus and premium payments, potentially resulting in wide disparities in employees' weekly pay depending on the particular hours worked. It is just this type of wide disparity in weekly pay that the fluctuating workweek method was intended to avoid by requiring the payment of a fixed amount as straight time pay for all hours in the workweek, whether few or many. The basis for allowing the half-time overtime premium computation under the fluctuating workweek method is the mutual understanding between the employer and the employee regarding payment of a fixed amount as straight time pay for whatever hours are worked each workweek, regardless of their number. While the example provided in the NPRM of nightshift premiums resulted in a relatively modest change in the employee's straight time pay, the Department now believes that the proposed regulation would have been inconsistent with the requirement of a fixed salary payment set forth by the Supreme Court in *Overnight Motor Transport* v. *Missel.* Moreover, on closer examination, the Department is persuaded that the courts have not been unduly challenged in applying the current regulation to additional bonus and premium payments. *See O'Brien* v. *Town of Agawam,* 350 F.3d 279 (1st Cir. 2003); *Adeva* v. *Intertek USA,* 2010 WL 97991 (D.N.J. 2010); *Dooley* v. *Liberty Mutual Ins. Co.,* 369 F. Supp. 2d 81 (D. Mass. 2005); *Ayers* v. *SGS Control Services, Inc.,* 2007 WL 646326 (S.D.N.Y. 2007).

Finally, while the proper use of the fluctuating workweek method of pay results in an employee being paid time and one-half of the employee's regular rate for overtime hours, the Department is cognizant that this method of pay results in a regular rate that diminishes as the workweek increases, which may create an incentive to require employees to work long hours. The Department does not believe that it would be appropriate to expand the use of this method of computing overtime pay beyond the scope of the current regulation. Accordingly, the final rule has been modified from the proposal to restore the current rule requiring payment of the fixed salary amount as the straight time pay for whatever hours are worked in the workweek, that a clear mutual understanding of the parties must exist that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek whatever their number, that the fixed salary amount must be sufficient to provide compensation at a rate not less than the minimum wage, and that the employee must receive extra compensation in addition to the fixed salary for all overtime hours worked at a rate not less than one-half the regular rate of pay. Editorial revisions have been included in the text of the final rule to delete gender-specific references and to update the computation examples to provide wage rates above the minimum wage and the exact calculation of the regular rate. The proposed examples in the NPRM at § 778.114(b)(2) suggesting methods for making supplemental nightshift premium payments as part of the fluctuating workweek methodology for computing half-time overtime pay have been deleted from the final rule.

Other Revisions

The current recordkeeping regulations on tipped employees at 29 CFR 516.28 include an outdated parenthetical reference that suggests a limit "(not in excess of 40 percent of the applicable statutory minimum wage)" as the maximum amount of tip credit an employer may claim under the FLSA. 29 CFR 516.28(a)(3). This outdated reference reflected the former provisions of section 3(m) of the FLSA as amended by the 1977 FLSA Amendments, which has since been overtaken by subsequent statutory amendments passed in 1989 and 1996. *See* Public Law 95–151, § 3(b)(2), 91 Stat. 1249 (Nov. 1, 1977); Public Law 101–157, § 5, 103 Stat. 941 (Nov. 17, 1989); Public Law 104–188, § 2105(b), 110 Stat. 1929 (Aug. 20, 1996). The Department inadvertently overlooked updating this reference in part 516 when updating the other tip credit references in the NPRM. Because the regulatory reference has been superseded by subsequent statutory enactments, the Department is updating this section of the recordkeeping regulation in this final rule to conform it to current law and, because of the technical nature of the change, is doing so without prior notice and opportunity for public comment. The Department hereby finds, pursuant to the Administrative Procedure Act, that prior notice and opportunity for public comment on this ministerial change that is required by statutory amendment are impracticable, unnecessary, or contrary to the public interest. *See* 5 U.S.C. 553(b)(3)(B).

The current interpretative regulation on "Hours Worked," at 29 CFR 785.7 ("Judicial construction"), cites incorrectly to a holding of the U.S. Supreme Court in *Tennessee Coal, Iron & Railroad Co.* v. *Muscoda Local No. 123,* 321 U.S. 590, 598 (1944). The typographical error in the phrase "primarily for the benefit of the employer *of* his business" is corrected by replacing the incorrect "of" with "and." Because this change is required to conform the text to the cited holding, the Department is making this correction without prior notice and opportunity for public comment. The Department hereby finds, pursuant to the Administrative Procedure Act, that prior notice and opportunity for public comment on this ministerial change are

impracticable, unnecessary, or contrary to the public interest. *See* 5 U.S.C. 553(b)(3)(B).

IV. Paperwork Reduction Act

This rule does not impose new information collection requirements for purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

V. Executive Orders 12866 and 13563; Small Business Regulatory Enforcement Fairness Act; Regulatory Flexibility

This final rule is not economically significant within the meaning of Executive Order 12866, or a "major rule" under the Unfunded Mandates Reform Act or Section 801 of the Small Business Regulatory Enforcement Fairness Act.

As discussed previously in this preamble, over the years, Congress has amended the FLSA to refine or to add to exemptions and to clarify the minimum wage and overtime pay requirements. However, in many cases, the Department of Labor did not update the FLSA regulations to reflect these statutory changes. The Department believes that the existing outdated regulatory provisions may cause confusion within the regulated community resulting in inadvertent violations and the costs of corrective compliance measures to remedy them.

The Department has determined that the final rule changes will not result in any additional compliance costs for regulated entities because the current compliance obligations derive from current law and not the outdated regulatory provisions that have been superseded years ago.

The Department is aware that this interpretation appears to be inconsistent with OMB Circular A–4's guidance on the use of analysis baselines, which states: "In some cases, substantial portions of a rule may simply restate statutory requirements that would be self-implementing, even in the absence of the regulatory action. In these cases, you should use a pre-statute baseline" to conduct the regulatory impact analysis. However, as the discussion below indicates, the Department believes the use of a pre-statute baseline would be extremely difficult for statutes enacted a decade or more in the past. Fundamental changes in the economy and labor market (*e.g.,* the introduction of technology, changes in the size and composition of the labor force, changes in the economy that impact the demand for labor, *etc.*) would make it difficult, if not impossible, to separate those changes from changes that resulted from enactment of the statute.

Moreover, the Department believes the economic impacts due to the statutory changes to the FLSA are typically greatest in the short run and diminish over time. This is due to labor markets determining the most efficient way to adjust to the new requirements, and because the Department believes many of the changes mandated by various revisions to the FLSA are reflective of the natural evolution of the labor market and would have become more common even in the absence of regulatory changes. For example, as nominal wages rise overtime, the marginal impact of a fixed minimum wage provision decreases, since it is less binding on the market. Therefore, the impacts resulting from the promulgation of the final regulations are not likely to be measurable. In fact, the Department anticipates that this final rule will simply enhance the Department's enforcement of, and the public's understanding of, compliance obligations under the FLSA by replacing outdated regulations with updated provisions that reflect current law.

1996 and 2007 Amendments to the FLSA Minimum Wage

The current FLSA regulations reference the minimum wage in several places, some referring to the 1981 minimum wage of $3.35 and others referring to the 1991 minimum wage of $4.25. To eliminate the current inconsistencies between the FLSA regulations and the statute, the Department revised the regulations to refer to the statutory minimum wage provision rather than a specific minimum wage. Since the final regulations do not include any reference to a specific minimum wage, the Department believes they do not impose the burden of increasing the minimum wage from the levels specified in the current regulations. That burden was imposed by the statutory changes and is not derived from the FLSA regulations. Thus, the Department concludes that the only incremental effect of this final rule on the public from these changes is possibly clearing up some confusion. This differentiates the minimum wage provisions from many other rulemakings in which the Department is given little statutory discretion, but nonetheless is still required to update the CFR.

Small Business Job Protection Act of 1996

Sections 2101 through 2103 of Title II of SBJPA, entitled the "Employee Commuting Flexibility Act of 1996," amended section 4(a) of the Portal Act, 29 U.S.C. 254(a), to state that for travel time involving the employee's use of employer-provided vehicles for commuting at the beginning and end of the workday to be considered noncompensable, the use of the vehicle must be "conducted under an agreement between the employer and the employee or the employee's representative." The Department believes that since 1996 the labor market has adjusted to this statutory change and that it would be very difficult, if not impossible, to estimate the impact of this amendment. It is likely that as part of their overall compensation package, some employers and their employees have agreed to make the travel time compensable while others have agreed to make it noncompensable. In addition, since this provision simply clarifies that compensability should be subject to an agreement, but does not otherwise restrict the type of agreement employers and employees may reach, the Department believes this provision by its nature does not impose a significant burden on the public. Therefore, the Department concludes that the final rule will have no measurable effect on the public except to possibly clear up some confusion.

In addition, section 2105 of the SBJPA amended the FLSA effective August 20, 1996, by adding section 6(g), 29 U.S.C. 206(g), which provides that "[a]ny employer may pay any employee [who has not attained the age of 20] of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than $4.25 an hour." The Department believes that the labor market has also adjusted to this change during the period since the enactment of the SBJPA. Although youths would obviously want to receive the normal minimum wage rather than the youth wage, some youths will decide to accept the lower youth wage in order to gain experience in the labor market. Similarly, although some employers may want to pay the lower youth wage, some may find compliance with the added requirements associated with the youth wage not to be worth the savings in wages. Thus, the Department concludes that the final rule will have no measurable effect on the public except to possibly clear up some confusion.

Agricultural Workers on Water Storage/ Irrigation Projects

Public Law 105–78, 111 Stat. 1467 (Nov. 13, 1997), amended section 13(b)(12) of the FLSA, 29 U.S.C. 213(b)(12), by extending the exemption from overtime pay requirements applicable to workers on water storage and irrigation projects where at least 90

percent of the water is used for agricultural purposes, rather than where the water is used exclusively for agricultural purposes. The Department believes that the labor market has also adjusted to this change during the period since the enactment of the amendment. Although agricultural workers and workers employed on water storage/irrigation projects listed in the exemption are not required to be paid time and one-half for the hours worked in excess of 40 in a work week, their overall compensation will be determined by market forces. In some cases, employers and their employees will choose some form of premium overtime pay (even though it is not mandated by the FLSA) while others may choose a higher salary with no additional compensation for the hours worked in excess of 40 in a week. In addition, this provision applies to a relatively small part of the overall U.S. labor force; thus, the Department believes any possible impacts due to this exemption would likely not be substantial. Therefore, the Department concludes that the final rule will have no measurable effect on the public except to possibly clear up some confusion.

Certain Volunteers at Private Non-Profit Food Banks

Section 1 of the Amy Somers Volunteers at Food Banks Act, Public Law 105–221, 112 Stat. 1248 (Aug. 7, 1998), amended section 3(e) of the FLSA, 29 U.S.C. 203(e), by adding section (5) to provide that the term "employee" does not include individuals volunteering solely for humanitarian purposes at private non-profit food banks and who receive groceries from those food banks. 29 U.S.C. 203(e)(5). The Department believes that the labor market has also adjusted to this change during the period since the enactment of the amendment. The Department also believes this regulatory change is not likely to cause an impact we would consider significant, since its application is limited and it simply clarifies that certain individuals may be considered volunteers.

Employees Engaged in Fire Protection Activities

In 1999, Congress amended section 3 of the FLSA, 29 U.S.C. 203, by adding section (y) to define "an employee in fire protection activities." This change in definition impacts fire protection employees who may be covered by the partial overtime exemption allowed by § 7(k) (29 U.S.C. 207(k)) or the overtime exemption for public agencies with fewer than five employees in fire protection activities pursuant to § 13(b)(20) (29 U.S.C. 213(b)(20)). The Department believes that these provisions apply to a relatively small proportion of the labor market, and that the market has adjusted to this change during the period since the enactment of the amendment. Thus, the Department concludes that the final regulatory changes will have no measurable effect on the public except to possibly clear up some confusion by replacing outdated regulations with updated provisions to reflect current law.

Stock Options Excluded From the Computation of the Regular Rate

The Worker Economic Opportunity Act enacted by Congress on May 18, 2000, amended §§ 7(e) and 7(h) of the FLSA. 29 U.S.C. 207(e), (h). In § 7(e), a new subsection (8) adds "[a]ny value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program" meeting particular criteria to the types of remuneration that are excluded from the computation of the regular rate. In § 7(h), the amendment clarifies that the amounts excluded under § 7(e) may not be counted toward the employer's minimum wage requirement under section 6, and that extra compensation excluded pursuant to the new subsection (8) may not be counted toward overtime pay under § 7. The Department believes that the labor markets have adjusted to this statute, which provides additional alternatives for employee compensation, but does not otherwise limit or mandate the overall levels of compensation owed to any category of worker. The final regulatory changes merely help to correct any confusion in this area.

Fair Labor Standards Act Amendments of 1974 and 1977

On April 7, 1974, Congress enacted an amendment to section 13(b)(10) of the FLSA, 29 U.S.C. 213(b)(10). Public Law 93–259, 88 Stat. 55 (1974). This amendment added an overtime exemption for salespersons primarily engaged in selling boats (in addition to the pre-existing exemption for sellers of trailers or aircraft). This amendment also eliminated the overtime exemption for partsmen and mechanics servicing trailers or aircraft. The Department believes that these provisions apply to a relatively small proportion of the labor market, and that the labor market has also adjusted to this change during the long period since the enactment of the amendment. Although salespersons primarily engaged in selling boats are not required to be paid time and one-half for the hours worked in excess of 40 in a work week, their overall compensation will be determined by market forces. In some cases, employers and their employees may choose some form of premium overtime pay (even though it is not mandated by the FLSA) while others may choose a higher salary and commissions with no additional compensation for the hours worked in excess of 40 in a week.

Similarly, the Department believes that the market has adjusted to no exemptions for partsmen and mechanics servicing trailers or aircraft. Although there may have been some short run effects related to the statutory change, in the years since enactment of the statute, employers and their employees have adjusted to the overtime requirement. Thus, the Department concludes that the final regulatory changes will have no measurable effect on the public except to possibly clear up some confusion.

On November 1, 1977, Congress amended section 3(t) of the FLSA, 29 U.S.C. 203(t). Public Law 95–151, § 3(a), 91 Stat. 1245. Section 3(t) of the FLSA defines the phrase "tipped employee." The amendment changed the conditions for taking the tip credit when making wage payments to qualifying tipped employees under the FLSA. Prior to the 1977 amendment, the definition encompassed "any employee engaged in an occupation in which he customarily and regularly receives more than $20 a month in tips." The 1977 amendment raised the threshold in section 3(t) to $30 a month in tips. Although the mandatory paid wage ($2.13) for tipped employees is below the full minimum wage, these workers must still receive hourly compensation (cash wages plus tips) at least equal to the minimum wage. Moreover, regardless of the minimum wage, if the hourly compensation is too low employers will have trouble finding a sufficient number of workers. The Department believes that the labor market has also adjusted to this change during the period since the enactment of the amendment and that the regulatory changes will have no measurable economic effect on the public except to possibly clear up some confusion.

Meal Credit Under Section 3(m)

The Department proposed to amend § 531.30 to reflect that, with the exception of meals, the employee's acceptance of a facility for which the employer seeks to take a 3(m) credit must be voluntary and uncoerced. The Department determined that the

proposed change would have no measurable economic impact. After consideration of the comments received, the Department has determined that further study of this issue is warranted, and therefore is not adopting the proposal. Because the Department is not implementing this proposal, there is no change to the status quo. As a result, the Department does not believe that there will be any measurable economic impact on the public.

Section 7(o) Compensatory Time Off

In 1987, the Department issued final regulations implementing a detailed scheme for the accrual and use of compensatory time off under Section 7(o). 29 U.S.C. 207(o). Section 7(o)(5) governs a public employee's use of accrued compensatory leave. That section states:

> An employee of a public agency which is a State, political subdivision of a State, or an interstate governmental agency—(A) who has accrued compensatory time off authorized to be provided under paragraph (1), and (B) who has requested the use of such compensatory time, shall be permitted by the employee's employer to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency.

29 U.S.C. 207(o)(5). As discussed supra, the Department proposed to amend § 553.25(c) to comport with appellate court decisions reading the statutory language to state that once an employee requests compensatory time off, the employer has a reasonable period of time to allow the employee to use the time unless doing so would be unduly disruptive. Additionally, the Department proposed to clarify the employer's obligation when denying an employee's request for the use of compensatory time off in § 553.25(d).

In the NPRM, the Department stated its belief that the proposed changes would eliminate some of the confusion over the use of compensatory time off. The Department stated that it did not believe the proposed changes altered the nature of compensatory time off rights and responsibilities, but recognized that because of uncertainty as to their ability to use compensatory time when requested, some employees might choose not to accrue compensatory time off, thus resulting in some slight economic impacts.

As already discussed in this preamble, since the publication of the NPRM, another appellate court has addressed this issue and concluded that the statutory language is unclear and the Department's regulations requiring an employer to grant the specific time requested unless it would unduly disrupt the agency's operations is reasonable. The Department has therefore reexamined its proposal based on all the appellate decisions and the public comments and has decided not to finalize the proposed revision to section 553.25(c) and (d) and to leave the current regulation unchanged consistent with its longstanding position that employees are entitled to use compensatory time on the date requested absent undue disruption to the agency. Because the proposed changes will not be implemented, the Department does not believe that there will be any measurable economic impact on the public.

Fluctuating Workweek Method of Computing Overtime Under 29 CFR 778.114

The Department proposed to modify the regulation at 29 CFR 778.114 addressing the fluctuating workweek method of computing overtime compensation for salaried nonexempt employees. The proposed regulation provided that bona fide bonus or premium payments would not invalidate the fluctuating workweek method of compensation, but that such payments (as well as "overtime premiums") must be included in the calculation of the regular rate unless they are excluded by FLSA sections 7(e)(1)–(8). Paying employees bonus or premium payments for certain activities such as working undesirable hours is a common and beneficial practice for both employers and their employees.

For the reasons discussed earlier in this preamble, while the Department continues to believe that the payment of bonus and premium payments can be beneficial for employees in many other contexts, we have concluded that unless such payments are overtime premiums, they are incompatible with the fluctuating workweek method of computing overtime under section 778.114. Therefore the final rule does not implement this proposed provision. Because the proposed changes will not be implemented, the Department does not believe that there will be any measurable economic impact on the public.

1. Executive Orders 12866 and 13563 (Regulatory Review)

The Department does not believe that incorporating these statutory amendments into the FLSA and Portal Act regulations will impose measurable costs on private or public sector entities. The final rule changes should not result in additional compliance costs for regulated entities because employers have been obligated to comply with the underlying statutory provisions for many years. With this action, DOL is merely bringing up-to-date regulatory provisions that were superseded years ago.

2. Regulatory Flexibility Act

Furthermore, because the final rule will not impose any measurable costs on employers, both large and small entities, the Department has determined that it would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). The Department certified to the Chief Counsel for Advocacy to this effect at the time the NPRM was published. The Department received no contrary comments that questioned the Department's analysis or conclusions in this regard. Consequently, the Department certifies once again pursuant to 5 U.S.C. 604 that the revisions being implemented in connection with promulgating this final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Department need not prepare a regulatory flexibility analysis.

VI. Unfunded Mandates Reform Act

This final rule has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA). 2 U.S.C. 1501 *et seq.* For the purposes of the UMRA, this rule does not impose any Federal mandate that may result in increased expenditures by State, local, or Tribal governments, or increased expenditures by the private sector, of more than $100 million in any year.

VII. Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with the Executive Order on Federalism (Executive Order 13132, 64 FR 43255, Aug. 10, 1999). This rule does not have federalism implications as outlined in E.O. 13132. The rule does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

VIII. Executive Order 13175, Indian Tribal Governments

The Department has reviewed this rule under the terms of Executive Order 13175 and determined it did not have "tribal implications." The rule does not have "substantial direct effects on one or more Indian tribes, on the relationship

between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes." As a result, no Tribal summary impact statement has been prepared.

IX. Effects on Families

The Department certifies that this rule will not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

X. Executive Order 13045, Protection of Children

The Department has reviewed this rule under the terms of Executive Order 13045 and determined this action is not subject to E.O. 13045 because it is not economically significant as defined in E.O. 12866 and it does not impact the environmental health or safety risks of children.

XI. Environmental Impact Assessment

The Department has reviewed this rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, the regulations of the Council of Environmental Quality, 40 CFR 1500 *et seq.*, and the Departmental NEPA procedures, 29 CFR part 11, and determined that this rule will not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

XII. Executive Order 13211, Energy Supply

The Department has determined that this rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution or use of energy.

XIII. Executive Order 12630, Constitutionally Protected Property Rights

The Department has determined that this rule is not subject to Executive Order 12630 because it does not involve implementation of a policy "that has taking implications" or that could impose limitations on private property use.

XIV. Executive Order 12988, Civil Justice Reform Analysis

The Department drafted and reviewed this final rule in accordance with Executive Order 12988 and determined that the rule will not unduly burden the Federal court system. The rule was: (1) Reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

List of Subjects

29 CFR Part 4

Administrative practice and procedures, Employee benefit plans, Government contracts, Labor, Law enforcement, Minimum wages, Penalties, Wages.

29 CFR Part 516

Employment, Recordkeeping, Law enforcement, Labor.

29 CFR Part 531

Employment, Labor, Minimum wages, Wages.

29 CFR Part 553

Firefighters, Labor, Law enforcement officers, Overtime pay, Wages.

29 CFR Part 778

Employment, Overtime pay, Wages.

29 CFR Part 779

Compensation, Overtime pay.

29 CFR Part 780

Agriculture, Irrigation, Overtime pay.

29 CFR Part 785

Compensation, Hours of work.

29 CFR Part 786

Compensation, Minimum wages, Overtime pay.

29 CFR Part 790

Compensation, Hours of work.

Signed at Washington, DC, this 16th day of March 2011.

Nancy J. Leppink,

Acting Administrator, Wage and Hour Division.

For the reasons set forth above, the Department amends Title 29, Parts 4, 516, 531, 553, 778, 779, 780, 785, 786, and 790 of the Code of Federal Regulations as follows:

PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

■ 1. The authority citation for part 4 is revised to read as follows:

Authority: 41 U.S.C. 351 *et seq.*; 41 U.S.C. 38 and 39; 5 U.S.C. 301; Pub. L. 104–188, § 2105(b); Pub. L. 110–28, 121 Stat. 112; Secretary's Order 9–2009, 74 FR 58836 (Nov. 13, 2009).

§ 4.159 General minimum wage. [Amended]

■ 2. Amend § 4.159 by removing the last sentence.

■ 3. Amend § 4.167 by revising the twelfth sentence to the end, to read as follows:

§ 4.167 Wage payments—medium of payment.

* * * The general rule under that Act provides, when determining the wage an employer is required to pay a tipped employee, the maximum allowable hourly tip credit is limited to the difference between $2.13 and the applicable minimum wage specified in section 6(a)(1) of that Act. (*See* § 4.163(k) for exceptions in section 4(c) situations.) In no event shall the sum credited as tips exceed the value of tips actually received by the employee. The tip credit is not available to an employer unless the employer has informed the employee of the tip credit provisions and all tips received by the employee have been retained by the employee (other than as part of a valid tip pooling arrangement among employees who customarily and regularly receive tips; *see* section 3(m) of the Fair Labor Standards Act).

PART 516—RECORDS TO BE KEPT BY EMPLOYERS

■ 4. The authority citation for part 516 is revised to read as follows:

Authority: Sec. 11, 52 Stat. 1066, as amended, 29 U.S.C. 211. Section 516.28 also issued under Pub. L. 104–188, § 2105(b); Pub. L. 110–28, 121 Stat. 112. Section 516.33 also issued under 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* Section 516.34 also issued under Sec. 7, 103 Stat. 944, 29 U.S.C. 207(q).

■ 5. Amend § 516.28 by revising the first sentence of paragraph (a)(3) to read as follows:

§ 516.28 Tipped employees.

(a) * * *

(3) Amount by which the wages of each tipped employee have been deemed to be increased by tips as determined by the employer (not in excess of the difference between $2.13 and the applicable minimum wage specified in section 6(a)(1) of the Act). * * *

* * * * * *

PART 531—WAGE PAYMENTS UNDER THE FAIR LABOR STANDARDS ACT OF 1938

■ 6. The authority citation for part 531 is revised to read as follows:

Authority: Sec. 3(m), 52 Stat. 1060; sec. 2, 75 Stat. 65; sec. 101, 80 Stat. 830; sec. 29(B), 88 Stat. 55, Pub. L. 93–259; Pub. L. 95–151, 29 U.S.C. 203(m) and (t); Pub. L. 104–188, § 2105(b); Pub. L. 110–28, 121 Stat. 112.

§ 531.7 [Removed and Reserved]

■ 7. Remove and reserve § 531.7.

■ 8. Amend § 531.36 by revising paragraph (a) to read as follows:

§ 531.36 Nonovertime workweeks.

(a) When no overtime is worked by the employees, section 3(m) and this part apply only to the applicable minimum wage for all hours worked. To illustrate, where an employee works 40 hours a week at a cash wage rate of at least the applicable minimum wage and is paid that amount free and clear at the end of the workweek, and in addition is furnished facilities, no consideration need be given to the question of whether such facilities meet the requirements of section 3(m) and this part, since the employee has received in cash the applicable minimum wage for all hours worked. Similarly, where an employee is employed at a rate in excess of the applicable minimum wage and during a particular workweek works 40 hours for which the employee receives at least the minimum wage free and clear, the employer having deducted from wages for facilities furnished, whether such deduction meets the requirement of section 3(m) and subpart B of this part need not be considered, since the employee is still receiving, after the deduction has been made, a cash wage of at least the minimum wage for each hour worked. Deductions for board, lodging, or other facilities may be made in nonovertime workweeks even if they reduce the cash wage below the minimum wage, provided the prices charged do not exceed the "reasonable cost" of such facilities. When such items are furnished the employee at a profit, the deductions from wages in weeks in which no overtime is worked are considered to be illegal only to the extent that the profit reduces the wage (which includes the "reasonable cost" of the facilities) below the required minimum wage. Facilities must be measured by the requirements of section 3(m) and this part to determine if the employee has received the applicable minimum wage in cash or in facilities which may be legitimately included in "wages" payable under the Act.

* * * * *

■ 9. Revise § 531.37 to read as follows:

§ 531.37 Overtime workweeks.

(a) Section 7 requires that the employee receive compensation for overtime hours at "a rate of not less than one and one-half times the regular rate at which he is employed." When overtime is worked by an employee who receives the whole or part of his or her wage in facilities and it becomes necessary to determine the portion of wages represented by facilities, all such facilities must be measured by the requirements of section 3(m) and subpart B of this part. It is the Administrator's opinion that deductions may be made, however, on the same basis in an overtime workweek as in nonovertime workweeks (*see* § 531.36), if their purpose and effect are not to evade the overtime requirements of the Act or other law, providing the amount deducted does not exceed the amount which could be deducted if the employee had only worked the maximum number of straight-time hours during the workweek. Deductions in excess of this amount for such articles as tools or other articles which are not "facilities" within the meaning of the Act are illegal in overtime workweeks as well as in nonovertime workweeks. There is no limit on the amount which may be deducted for "board, lodging, or other facilities" in overtime workweeks (as in workweeks when no overtime is worked), provided that these deductions are made only for the "reasonable cost" of the items furnished. These principles assume a situation where bona fide deductions are made for particular items in accordance with the agreement or understanding of the parties. If the situation is solely one of refusal or failure to pay the full amount of wages required by section 7, these principles have no application. Deductions made only in overtime workweeks, or increases in the prices charged for articles or services during overtime workweeks will be scrutinized to determine whether they are manipulations to evade the overtime requirements of the Act.

(b) Where deductions are made from the stipulated wage of an employee, the regular rate of pay is arrived at on the basis of the stipulated wage before any deductions have been made. Where board, lodging, or other facilities are customarily furnished as additions to a cash wage, the reasonable cost of the facilities to the employer must be considered as part of the employee's regular rate of pay. *See Walling* v. *Alaska Pacific Consolidated Mining Co.*, 152 F.2d 812 (9th Cir. 1945), *cert. denied,* 327 U.S. 803.

■ 10. Remove the undesignated center heading above § 531.50.

■ 11. Designate §§ 531.50 through 531.60 as subpart D, and add a heading for subpart D to read as follows:

Subpart D—Tipped Employees

■ 12. Revise § 531.50 to read as follows:

§ 531.50 Statutory provisions with respect to tipped employees.

(a) With respect to tipped employees, section 3(m) provides that, in determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—

(1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996 [*i.e.,* $2.13]; and

(2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.

(b) "Tipped employee" is defined in section 3(t) of the Act as follows: *Tipped employee* means any employee engaged in an occupation in which he customarily and regularly receives more than $30 a month in tips.

§§ 531.51, 531.56, 531.57, 531.58 [Amended]

■ 13. In addition to the amendments set forth above, in 29 CFR part 531, remove the words "$20" and add, in their place, the words "$30" wherever they appear in the following places:

■ a. Section 531.51;

■ b. Section 531.56, the section heading and paragraphs (a) through (e);

■ c. Section 531.57; and

■ d. Section 531.58.

■ 14. Amend § 531.52 by revising the second sentence to the end of the paragraph to read as follows:

§ 531.52 General characteristics of "tips."

* * * Whether a tip is to be given, and its amount, are matters determined solely by the customer, who has the right to determine who shall be the recipient of the gratuity. Tips are the property of the employee whether or not the employer has taken a tip credit under section 3(m) of the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in section 3(m): As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool. Only tips actually received by an employee as money belonging to the employee may be counted in determining whether the person is a "tipped employee" within the meaning of the Act and in applying the provisions of section 3(m) which govern wage credits for tips.

■ 15. Amend § 531.54 by adding two sentences to the end of the paragraph to read as follows:

§ 531.54 Tip pooling.

* * * Section 3(m) does not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, an employer must notify its employees of any required tip pool contribution amount, 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.

■ 16. Revise § 531.55 to read as follows:

§ 531.55 Examples of amounts not received as tips.

(a) A compulsory charge for service, such as 15 percent of the amount of the bill, imposed on a customer by an employer's establishment, is not a tip and, even if distributed by the employer to its employees, cannot be counted as a tip received in applying the provisions of section 3(m) and 3(t). Similarly, where negotiations between a hotel and a customer for banquet facilities include amounts for distribution to employees of the hotel, the amounts so distributed are not counted as tips received.

(b) As stated above, service charges and other similar sums which become part of the employer's gross receipts are not tips for the purposes of the Act. Where such sums are distributed by the employer to its employees, however, they may be used in their entirety to satisfy the monetary requirements of the Act.

■ 17. Amend § 531.56 by revising the last sentence in paragraph (d) to read as follows:

§ 531.56 "More than $30 per month in tips."

* * * * *

(d) * * * It does not govern or limit the determination of the appropriate amount of wage credit under section 3(m) that may be taken for tips under section 6(a)(1) (tip credit equals the difference between the minimum wage required by section 6(a)(1) and $2.13 per hour).

* * * * *

■ 18. Revise § 531.59 to read as follows:

§ 531.59 The tip wage credit.

(a) In determining compliance with the wage payment requirements of the Act, under the provisions of section 3(m) the amount paid to a tipped employee by an employer is increased on account of tips by an amount equal to the formula set forth in the statute (minimum wage required by section 6(a)(1) of the Act minus $2.13), provided that the employer satisfies all the requirements of section 3(m). This tip credit is in addition to any credit for board, lodging, or other facilities which may be allowable under section 3(m).

(b) As indicated in § 531.51, the tip credit may be taken only for hours worked by the employee in an occupation in which the employee qualifies as a "tipped employee." Pursuant to section 3(m), an employer is not eligible to take the tip credit unless it has informed its tipped employees in advance of the employer's use of the tip credit of the provisions of section 3(m) of the Act, *i.e.:* The amount of the cash wage that is to be paid to the tipped employee by the employer; the additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee; that all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and that the tip credit shall not apply to any employee who has not been informed of these requirements in this section. The credit allowed on account of tips may be less than that permitted by statute (minimum wage required by section 6(a)(1) minus $2.13); it cannot be more. In order for the employer to claim the maximum tip credit, the employer must demonstrate that the employee received at least that amount in actual tips. If the employee received less than the maximum tip credit amount in tips, the employer is required to pay the balance so that the employee receives at least the minimum wage with the defined combination of wages and tips. With the exception of tips contributed to a valid tip pool as described in § 531.54, the tip credit provisions of section 3(m) also require employers to permit employees to retain all tips received by the employee.

■ 19. Amend § 531.60(a) by removing the paragraph designation "(a)" and revising the first and third sentences to read as follows:

§ 531.60 Overtime payments.

When overtime is worked by a tipped employee who is subject to the overtime pay provisions of the Act, the employee's regular rate of pay is determined by dividing the employee's total remuneration for employment (except statutory exclusions) in any workweek by the total number of hours actually worked by the employee in that workweek for which such compensation was paid. * * * In accordance with section 3(m), a tipped employee's regular rate of pay includes the amount of tip credit taken by the employer per hour (not in excess of the minimum wage required by section 6(a)(1) minus $2.13), the reasonable cost or fair value of any facilities furnished to the employee by the employer, as authorized under section 3(m) and this part 531, and the cash wages including commissions and certain bonuses paid by the employer. * * *

* * * * *

PART 553—APPLICATION OF THE FAIR LABOR STANDARDS ACT TO EMPLOYEES OF STATE AND LOCAL GOVERNMENTS

■ 20. The authority citation for part 553 is revised to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended (29 U.S.C. 201–219); Pub. L. 99–150, 99 Stat. 787 (29 U.S.C. 203, 207, 211). Pub. L. 106–151, 113 Stat. 1731 (29 U.S.C. 203(y)).

■ 21. Amend § 553.210 by revising paragraph (a), removing paragraph (b), and redesignating paragraph (c) as (b) to read as follows:

§ 553.210 Fire Protection Activities.

(a) As used in sections 7(k) and 13(b)(20) of the Act, the term "any employee * * * in fire protection activities" refers to "an employee, including a firefighter, paramedic, emergency medical technician, rescue worker, ambulance personnel, or hazardous materials worker, who—(1) is trained in fire suppression, has the legal authority and responsibility to engage in fire suppression, and is employed by a fire department of a municipality, county, fire district, or State; and (2) is engaged in the prevention, control, and extinguishment of fires or response to emergency situations where life, property, or the environment is at risk."

■ 22. In § 553.212, revise paragraph (a) and the last sentence of paragraph (b) to read as follows:

§ 553.212 Twenty percent limitation on nonexempt work.

(a) Employees engaged in law enforcement activities as described in § 553.211 may also engage in some nonexempt work which is not performed as an incident to or in conjunction with their law enforcement activities. The performance of such nonexempt work will not defeat either the section 13(b)(20) or 7(k) exemptions unless it exceeds 20 percent of the total hours worked by that employee during the workweek or applicable work period. A person who spends more than

20 percent of his/her working time in nonexempt activities is not considered to be an employee engaged in law enforcement activities for purposes of this part.

(b) * * * In addition, the hours of work in the different capacity need not be counted as hours worked for overtime purposes on the regular job, nor are such hours counted in determining the 20 percent tolerance for nonexempt work for law enforcement personnel discussed in paragraph (a) of this section.

§ 553.215 [Removed and Reserved]

■ 23. Remove and reserve § 553.215.

§§ 553.221, 553.222, 553.223, 553.226, and 553.231 [Amended]

■ 24. Amend §§ 553.221, 553.222, 553.223, 553.226 and 553.231 to remove and add terms as follows. Remove the words "firefighter" or "firefighters" and add, in their place, the words "employee in fire protection activities" or "employees in fire protection activities," respectively, wherever they appear in the following places:

■ a. Section 553.221(a), (d), and (g);
■ b. Section 553.222(a) and (c);
■ c. Section 553.223(a), (c), and (d);
■ d. Section 553.226(c); and
■ e. Section 553.231(b).

PART 778—OVERTIME COMPENSATION

■ 25. The authority citation for part 778 is revised to read as follows:

Authority: 52 Stat. 1060, as amended; 29 U.S.C. 201 *et seq.* Section 778.200 also issued under Pub. L. 106–202, 114 Stat. 308 (29 U.S.C. 207(e) and (h)).

■ 26. Revise § 778.110 to read as follows:

§ 778.110 Hourly rate employee.

(a) *Earnings at hourly rate exclusively.* If the employee is employed solely on the basis of a single hourly rate, the hourly rate is the "regular rate." For overtime hours of work the employee must be paid, in addition to the straight time hourly earnings, a sum determined by multiplying one-half the hourly rate by the number of hours worked in excess of 40 in the week. Thus a $12 hourly rate will bring, for an employee who works 46 hours, a total weekly wage of $588 (46 hours at $12 plus 6 at $6). In other words, the employee is entitled to be paid an amount equal to $12 an hour for 40 hours and $18 an hour for the 6 hours of overtime, or a total of $588.

(b) *Hourly rate and bonus.* If the employee receives, in addition to the earnings computed at the $12 hourly rate, a production bonus of $46 for the week, the regular hourly rate of pay is $13 an hour (46 hours at $12 yields $552; the addition of the $46 bonus makes a total of $598; this total divided by 46 hours yields a regular rate of $13). The employee is then entitled to be paid a total wage of $637 for 46 hours (46 hours at $13 plus 6 hours at $6.50, or 40 hours at $13 plus 6 hours at $19.50).

■ 27. Revise § 778.111 to read as follows:

§ 778.111 Pieceworker.

(a) *Piece rates and supplements generally.* When an employee is employed on a piece-rate basis, the regular hourly rate of pay is computed by adding together total earnings for the workweek from piece rates and all other sources (such as production bonuses) and any sums paid for waiting time or other hours worked (except statutory exclusions). This sum is then divided by the number of hours worked in the week for which such compensation was paid, to yield the pieceworker's "regular rate" for that week. For overtime work the pieceworker is entitled to be paid, in addition to the total weekly earnings at this regular rate for all hours worked, a sum equivalent to one-half this regular rate of pay multiplied by the number of hours worked in excess of 40 in the week. (For an alternative method of complying with the overtime requirements of the Act as far as pieceworkers are concerned, *see* § 778.418.) Only additional half-time pay is required in such cases where the employee has already received straight-time compensation at piece rates or by supplementary payments for all hours worked. Thus, for example, if the employee has worked 50 hours and has earned $491 at piece rates for 46 hours of productive work and in addition has been compensated at $8.00 an hour for 4 hours of waiting time, the total compensation, $523.00, must be divided by the total hours of work, 50, to arrive at the regular hourly rate of pay—$10.46. For the 10 hours of overtime the employee is entitled to additional compensation of $52.30 (10 hours at $5.23). For the week's work the employee is thus entitled to a total of $575.30 (which is equivalent to 40 hours at $10.46 plus 10 overtime hours at $15.69).

(b) *Piece rates with minimum hourly guarantee.* In some cases an employee is hired on a piece-rate basis coupled with a minimum hourly guaranty. Where the total piece-rate earnings for the workweek fall short of the amount that would be earned for the total hours of work at the guaranteed rate, the employee is paid the difference. In such weeks the employee is in fact paid at an hourly rate and the minimum hourly guaranty is the regular rate in that week. In the example just given, if the employee was guaranteed $11 an hour for productive working time, the employee would be paid $506 (46 hours at $11) for the 46 hours of productive work (instead of the $491 earned at piece rates). In a week in which no waiting time was involved, the employee would be owed an additional $5.50 (half time) for each of the 6 overtime hours worked, to bring the total compensation up to $539 (46 hours at $11 plus 6 hours at $5.50 or 40 hours at $11 plus 6 hours at $16.50). If the employee is paid at a different rate for waiting time, the regular rate is the weighted average of the 2 hourly rates, as discussed in § 778.115.

■ 28. Amend § 778.113 by revising paragraph (a) and the fifth sentence of paragraph (b) to read as follows:

§ 778.113 Salaried employees—general.

(a) *Weekly salary.* If the employee is employed solely on a weekly salary basis, the regular hourly rate of pay, on which time and a half must be paid, is computed by dividing the salary by the number of hours which the salary is intended to compensate. If an employee is hired at a salary of $350 and if it is understood that this salary is compensation for a regular workweek of 35 hours, the employee's regular rate of pay is $350 divided by 35 hours, or $10 an hour, and when the employee works overtime the employee is entitled to receive $10 for each of the first 40 hours and $15 (one and one-half times $10) for each hour thereafter. If an employee is hired at a salary of $375 for a 40-hour week the regular rate is $9.38 an hour.

(b) * * * The regular rate of an employee who is paid a regular monthly salary of $1,560, or a regular semimonthly salary of $780 for 40 hours a week, is thus found to be $9 per hour. * * *

* * * * * *

■ 29. Amend § 778.114 by revising paragraph (b) to read as follows:

§ 778.114 Fixed salary for fluctuating hours.

* * * * *

(b) The application of the principles above stated may be illustrated by the case of an employee whose hours of work do not customarily follow a regular schedule but vary from week to week, whose total weekly hours of work never exceed 50 hours in a workweek, and whose salary of $600 a week is paid with the understanding that it constitutes the employee's compensation, except for overtime

premiums, for whatever hours are worked in the workweek. If during the course of 4 weeks this employee works 40, 37.5, 50, and 48 hours, the regular hourly rate of pay in each of these weeks is $15.00, $16.00, $12.00, and $12.50, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due. For the first week the employee is entitled to be paid $600; for the second week $600.00; for the third week $660 ($600 plus 10 hours at $6.00 or 40 hours at $12.00 plus 10 hours at $18.00); for the fourth week $650 ($600 plus 8 hours at $6.25, or 40 hours at $12.50 plus 8 hours at $18.75).

* * * * *

■ 30. Amend § 778.200 by adding paragraph (a) (8) and revising paragraph (b) to read as follows:

§ 778.200 Provisions governing inclusion, exclusion, and crediting of particular payments.

(a) * * *

(8) Any value or income derived from employer-provided grants or rights provided pursuant to a stock option, stock appreciation right, or bona fide employee stock purchase program which is not otherwise excludable under any of paragraphs (a)(1) through (a)(7) of this section if—

(i) Grants are made pursuant to a program, the terms and conditions of which are communicated to participating employees either at the beginning of the employee's participation in the program or at the time of the grant;

(ii) In the case of stock options and stock appreciation rights, the grant or right cannot be exercisable for a period of at least 6 months after the time of grant (except that grants or rights may become exercisable because of an employee's death, disability, retirement, or a change in corporate ownership, or other circumstances permitted by regulation), and the exercise price is at least 85 percent of the fair market value of the stock at the time of grant;

(iii) Exercise of any grant or right is voluntary; and

(iv) Any determinations regarding the award of, and the amount of, employer-provided grants or rights that are based on performance are—

(A) Made based upon meeting previously established performance criteria (which may include hours of work, efficiency, or productivity) of any business unit consisting of at least 10 employees or of a facility, except that, any determinations may be based on length of service or minimum schedule of hours or days of work; or

(B) Made based upon the past performance (which may include any criteria) of one or more employees in a given period so long as the determination is in the sole discretion of the employer and not pursuant to any prior contract.

(b) *Section 7(h).* This subsection of the Act provides as follows:

(1) Except as provided in paragraph (2), sums excluded from the regular rate pursuant to subsection (e) shall not be creditable toward wages required under section 6 or overtime compensation required under this section.

(2) Extra compensation paid as described in paragraphs (5), (6), and (7) of subsection (e) of this section shall be creditable toward overtime compensation payable pursuant to this section.

* * * * *

■ 31. Amend § 778.208 by revising the first sentence to read as follows:

§ 778.208 Inclusion and exclusion of bonuses in computing the "regular rate."

Section 7(e) of the Act requires the inclusion in the regular rate of all remuneration for employment except eight specified types of payments. * * *

PART 779—THE FAIR LABOR STANDARDS ACT AS APPLIED TO RETAILERS OF GOODS OR SERVICES

■ 32. The authority citation for part 779 is revised to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; Sec. 29(B), Pub. L. 93–259, 88 Stat. 55; 29 U.S.C. 201–219.

■ 33. Revise the undesignated center heading for §§ 779.371 and 779.372 to read as follows:

Automobile, Truck and Farm Implement Sales and Services, and Trailer, Boat and Aircraft Sales

■ 34. Amend § 779.371 by revising the fifth sentence of paragraph (a) to read as follows:

§ 779.371 Some automobile, truck, and farm implement establishments may qualify for exemption under section 13(a)(2).

(a) * * * Section 13(b)(10) is applicable not only to automobile, truck, and farm implement dealers but also to dealers in trailers, boats, and aircraft. * * *

* * * * *

■ 35. Amend § 779.372 by revising paragraphs (a), (b)(1)(ii), (b)(2), and (c) to read as follows:

§ 779.372 Nonmanufacturing establishments with certain exempt employees under section 13(b)(10).

(a) *General.* A specific exemption from only the overtime pay provisions of section 7 of the Act is provided in section 13(b)(10) for certain employees of nonmanufacturing establishments engaged in the business of selling automobiles, trucks, farm implements, trailers, boats, or aircraft. Section 13(b)(10)(A) states that the provisions of section 7 shall not apply with respect to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers." Section 13(b)(10)(B) states that the provisions of section 7 shall not apply with respect to "any salesman primarily engaged in selling trailers, boats, or aircraft, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling trailers, boats, or aircraft to ultimate purchasers." This exemption will apply irrespective of the annual dollar volume of sales of the establishment or of the enterprise of which it is a part.

(b) * * *

(1) * * *

(ii) The establishment must be primarily engaged in the business of selling automobiles, trucks, or farm implements to the ultimate purchaser for section 13(b)(10)(A) to apply. If these tests are met by an establishment the exemption will be available for salesmen, partsmen and mechanics, employed by the establishment, who are primarily engaged during the work week in the selling or servicing of the named items. Likewise, the establishment must be primarily engaged in the business of selling trailers, boats, or aircraft to the ultimate purchaser for the section 13(b)(10)(B) exemption to be available for salesmen employed by the establishment who are primarily engaged during the work week in selling these named items. An explanation of the term "employed by" is contained in §§ 779.307 through 779.311. The exemption is intended to apply to employment by such an establishment of the specified categories of employees even if they work in physically separate buildings or areas, or even if, though working in the principal building of the dealership, their work relates to the work of physically separate buildings or areas, so long as they are employed in a department which is functionally operated as part of the dealership.

(2) This exemption, unlike the former exemption in section 13(a)(19) of the Act prior to the 1966 amendments, is not limited to dealerships that qualify as retail or service establishments nor is it limited to establishments selling automobiles, trucks, and farm implements, but also includes dealers in trailers, boats, and aircraft.

(c) *Salesman, partsman, or mechanic.* (1) As used in section 13(b)(10)(A), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of the automobiles, trucks, or farm implements that the establishment is primarily engaged in selling. As used in section 13(b)(10)(B), a salesman is an employee who is employed for the purpose of and is primarily engaged in making sales or obtaining orders or contracts for sale of trailers, boats, or aircraft that the establishment is primarily engaged in selling. Work performed incidental to and in conjunction with the employee's own sales or solicitations, including incidental deliveries and collections, is regarded as within the exemption.

(2) As used in section 13(b)(10)(A), a partsman is any employee employed for the purpose of and primarily engaged in requisitioning, stocking, and dispensing parts.

(3) As used in section 13(b)(10)(A), a mechanic is any employee primarily engaged in doing mechanical work (such as get ready mechanics, automotive, truck, or farm implement mechanics, used car reconditioning mechanics, and wrecker mechanics) in the servicing of an automobile, truck or farm implement for its use and operation as such. This includes mechanical work required for safe operation, as an automobile, truck, or farm implement. The term does not include employees primarily performing such nonmechanical work as washing, cleaning, painting, polishing, tire changing, installing seat covers, dispatching, lubricating, or other nonmechanical work. Wrecker mechanic means a service department mechanic who goes out on a tow or wrecking truck to perform mechanical servicing or repairing of a customer's vehicle away from the shop, or to bring the vehicle back to the shop for repair service. A tow or wrecker truck driver or helper who primarily performs nonmechanical repair work is not exempt.

* * * * *

PART 780—EXEMPTIONS APPLICABLE TO AGRICULTURE, PROCESSING OF AGRICULTURAL COMMODITIES, AND RELATED SUBJECTS UNDER THE FAIR LABOR STANDARDS ACT

■ 36. The authority citation for part 780 is revised to read as follows:

Authority: Secs. 1–19, 52 Stat. 1060, as amended; 75 Stat. 65; 29 U.S.C. 201–219. Pub. L. 105–78, 111 Stat. 1467.

■ 37. Revise § 780.400 to read as follows:

§ 780.400 Statutory provisions.

Section 13(b)(12) of the Fair Labor Standards Act exempts from the overtime provisions of section 7 any employee employed in agriculture or in connection with the operation or maintenance of ditches, canals, reservoirs, or waterways, not owned or operated for profit, or operated on a sharecrop basis, and which are used exclusively for supply and storing of water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year.

■ 38. Amend § 780.401 by revising the first sentence of paragraph (a) and paragraph (b) to read as follows:

§ 780.401 General explanatory statement.

(a) Section 13(b)(12) of the Act contains the same wording exempting any employee employed in agriculture as did section 13(a)(6) prior to the 1966 amendments. * * *

(b) In addition to exempting employees engaged in agriculture, section 13(b)(12) also exempts from the overtime provisions of the Act employees employed in specified irrigation activities. The effect of the 1997 amendment to section 13(b)(12) is to expand the overtime exemption for any employee employed in specified irrigation activities used for supply and storing of water for agricultural purposes by substituting "water, at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year" for the prior requirement that all the water be used for agricultural purposes. Prior to the 1966 amendments employees employed in specified irrigation activities were exempt from the minimum wage and overtime pay requirements of the Act.

* * * * *

■ 39. Revise § 780.406 to read as follows:

§ 780.406 Exemption is from overtime only.

This exemption applies only to the overtime provisions of the Act and does not affect the minimum wage, child labor, recordkeeping, and other requirements of the Act.

■ 40. Revise § 780.408 to read as follows:

§ 780.408 Facilities of system at least 90 percent of which was used for agricultural purposes.

Section 13(b)(12) requires for exemption of irrigation work that the ditches, canals, reservoirs, or waterways in connection with which the employee's work is done be "used exclusively for supply and storing of water at least 90 percent of which was ultimately delivered for agricultural purposes during the preceding calendar year." If a water supplier supplies water of which more than 10 percent is used for purposes other than "agricultural purposes" during the preceding calendar year, the exemption would not apply. For example, the exemption would not apply where more than 10 percent of the water supplier's water is delivered to a municipality to be used for general, domestic, and commercial purposes. Water used for watering livestock raised by a farmer is "for agricultural purposes."

PART 785—HOURS WORKED

■ 41. The authority citation for part 785 is revised to read as follows:

Authority: 52 Stat. 1060; 29 U.S.C. 201–219; 29 U.S.C. 254. Pub. L. 104–188, 100 Stat. 1755.

■ 42. Amend § 785.7 by revising the first sentence to read as follows:

§ 785.7 Judicial construction.

The United States Supreme Court originally stated that employees subject to the act must be paid for all time spent in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business."
* * *

■ 43. Amend § 785.9 by adding a sentence after the third sentence in paragraph (a) to read as follows:

§ 785.9 Statutory exemptions.

(a) * * * The use of an employer's vehicle for travel by an employee and activities that are incidental to the use of such vehicle for commuting are not considered "principal" activities when meeting the following conditions: The use of the employer's vehicle for travel is within the normal commuting area for

the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or the representative of such employee. * * *

■ 44. Amend § 785.34 by adding a sentence after the first sentence to read as follows:

§ 785.34 Effect of section 4 of the Portal-to-Portal Act.

* * * Section 4(a) further provides that the use of an employer's vehicle for travel by an employee and activities that are incidental to the use of such vehicle for commuting are not considered principal activities when the use of such vehicle is within the normal commuting area for the employer's business or establishment and is subject to an agreement on the part of the employer and the employee or the representative of such employee. * * *

■ 45. Amend § 785.50 by adding a sentence at the end of paragraph (a)(2) to read as follows:

§ 785.50 Section 4 of the Portal-to-Portal Act.

* * * * *

(a) * * *

(2) * * * For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

* * * * *

PART 786—MISCELLANEOUS EXEMPTIONS AND EXCLUSIONS FROM COVERAGE

■ 46. The authority citation for part 786 is revised to read as follows:

Authority: 52 Stat. 1060, as amended; 29 U.S.C. 201–219. Pub. L. 104–188, 100 Stat. 1755. Pub. L. 105–221, 112 Stat. 1248, 29 U.S.C. 203(e).

■ 47. Revise the heading to part 786 to read as set forth above.

■ 48. Add subpart G consisting of § 786.300 to read as follows:

Subpart G—Youth Opportunity Wage

§ 786.300 Application of the youth opportunity wage.

Section 6(g) of the Fair Labor Standards Act allows any employer to pay any employee who has not attained the age of 20 years a wage of not less than $4.25 an hour during the first 90 consecutive calendar days after such employee is initially employed by such employer. For the purposes of hiring workers at this wage, no employer may take any action to displace employees, including partial displacements such as reducing hours, wages, or employment benefits. Any employer that violates these provisions is considered to have violated section 15(a)(3) of the Act.

■ 49. Add subpart H consisting of § 786.350 to read as follows:

Subpart H—Volunteers at Private Non-Profit Food Banks

§ 786.350 Exclusion from definition of "employee" of volunteers at private non-profit food banks.

Section 3(e)(5) of the Fair Labor Standards Act excludes from the definition of the term "employee" individuals who volunteer their services solely for humanitarian purposes at private non-profit food banks and who receive groceries from the food banks.

PART 790—GENERAL STATEMENT AS TO THE EFFECT OF THE PORTAL-TO-PORTAL ACT OF 1947 ON THE FAIR LABOR STANDARDS ACT OF 1938

■ 50. The authority citation for part 790 is revised to read as follows:

Authority: 52 Stat. 1060, as amended; 110 Stat. 1755; 29 U.S.C. 201–219; 29 U.S.C. 254.

■ 51. Amend § 790.3 by adding a sentence at the end of paragraph (a)(2) to read as follows:

§ 790.3 Provisions of the statute.

* * * * *

(a) * * *

(2) * * * For purposes of this subsection, the use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

* * * * *

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C

Developments and Trends in the Restrictive Covenant and Trade Secrets Area

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Introduction

- Restrictive Covenants
  - Economy causes less turning of the other cheek
  - Major tools in trade secret litigation
  - More states passing or proposing laws regulating their use
- Trade Secrets
  - The numbers are increasing
    - From 1988 to 1995 – cases doubled in federal courts
    - From 1995 to 2004 – cases doubled again
    - Cases will double again by 2017
    - Cases out pace overall rate of litigation in state courts
  - Coming from the inside
    - Over 90% of cases are from an employee or business partner

Introduction

- Basic restrictive covenant concepts
  - Types of covenants
  - Protectible interests
  - Need for reasonable geographic, temporal and activity restraints
- Basic restrictive covenant protocols
  - Agreements
  - Policies and procedures
- Focus on restrictive covenants between employer-employee (i.e., not sale-of-business or forfeiture-for-competition)

Employee Hires— Top Ten "Dos" and "Don'ts"

1. **DO** obtain a copy of employee's existing employment and other agreements
2. **DO** consult with legal counsel to determine validity and scope of applicable restrictions
   - Non-competition
   - Customer non-solicitation
   - Employee non-solicitation
   - Confidentiality
3. **DO** inform employee of company's expectation that executive will abide by any existing valid and enforceable restrictive covenant and related obligations

continued

Employee Hires— Top Ten "Dos" and "Don'ts"

4. **DO** inform employee that he or she is not expected to, and should not, bring with him or her any hard copy or electronic records from any prior employer
5. **DO** obtain a written representation from employee that he or she does not have any written or oral agreement with any person or entity that would prohibit his or her employment by the company, or that would substantially limit their ability to fully perform his or her new responsibilities
6. If employee's compensation is tied, in part, to generation of new business, **DON'T** link bonus awards to solicitation of specific customers covered by valid restrictive covenant

continued

Employee Hires— Top Ten "Dos" and "Don'ts"

7. If employee is covered by a valid and enforceable customer non-solicit provision, **DON'T** induce potential violation of provision by having employee direct other company employees to carry out customer solicitations
8. If employee is covered by valid and enforceable employee non-solicit provision, **DON'T** induce potential violation of provision by having employee involved in company's efforts to recruit other employees of employee's former employer

continued

Employee Hires—Top Ten "Dos" and "Don'ts"

9. If the company learns that employee has brought with him or her hard copy or electronic records from a prior employer, **DO** consult with legal counsel as to how to handle such documents
10. **DO** ensure that employee has executed with your company an appropriate employment agreement with narrowly tailored restrictive covenants, and that appropriate "control" copies of such agreements are maintained

Employee Departures—Top Ten "Dos"

1. **DO** conduct an exit interview
   - Establish written policy requiring exit interviews of all executives
   - Prepare written checklist of topics for HR director or manager to review
   - Attempt to ascertain specifics of new position with competition
   - Request immediate return of any company information or property, and written verification of same
2. **DO** cease computer access
   - Invalidate password access both internally and via remote access
   - Retrieve any company-issued laptops immediately

Employee Departures—Top Ten "Dos"

3. **DO** contact legal counsel
   - Advise in-house or outside counsel immediately
   - Ensure in-house or outside counsel is in contact with HR director
   - Ensure ability to prepare for emergency injunctive relief if necessary
   - Demonstrate emergency
4. **DO** interview co-workers
   - Secretary/personal assistant
   - Direct reports

Employee Departures—Top Ten "Dos"

5. **DO** review electronic mail and recent downloads
   - IT personnel can retrieve sent, received and deleted e-mails and attachments
   - Review by representative familiar with business dealings
   - Be sure your employee handbook, IT and related manuals make clear there is *no expectation of privacy in relation to use of company* equipment and systems

Employee Departures—Top Ten "Dos"

- Careful accessing employee's "personal" e-mail accounts
  - Federal Stored Communications Act—18 U.S.C. § 2701, *et seq.*
    - Prohibits unauthorized access to a "facility through which an *electronic communication service* is provided . . . and thereby obtain[ing] . . . an electronic communication while it is in *electronic storage* . . . ."
    - E-mail services, like Gmail and AOL, have been found to constitute electronic communications services. Theofel v. Farey-Jones, 359 F.3d 1066 (9th Cir. 2003); In re Doubleclick Inc. Privacy Litigation, 154 F. Supp. 2d 497 (S.D.N.Y. 2001)
    - Some courts have recognized e-mails saved in a personal e-mail account as "electronic storage," Theofel, supra ("There is no dispute that messages remaining on [the ISP's] server after delivery are stored 'by an electronic communication service'" under the SCA.); Bailey v. Bailey, No. 07-11672, 2008 U.S. Dist. LEXIS 8565 (E.D. Mich. Feb. 8, 2008) (obtaining saved e-mails in e-mail account violates the SCA), . . .
    - . . . whereas others have not, Bansal v. Russ, 513 F. Supp. 2d 264 (E.D. Pa. 2007) (obtaining "opened" e-mails does not violate SCA); Fraser v. Nationwide Mut. Ins. Co., 135 F. Supp. 2d 623 (E.D. Pa. 2001) (SCA provides protection only for e-mails in transmission and not after they have been received by recipient).

Employee Departures—Top Ten "Dos"

6. **DO** obtain telephone detail for office phone or company-issued cell phone
   - Provides information related to pre-resignation activities
   - Company can obtain without employee's consent
   - Be careful about efforts to obtain *personal* telephone records
7. **DO** review personnel file and applicable employment agreements
   - Secure original or copy of any signed agreements
   - Signed acknowledgment or handbook policy statement

continued

Employee Departures—Top Ten "Dos"

8. **DO** send reminder and/or cease-and-desist letter to employee
   - Letter should outline ongoing confidentiality or restrictive covenant obligations
   - Sending letter assists in demonstrating reasonable measures to protect trade secrets
9. **DO** send notification and/or cease-and-desist letter to new employer
   - Puts new employer on notice that employee is bound by restrictive covenant agreement
   - May assist in establishing tortious interference with business relationships claim

continued

Employee Departures—Top Ten "Dos"

10. **DO** evaluate filing lawsuit, including claim for emergency injunctive relief
    - Consider clear evidence of stolen documents
    - Consider threat of immediate and irreparable harm to customer or employee relationships
    - Consider evidence of pre-resignation competitive activities
    - Consider whether there is reasonably drafted restrictive covenant agreement

Legislative and Case Law Issues

- One size does not fit all
  - Multi-state employers
  - Contrary to public policy
  - California
- New York Case Law
  - Inevitable disclosure
  - Economic Espionage Act

Potential New Laws

- Massachusetts—HB 4607—prompted by tech corridor concerns about employee mobility
  - May apply only to an employee whose average annualized federal gross income derived from the employer during the three-year period before separation is greater than $75,000
  - Must be provided to new hire upon earlier of (i) when any written offer of employment if first sent to the employee or (ii) seven business days before commencement of employment (if offer is first communicated orally, employee must be simultaneously informed that non-compete will be required or he or she must receive required written notice before tendering resignation from then-current employer)
  - Void if longer than one year and six months is presumptively reasonable
  - Choice of law provision identifying law of other state as controlling is *invalid*

Potential New Laws

- Illinois—Covenant Not to Compete Act—HB 0016
  - Limits not-to-compete covenants to "key employees"
    - Those with "substantial involvement in the executive management" of employer's business, substantial customer contact, knowledge of trade secrets or other proprietary information, unique skills, or those who are among the 5% highest paid of employees in year preceding separation
  - Covenants are presumed unreasonable if:
    - Exceed one year in duration
    - Geographic area extends beyond region in which key employee provided services during one-year period before separation
  - Must inform key employee in written offer at least two weeks prior to first day of employment that covenant is required as condition of employment

"On the Books"

- Florida—FLA. STAT. ANN. §§ 542.331, *et seq.*
  - Sets forth presumptively reasonable and unreasonable time limitations for various types of covenants (e.g., in the employment context, six months or less is presumptively *reasonable*, and more than two years is presumptively *unreasonable*)
  - Authorizes judicial modification of unreasonable covenants
  - Provides that violation of enforceable covenant creates a presumption of irreparable harm, and prohibits court from balancing harm to individual resulting from covenant enforcement
  - Bars courts from construing a restrictive covenant narrowly against the drafter
  - Permits court to award attorneys' fees and costs to a prevailing party (employer or employee)

continued

"On the Books"

- Oregon—OR. REV. STAT. §§ 653.295, *et seq.*
  - Significantly limits enforceability of *covenants not to compete*
  - Requires employer to inform employee—in a written employment offer received by the employee at least two weeks before the first day of employment that a non-compete covenant is a condition of employment
  - For "existing" employees, requires a *subsequent bona fide advancement* of the employee
  - Voids any non-compete term in excess of two years
  - Limits application to employees whose annual gross salary and commissions, calculated on an annual basis, at the time of employee's termination exceeds the median family income for a four-person family (currently $62,500)
  - Does *not* apply to a "covenant not to solicit employees of the employer or solicit or transact business with customers of the employer"

continued

"On the Books"

- Colorado—COLO. REV. STAT. §§ 8-2-113, *et seq.*
  - Covenants not to compete are void, except:
    - Any contract for the protection of trade secrets
    - "Executive and management personnel and officers and employees who constitute professional staff to executive and management personnel"
  - Whether an employee fits this description is a question of fact for trial court
  - Covenants not to compete with independent contractors are *unenforceable* except to protect trade secrets
- Oklahoma—OKLA. STAT. tit. 15, § 217, *et seq.*
  - Voids *all* post-employment not-to-compete covenants
  - Permits restrictions on former employee solicitation of "established customers of the former employer"
  - Does *not* define "established customers"

"On the Books"

- Georgia's New Law—GA. STAT. ANN. §§ 13-8-2, *et seq.*
  - Constitution amended as of November 3, 2010, and intended to apply to non-competition agreements that were executed after January 1, 2011
    - Legal challenge to effective date
    - New version signed into law May 11, 2011
  - Much more *employer-friendly* than prior common law treatment of covenants
    - Before, if one covenant was void, the whole contract was void
    - Under new law, trial court has *discretion*
  - Restrictions of two years or less are presumed reasonable
  - Customer non-interference provisions are permitted
  - Old law likely still applies to contracts signed before January 1, 2011

The "Special" Case of California

- Status of enforceability of restrictive covenants
  - Covenants not to compete—*not enforceable*
  - Customer non-solicit—*not enforceable*
  - "Trade Secrets Exception"
    - There is some authority to support enforcement of covenants based upon a "narrow restraint"—i.e., solely for the protection of trade secrets
    - But even this exception has been called into doubt. Edwards v. Arthur Andersen LLP, 189 P.3d 285 (Cal. 2008)
    - Protection for trade secrets already available under California's Trade Secrets Act
    - California Supreme Court has *not conclusively addressed*
  - Covenants relating to employees
    - Non-solicit—*enforceable*
    - Non-hire—*not enforceable*

continued

The "Special" Case of California

- Should we still require that California-based employees sign agreements?
  - Yes, but base non-compete and customer non-solicit restrictions on the non-use/non-disclosure of trade secrets
  - Include confidentiality/non-disclosure provision
  - Include employee non-solicit provision
  - Cite as evidence of steps taken to safeguard trade secrets

continued

The "Special" Case of California

- "Standard" versus California-specific agreements
  - Consider having separate agreement for use with employees resident in California
  - If California-based employee signs "standard" company agreement not otherwise enforceable in California:
    - Select *other state's* law as controlling law, and *forum outside of California* as exclusive forum for litigation of disputes
    - But *no* authority from a California state court where the court applied a choice of law provision calling for application of another state's law to an agreement containing a covenant violative of California law
      - Dowell v. Bionese Webster, Inc., 102 Cal. Rptr. 3d 1 (Ca. Ct. App. 2010) (refusing to enforce NJ choice of law and exclusive venue provisions)
      - Application Group, Inc. v. Hunter Group, Inc., 72 Cal. Rptr. 2d 73 (Cal. Ct. App. 1998) (refusing to enforce MD choice of law provision)

The "Special" Case of California

- "Standard" versus California-specific agreements
  - Lesson to be learned: Win the race to the courthouse
    - Triosi v. Cannon Equip. Co., 2010 WL 2061989 (Cal. Ct. App. May 25, 2010) (enforcing MN forum selection clause in agreement between MN employer and CA employee because enforcement of clause itself would not contravene CA public policy and employee could argue for application of CA law in pending MN proceeding)
    - Marsh USA Inc. v. Hamby, 2010 WL 2927261 (N.Y. Sup. Ct. July 22, 2010) (applying NY choice of law provision in non-compete agreement between NY employer and CA-based employee)

New York Case Law

- Inevitable Disclosure
  - In the absence of misappropriation of trade secrets, it is nonetheless inevitable the former employee will use trade secrets with new employer
    - Industry, competition, and new position
  - IBM v. Papermaster, 2008 WL 4974508 (S.D.N.Y. 2008)
    - High-level employee of 26 years who developed cutting-edge microprocessors and had access to highly confidential information
    - Apple hired employee as senior developer of iPhone
    - IBM offered increased pay or "garden leave" during one-year non-compete
    - "No great leap for the court to find plaintiff has met its burden of showing a likelihood of irreparable harm. Thus, it is likely that Mr. Papermaster inevitably will draw upon his experience...gained from IBM and which Apple found so impressive."
    - No misappropriation was found

continued

New York Case Law

- Inevitable Disclosure
  - IBM v. Visentin, No. 11 Civ 399 (LAP) (S.D.N.Y. 2011)
    - Senior executive resigned to go to Hewlett-Packard Co.
    - One-year non-competition agreement
    - IBM filed suit for breach of contract and misappropriation of trade secrets and sought a preliminary injunction
    - Court determined that despite broad access to confidential information, Visentin had general management expertise as opposed to technical and trade secret expertise
    - Visentin did not need to use any of IBM's confidential information to do his new job at HP and the risk was low that he would disclose it

continued

New York Case Law

- Economic Espionage Act, 18 U.S.C. §§ 1831, *et seq.*
  - Passed "to ensure that the theft of intangible information is prohibited in the same way" as theft of physical goods
  - Crime, punishable by imprisonment up to 10 years, to steal a trade secret for "the economic benefit of anyone other than the owner thereof" while "intending or knowing that the offense will injure any owner of that secret"
  - Injunctive relief also available in civil action
  - Upside and downside
  - Recent high-profile prosecutions involved proprietary methods of high-speed securities trading
    - United States v. Samarth Agrawal, 10 CR 417 (JSR)
    - United States v. Sergey Aleynikov, 10 CR 96 (DLC)

United States District Court,
S.D. New York.
INTERNATIONAL BUSINESS MACHINES CORPORATION, Plaintiff,
v.
Mark D. PAPERMASTER, Defendant.

No. 08-CV-9078 (KMK).
Nov. 21, 2008.

West KeySummary**Injunction 212 ⚖138.39**

212 Injunction
212IV Preliminary and Interlocutory Injunctions
212IV(A) Grounds and Proceedings to Procure
212IV(A)3 Subjects of Relief
212k138.36 Contracts
212k138.39 k. Noncompetition Covenants or Agreements. Most Cited Cases

A technology company that produced microprocessors established a real risk of irreparable harm supporting a preliminary injunction, if a former employee continued in his new position at a computer company. The former employee, who had entered into a covenant not to compete, would have inevitably drawn upon his experience and expertise in microprocessors while producing products for the computer company and damaged the microprocessor company's ability to compete in selling its products. Further, even if the employee did not intend to disclose any trade secrets, he would have inadvertently disclosed secrets through his knowledge and in order to perform his new job.

Evan R. Chesler, Esq., Stephen S. Madsen, Esq., Cravath, Swaine & Moore LLP, New York, NY, for Plaintiff.

Blair G. Connelly, Esq., Latham & Watkins, LLP, New York, NY, for Defendant.

Timothy B. Hardwicke, Esq., Latham & Watkins, LLP, Chicago, IL, for Defendant.

AMENDED OPINION AND ORDER

KENNETH M. KARAS, District Judge.

***1** Before the Court in this diversity action is the application of Plaintiff International Business Machines Corporation ("Plaintiff" or "IBM"), for an order pursuant to Rule 65 of the Federal Rules of Civil Procedure to enjoin Defendant Mark D. Papermaster ("Defendant" or "Papermaster"), a former IBM executive, from working for, and from disclosing IBM's confidential information to, Apple Inc. ("Apple").

IBM filed its Complaint on October 22, 2008, including claims for breach of contract and misappropriation of trade secrets. On October 24, 2008, the Court granted Plaintiff's application for an Order to Show Cause as to why a preliminary injunction should not be ordered to bar Mr. Papermaster from working for Apple. Mr. Papermaster responded to the Order to Show Cause in a timely fashion, and the Court held a preliminary injunction hearing on November 6, 2008. By agreement of the Parties, there was no live testimony at this hearing. Instead, the record consists of the Declarations and Exhibits that accompanied the Parties' Memoranda of Law in support of and in opposition to Plaintiff's injunction application. At the hearing, Plaintiff, upon learning for the first time that Mr. Papermaster had already begun working for Apple, moved for a temporary restraining order.

The Court granted Plaintiff's motion for preliminary injunctive relief in an Order dated November 7, 2008, promising the reasons for that Order in a forthcoming opinion. This is that Opinion, which sets forth the Court's findings of facts and conclusions of law, as required by Rule 65 of the Federal Rules of Civil Procedure. For the reasons in this Opinion, the Court orders that Mr. Papermaster be enjoined from working for or with Apple until fur-

ther order of the Court. However, in consideration of the Parties' equities, the Court also finds that this case should proceed on an expedited schedule that will be addressed at an upcoming conference.

I. Facts

A. IBM

IBM, a New York corporation, is one of the world's largest technology companies, with nearly 400,000 employees worldwide. (Compl.¶ 6.) IBM's business depends on its technical research and development efforts, which allow it to "design, develop and manufacture a variety of products, including microprocessors and servers." (*Id.* ¶ 8.) Microprocessors are "a type of microelectronic device that provides intelligence and functionality to electronic devices, such as personal computers, video game consoles, intelligent handheld devices and servers." (*Id.*) "Servers are high-performance computers designed to handle the needs of multiple, concurrent users." (*Id.*)

To build these servers and microprocessors, IBM has developed what is known as "Power" architecture, which is based on a "broad array of know-how and/or technical instructions used to design electronic devices." (Supplemental Decl. of Rodney C. Adkins ("Suppl. Adkins Decl.") ¶ 5 n. 1.) From IBM's perspective, "Power" is "one of the handful of architectures used to design, develop and manufacture microprocessors for both large and small electronic devices." (*Id.* ¶ 5.) And, as evidenced by its use in a wide variety of applications, it is said to "be superior to other architectures in its scalability, its flexibility and its ability to be customized ...." (*Id.*)

***2** While IBM's model emphasizes large-scale products for businesses, (Decl. of Blair G. Connelly, Ex. C), the microprocessor technology developed by IBM has wide application, (Decl. of Rodney C. Adkins ("Adkins Decl.") ¶ 10; Suppl. Adkins Decl. ¶ 5). For example, within the last 18 months, IBM has developed technology that is compatible with consumer electronic products such as cellphones and MP3 players. (Suppl. Adkins Decl. ¶ 8.) In particular, IBM recently revealed a new type of digital storage technology that enables MP3 players (such as Apple's iPod) to store about half a million songs or 3,500 films with a lower power output. (*Id.* ¶ 8.c.) And, until two years ago, IBM supplied Apple with microprocessors, based on its "Power" architecture, for Apple's personal computers. (*Id.* ¶ 7.) [FN1]

> FN1. IBM sold its personal computer business to the Lenovo Group in 2005, but it claims that it continues to have an equity investment in that business and to sell personal computers when sales of these items accompanies technical service transactions. (Adkins Decl. ¶ 19.) IBM claims to have generated "substantial revenue" from such sales. (*Id.*)

B. Mr. Papermaster's 26-Year Career at IBM

Mr. Papermaster, a Texas resident, has worked at IBM for the past twenty-six years. (Decl. of Mark D. Papermaster ("Papermaster Decl .") ¶¶ 1, 5.) He has spent most of his career at IBM in various product design and development roles within the "Systems and Technology Group." (Adkins Decl. ¶ 7.) [FN2] From 1991 until 2006, Mr. Papermaster worked in microprocessor technology development, eventually becoming IBM's Vice President of Microprocessor Technology Development. (Papermaster Decl. ¶ 7.) Most of Mr. Papermaster's work in microprocessors has been focused on IBM's "Power" architecture, and because of his extensive work in this area he is viewed within IBM as the "top expert" in "Power" architecture (Compl.¶ 14), and in the industry as "an extremely well-respected figure in the clubby world of chip design," (Supplemental Decl. of Stephen C. Madsen ("Suppl. Madsen Decl."), Ex. 2 (Tom Krazit, *Apple Hires Top IBM Chip Designer and Blade Server Guru,* CNet News, Oct. 30, 2008)). Most of Mr. Papermaster's work in microprocessors has involved server applications, but he spent approximately five years working on microprocessor applications for personal computers. (Papermaster Decl. ¶

7.) In fact, IBM has a separate Vice President in microprocessor design to run IBM's microprocessor development efforts for consumer electronics and embedded products. (*Id.*) FN3

FN2. The Systems and Technology Group "is the IBM business that provides the Company's clients with a wide range of business solutions to advanced computing and technical data storage needs." (Adkins Decl. ¶ 4.) It is this group that designs and manufactures, among other things, microprocessors and servers. (*Id.*) In addition to the Systems and Technology Group, IBM's other major groups include a Global Technology Services segment, a Global Business Services segment, a Software segment, and a Global Financing segment. (Adkins Decl. ¶ 3.)

FN3. According to Mr. Papermaster, there are three "common categories for microprocessor applications: (1) microprocessors for business enterprise applications such as servers; (2) microprocessors for personal computing and gaming; and (3) those 'embedded' in other machines, such as automobiles, telephones, and appliances." (Papermaster Decl. ¶ 7.) Further, according to Mr. Papermaster, each of these three categories "drives a different design with different capability, power consumption, and circuit techniques." (*Id.*) Mr. Papermaster acknowledges having worked in two of the three categories of microprocessors-servers and personal computing. (*Id.*)

From October 2006 until his departure from IBM on October 24, 2008, Mr. Papermaster served as Vice President of IBM's Blade Development Unit, a unit within the Systems and Technology Group, which designs and delivers IBM's "blade" servers. (Adkins Decl. ¶ 11; Papermaster Decl. ¶ 6; Compl. ¶ 15.) A "blade" is a "small, thin server that fits into [a] 'rack' or 'chassis' with other 'blades' forming a system IBM calls [a] 'BladeCenter.' " (Adkins Decl. ¶ 11 n. 1.) Each blade is a server unto itself and is often dedicated to a single application. (Papermaster Decl. ¶ 6 .) The blade servers, which are not consumer products, were first introduced in 2002. (*Id.*)

***3** Mr. Papermaster describes himself as having developed a "strong reputation" at IBM for his "ability to lead large teams on complex projects." (Papermaster Decl. ¶ 3.) He believes that he is perceived as having "strong technology management skills to bring together technical experts and enable them to integrate on specific product developments." (*Id.*) IBM apparently shared Mr. Papermaster's view, as it selected Mr. Papermaster to be a member of the Integration & Values Team ("I & VT") at IBM, an elite group that develops IBM's corporate strategy. (Compl.¶¶ 10-11.) The I & VT consists of approximately 300 top IBM executives who are considered to be its key leaders. (Decl. of J. Randall MacDonald ("MacDonald Decl.") ¶ 4.) In fact, the members of this elite group are appointed by the Chairperson of IBM and include the CEO and all twenty of the company's senior executives. (*Id.*) As a member of the I & VT, Mr. Papermaster had access to highly confidential information, including strategic plans, marketing plans, product development, and long-term business opportunities for IBM. (*Id.* ¶ 7; Adkins Decl. ¶ 13.) Defendant states that during his time at IBM, he attended four I & VT meetings and only recalls reviewing materials once. (Papermaster Decl. ¶¶ 8-10.)

In addition to his participation on the I & VT, Mr. Papermaster served on the Technical Leadership Team ("TLT"), which is comprised of IBM's top technical leaders and works to attract, develop, and retain a talented and diverse technical workforce. (MacDonald Decl. ¶ 11.) As a member of the TLT, Mr. Papermaster had access to confidential information concerning IBM's technical talent "pipeline," technical organizational capabilities, and technical recruitment strategies, all of which

are part of IBM's corporate strategy development and are highly confidential. (*Id.*) In fact, the information made available to TLT members is not made available to most IBM employees, let alone the public. (*Id.*) Mr. Papermaster claims that he does not "believe that [he] learned any trade secret information that would be useful to [him] or Apple" from his participation in the TLT. (Papermaster Decl. ¶ 12.)

C. The Noncompetition Agreement

On June 21, 2006, as a prerequisite to his membership in the I & VT and in return for consideration to him, Mr. Papermaster executed a Noncompetition Agreement. The Noncompetition Agreement contains a provision that: "during [Mr. Papermaster's] employment with IBM and for one (1) year following the termination of [his] employment ... [Mr. Papermaster] will not directly or indirectly within the 'Restricted Area' (I) 'Engage in or Associate with' (a) any 'Business Enterprise' or (b) any significant competitor or major competitor of the Company." (Compl. ¶ 19; Noncompetition Agreement § 1(b).) In the Noncompetition Agreement, the following are key defined terms:

- "Restricted Area" is defined as "any geographic area in the world for which [Mr. Papermaster] had job responsibilities during the last twelve (12) months of [his] employment with the Company." (Compl. ¶ 20; Noncompetition Agreement § 2(d).)

***4** • "Engage or Associate with" is defined to mean, among other things, acting as an "associate, employee, member, ... or otherwise." (Compl. ¶ 21; Noncompetition Agreement § 2(c).)

- "Business Enterprise" is defined as "any entity that engages in ... competition with the business units or divisions of the Company in which [Mr. Papermaster] worked at any time during the two (2) year period prior to the termination of [his] employment. (Compl. ¶ 22; Noncompetition Agreement § 2(a).)

Mr. Papermaster also agreed to a nonsolicitation covenant that: "during [his] employment with IBM and for one (1) year following the termination of [his] employment ... [he] will not directly or indirectly within the 'Restricted Area' ... solicit, for competitive business purposes, any customer of the Company with which [he was] involved as part of [his] job responsibilities during the last twelve (12) months of [his] employment with the Company" and "for the two (2) year period following the termination of [his] employment ... [he] will not directly or indirectly within the 'Restricted Area,' hire, solicit or make an offer to any employee of the Company to be employed or perform services outside of the Company." (Compl. ¶ 23; Noncompetition Agreement § 1(b).)

In executing the Noncompetition Agreement, Mr. Papermaster also made several acknowledgments, including that:

- "the business in which IBM and its affiliates ... are engaged is intensely competitive" (Compl. ¶ 24; Noncompetition Agreement § 1(a));

- "[his] employment by IBM has required, ... that [he] have access to, and knowledge of, confidential information of the Company, including but not limited to, certain or all of the Company's methods, information, systems, plans for acquisition or disposition of products, expansion plans, financial status and plans, customer lists, client data, personnel information and trade secrets of the Company, all of which are of vital importance to the success of the Company's business" (Compl. ¶ 24; Noncompetition Agreement § 1(a));

- "[his] services to the Company are, and will continue to be, extraordinary, special and unique" (Compl. ¶ 24; Noncompetition Agreement § 1(a));

- "the Company would suffer irreparable harm if [he failed] to comply with [the noncompetition and the nonsolicitation covenants]" (Compl. ¶ 24;

Noncompetition Agreement § 3);

• "the restrictions set forth [in the covenants] are reasonable as to geography, duration and scope" (Compl. ¶ 24; Noncompetition Agreement § 3).

D. Apple and Its Recruiting of Mr. Papermaster

Apple, which is headquartered in California, designs, manufactures, and markets personal computers, portable digital music players, mobile communication devices, and a variety of related software, services, peripherals, and networking solutions. (Papermaster Decl. ¶ 14.) Two of Apple's many consumer products are the iPod and the iPhone. (Decl. of Robert Mansfield ("Mansfield Decl.") ¶ 2.) Apple also sells servers, its top line is known as the "Xserve," although sales of these products account for only **[REDACTED]** of Apple's annual revenues. (Mansfield Decl. ¶ 3.) Mr. Papermaster claims that other than the divested personal computer business that IBM had, and "a single sale several years ago of Apple's Xserve product to a university," he does "not recall a single instance of Apple being described as a competitor of IBM during" his tenure at IBM. (Papermaster Decl. ¶ 15.) On the other hand, the record contains third-party industry analyses demonstrating that, in fact, IBM and Apple are viewed as competitors, as are IBM and other electronics companies that sell products to Apple, such as Intel. (Suppl. Madsen Decl. Ex. 5 (Hoovers Report at 10); Ex. 6 (Merrill Lynch Report at 16, Chart 23).)

***5** In April 2008, Apple acquired P.A. Semi, a microchip design company in California with which IBM competes in the microprocessor field. (Adkins Decl. ¶ 20.) In fact, as noted above, until 2006, Apple utilized IBM's PowerPC microprocessors, which are based on IBM's "Power" architecture, in Apple's personal computers (*id.*), and Apple contemplated using P.A. Semi's microprocessors in lieu of IBM microprocessors. (Adkins Decl. ¶ 20.) Moreover, P .A. Semi is believed to be developing microprocessors suitable for video gaming applications, another area of potential competition with IBM. (*Id.* ¶ 21.) [FN4] Most relevant to this litigation, Apple's CEO, Steven Jobs, has commented that "P.A. Semi is going to do system-on-chips for iPhones and iPods." (*Id.* ¶ 23; Suppl. Madsen Decl., Ex. 2 (Tom Krazit, *Apple Hires Top IBM Chip Designer and Blade Server Guru,* CNet News, Oct. 30, 2008 (noting that Mr. Jobs told The New York Times that "P.A. Semi would be used to build chips for the iPhone and iPod Touch.")).)

> FN4. Prior to its acquisition by Apple, P.A. Semi was a licensee of IBM. (Adkins Decl. ¶ 24.) However, after the Apple acquisition, IBM limited the license to prohibit P.A. Semi from using IBM's "Power" architecture in new microprocessor lines. (*Id.*) In any event, there is evidence in the record demonstrating that Mr. Papermaster's knowledge of IBM's microprocessor technology exceeds that of P.A. Semi. (*Id.*)

In October 2007, Apple began a search for an executive in the consumer electronics field to serve under the current Senior Vice President, iPod Division, and to become the successor in that role. (Decl. of Danielle Lambert ("Lambert Decl.") ¶ 5.) For the following five months, Apple interviewed several candidates, including Mr. Papermaster, but did not find anybody to fill the position. (*Id.*) As part of its search for the right candidate, Apple sought the input of some of its senior management. One individual whose views were solicited was Bob Mansfield, who serves as Senior Vice President of Macintosh ("Mac") Hardware Engineering at Apple and is a former IBM executive. (Lambert Decl. ¶ 6.) Mr. Mansfield noted, in internal emails in January 2008, that Mr. Papermaster "fits the bill [with respect to] systems and semiconductor understanding, but in every other way is a long shot" and that Mr. Papermaster is "immensely smart about microprocessor design, large systems, and semiconductors." (Lambert Decl., Ex. 1.) Mr. Mansfield also commented that because Mr. Papermaster had not had "the benefit of an education outside of IBM," he was "worried about the differences in pace of development, etc[.], but not overly wor-

ried." (*Id.*) [FN5] Notwithstanding Mr. Mansfield's supportive comments, Apple elected not to offer the position to Mr. Papermaster, instead offering him, in February or March 2008, a position in "developing the hardware for products in the area of personal computers." (Lambert Decl. ¶ 10.) [FN6]

> FN5. Mr. Mansfield sent this email in response to an email from Danielle Lambert, the Vice President of Human Resources at Apple. In her email to Mr. Mansfield, Ms. Lambert wrote that Mr. Mansfield had mentioned that Mr. Papermaster was "spot on in systems and semiconductor understanding," but that he may be "off in other ways." (Lambert Decl., Ex. 1.)

> FN6. The precise date of Apple's first offer to Mr. Papermaster is not clear, but Mr. Papermaster describes it as occurring "several weeks" after his February 2008 interview. (Papermaster Decl. ¶ 17.)

In September 2008, following the release of the new iPod and iPhone, Apple renewed its efforts to find a successor to the Senior Vice President for the iPod/iPhone Division. (*Id.* ¶ 11.) Whatever led Apple to decide not to offer Mr. Papermaster the position earlier in 2008, apparently did not prevent it from re-interviewing Mr. Papermaster in October 2008. (*Id.* ¶ 12.) Thus, Mr. Papermaster interviewed with Apple again, and on October 10, 2008, Apple offered Mr. Papermaster a position in the iPod/iPhone Division as Senior Vice President, Device Hardware Engineering, which he promptly accepted. (*Id.* ¶ 13.) In this position, Mr. Papermaster will report to Mr. Jobs. (Papermaster Decl. ¶ 19.) At the time of the offer, Apple asked Mr. Papermaster to keep the offer confidential and not to disclose the position he would be assuming at Apple, in which he would manage the development of consumer electronics products, specifically the iPod and iPhone. (Papermaster Decl. ¶¶ 18, 20.)

***6** On October 13, 2008, Mr. Papermaster informed his superiors at IBM that he intended to accept a position at Apple that would begin sometime in November. (MacDonald Decl. ¶ 13; Papermaster Decl. ¶ 25.) Evidently, Mr. Papermaster did not tell IBM officials of his acceptance of Apple's offer, as on October 20, 2008, in an effort to persuade Mr. Papermaster to remain at IBM, the company offered him either a substantial increase in compensation to stay at IBM or one year's salary in exchange for his agreement not to work at Apple for one year. (MacDonald Decl. ¶ 15-16.) At that time, IBM informed Mr. Papermaster that acceptance of Apple's offer would violate the Noncompetition Agreement he had signed. (Papermaster Decl. ¶ 27.) Mr. Papermaster informed IBM that he needed time to consider the offer, but he submitted his resignation the next day, and his last day of employment was October 24, 2008. (Compl. ¶ 42; Papermaster Decl. ¶ 30.)

On October 15, 2008, without IBM's knowledge, Mr. Papermaster signed an Employment Agreement with Apple. (Papermaster Decl., Ex. 4.) Mr. Papermaster also signed an Intellectual Property Agreement, which contained a provision acknowledging his agreement to "not improperly use or disclose to Apple any confidential, or proprietary, or secret information of [his] former employers or any other person" and not to "bring any confidential, proprietary or secret information of [his] former employer(s) or any other person(s) onto Apple property." (Papermaster Decl., Ex. 5.) At the preliminary injunction hearing, Mr. Papermaster's counsel indicated that Mr. Papermaster began his employment at Apple on November 3, 2008, a fact which IBM was not aware of until the preliminary injunction hearing, thus prompting IBM to request a temporary restraining order.

II. Discussion

A. Standard of Review

"A preliminary injunction is 'an extraordinary and drastic remedy,' " *Int'l Creative Mgmt., Inc. v. Abate,* No. 07-CV-1979, 2007 WL 950092, at *2 (S.D.N.Y. Mar. 28, 2007) (quoting *Med. Soc'y of State of New York v. Toia,* 560 F.2d 535, 538 (2d

Cir.1977)), and is " 'one of the most drastic tools in the arsenal of judicial remedies,' " *id.* (quoting *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 60 (2d Cir.1985)). " 'To obtain a preliminary injunction a party must demonstrate: (1) that [it] will be irreparably harmed if an injunction is not granted, and (2) either (a) a likelihood of success on the merits or (b) sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of the hardships tipping decidedly in its favor.' " *Lusk v. Vill. of Cold Spring,* 475 F.3d 480, 485 (2d Cir.2007) (quoting *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348-49 (2d Cir.2003)).[FN7]

FN7. Plaintiff claims that a choice of law provision provides that the Noncompetition Agreement will be governed by New York law. (Mem. of Law in Supp. of Pl.'s Mot. for Prelim. Inj. ("Pl.'s Mem.") 9.) Defendant, although applying New York law in his response papers, notes that he does not concede that New York is the applicable choice of law for the underlying dispute because he resides in Texas, and Apple is located in California. (Def. Mark D. Papermaster's Mem. of Law in Opp. to Pl.'s Mot. for Prelim. Inj. ("Def.'s Mem.") 11 n. 2.) For purposes of this application for injunctive relief, the Court will apply New York law, while recognizing that Defendant claims the right to address this issue in the future.

Irreparable harm is " 'the single most important prerequisite for the issuance of a preliminary injunction.' " *Natsource LLC v. Paribello,* 151 F.Supp.2d 465, 469 (S.D.N.Y.2001) (quoting *Bell & Howell: Mamiya Co. v. Masel Supply Co.*, 719 F.2d 42, 45 (2d. Cir.1983)). To demonstrate irreparable injury, the movant must show "an injury that is neither remote nor speculative, but actual and imminent and cannot be remedied by an award of monetary damages." *Estee Lauder Cos. v. Batra,* 430 F.Supp.2d 158, 174 (S.D.N.Y.2006); *Johnson Controls, Inc. v. A.P.T. Critical Sys., Inc.*, 323 F.Supp.2d 525, 531 (S.D.N.Y.2004) ("Irreparable harm is an injury for which a monetary award cannot be adequate compensation." (quoting *Jayaraj v. Scappini,* 66 F.3d 36, 39 (2d Cir.1995))). "In noncompete cases, such as this one, the irreparable harm analysis and the likelihood of success on the merits analysis are closely related and often conflated." *Int'l Creative Mgmt.*, 2007 WL 950092, at *2.

B. Irreparable Harm

***7** IBM claims that Mr. Papermaster possesses trade secrets and other sensitive information and that there is a substantial risk of Mr. Papermaster disclosing this information to IBM's detriment. Further, IBM argues that Mr. Papermaster has already acknowledged that a breach of the Noncompetition Agreement would irreparably harm IBM. (*See* Noncompetition Agreement § 3 ("You acknowledge that the Company would suffer irreparable harm if you fail to comply with [the Agreement], and that the Company would be entitled to any appropriate relief, including ... equitable relief." (emphasis added)).)

New York courts define a "trade secret" as "any formula, pattern, device or compilation of information which is used in one's business, and which gives [the owner] an opportunity to obtain an advantage over competitors who do not know or use it." *N. Atl. Instruments v. Haber,* 188 F.3d 38, 44 (2d Cir.1999) (internal quotation marks omitted). Courts routinely have noted that it is "very difficult to calculate the monetary damages that would successfully redress the loss" associated with trade secret misappropriation. *Estee Lauder,* 430 F.Supp.2d at 174; *see also FMC Corp. v. Taiwan Tainan Giant Indus. Co.*, 730 F.2d 61, 63 (2d Cir.1984) ("[I]t is clear that the loss of trade secrets cannot be measured in money damages."); *Natsource,* 151 F.Supp.2d at 469 (noting "that it is generally not possible to calculate monetary damages if an employee violates a non-compete clause" (citing *Ticor Title Ins. Co. v. Cohen,* 173 F.3d 63, 69 (2d

Cir.1999))). To determine whether information constitutes a trade secret, the courts consider the following factors: "(1) the extent to which the information is known outside of the business; (2) the extent to which it is known by employees and others involved in the business; (3) the extent of measures taken by the business to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the business in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *N. Atl. Instruments,* 188 F.3d at 44 (quoting *Ashland Mgmt. v. Janien,* 82 N.Y.2d 395, 604 N.Y.S.2d 912, 624 N.E.2d 1007, 1013 (N.Y.1993)).

Where a court finds that an employee is in possession of trade secret information, the court must still determine whether that employee has actually misappropriated the information or whether the new employment "creates a risk that disclosure of this information is inevitable." *Payment Alliance Int'l. Inc. v. Ferreira,* 530 F.Supp.2d 477, 482 (S.D.N.Y.2007). Here, although there is no proof that Defendant has actually misappropriated trade secrets (particularly given that he was at Apple for only five days before the injunction issued), Plaintiff argues that there is a substantial risk that he will do so in his new employment. Factors that guide a court in making the determination that disclosure of trade secrets is inevitable include: "(1) the extent to which the new employer is a direct competitor of the former employer; (2) whether the employee's new position is nearly identical to his old one, such that he could not reasonably be expected to fulfill his new job responsibilities without utilizing the trade secrets of his former employer; (3) the extent to which the trade secrets at issue would be valuable to the new employer; and (4) the nature of the industry and its trade secrets." *Payment Alliance Int'l,* 530 F.Supp.2d at 482 (internal quotation marks and citations omitted); *EarthWeb, Inc. v. Schlack,* 71 F.Supp.2d 299, 310 (S.D.N.Y.1999) (same). Thus, "[e]ven where a trade secret has not yet been disclosed, irreparable harm may be found based upon a finding that trade secrets will inevitably be disclosed, where ... the movant competes directly with the prospective employer and the transient employee possesses highly confidential or technical knowledge concerning [ ] marketing strategies, or the like." *Estee Lauder,* 430 F.Supp.2d at 174 (internal quotation marks omitted and alterations in original). In this analysis, the existence of the Noncompetition Agreement is highly relevant. *See Innoviant Pharmacy, Inc. v. Morganstern,* 390 F.Supp.2d 179, 188-89 (N.D.N.Y.2005) ("In cases such as this, involving a person competing with his or her former employer, particularly when such activity is prohibited by a restrictive covenant or is facilitated by the misappropriation of trade secrets or customer information, courts have often taken a somewhat relaxed approach to the irreparable harm inquiry, and in certain circumstances have found it appropriate to presume the existence of such an injury.").

***8** Here, Mr. Papermaster is fully aware of many of IBM's most sensitive trade secrets, and he does not claim otherwise. He worked for years with some of the crown jewels of IBM's technology, including its "Power" architecture. This well-developed blueprint, which has been jealously guarded and promoted by IBM, is used to design microprocessors for large (i.e., servers) and small (i.e., cellphones and MP3 players) devices, and it gives IBM a leg up in the competitive world of electronics components. Moreover, Mr. Papermaster has been exposed to other sensitive and confidential information through his work as a member of the I & VT and TLT group, such as strategic plans, product development, technical recruitment, and long-term business opportunities for IBM, all of which is information that is disclosed to a select few within the company.

Because Mr. Papermaster has been inculcated with some of IBM's most sensitive and closely-guarded technical and strategic secrets, it is no great leap for the Court to find that Plaintiff has

met its burden of showing a likelihood of irreparable harm. To begin, IBM has amply demonstrated that its business strategy continues to be the development of cutting-edge microprocessors that have application across the full spectrum of electronics products. Of course, the Court recognizes that IBM does not sell MP3 players or cellphones that compete with the iPod or the iPhone. But, IBM does sell the microprocessor technology that provides the electronic brains for those products and competes for that business. To profit from the manufacture and sales of such microprocessors, IBM relies heavily on its "Power" architecture, and has employed Mr. Papermaster as its top expert in the development and application of that technology.

It is conceded that Mr. Papermaster has spent the last two years working on a product, the blade server, that competes directly with Apple's "Xserve," and this alone establishes that IBM and Apple directly compete. Mr. Papermaster, however, has not been hired by Apple to work on the "Xserve." Thus, it is no more helpful to IBM's case that Apple sells servers than it is to Mr. Papermaster's case when he says that he will not use his server knowledge in his new job at Apple. However, Mr. Papermaster has been given the title of "Senior Vice President, Device Hardware Engineering," and will work on the iPod and the iPhone, products that the Court takes judicial notice are critical to Apple's financial success. (*See, e.g.,* Press Release, *Apple Reports Fourth Quarter Results* (Oct. 21, 2008), http://www.apple.com/pr/library/2008/10/21results.html (noting revenue growth related to iPod and iPhone products and quoting Mr. Jobs as stating, "Apple just reported one of the best quarters in its history, with a spectacular performance by the iPhone ....").) Little has been said about the precise responsibilities that this title entails, or what Mr. Papermaster's average day would look like. But, his counsel represented to the Court at the preliminary injunction hearing that Mr. Papermaster will be responsible for the "P & L" of the iPod and iPhone. In other words, Mr. Papermaster has not been wooed to Apple merely to head up sales and marketing, or to run Apple's human resources department, for example. Instead, he has been hired specifically to help Apple make these two critical products more profitable. To do that, it is obvious that Mr. Papermaster will be responsible for improving these products, that is, to make sure that they store more information, do it more quickly, and use less power in doing so.

***9** It cannot be disputed that iPods and iPhones are powered by microprocessors, and any improvement in the speed, storage, and power capabilities of those devices depends on improvements in microprocessor design. IBM's business includes the development of microprocessors for consumer electronics. (*See* Suppl. Madsen Deck, Ex. 1 (2007 IBM form 10-K), at 7 (noting IBM's "leadership position in the design of smaller, faster and energy-efficient semiconductor devices").) [FN8] Thus, it is likely that Mr. Papermaster inevitably will draw upon his experience and expertise in microprocessors and the "Power" architecture, which he gained from his many years at IBM, and which Apple found so impressive, to make sure that the iPod and iPhone are fitted with the best available microprocessor technology and at a lower cost. Indeed, any claim that he would merely use general engineering skills is belied by Apple's focus on Mr. Papermaster's "spot on" knowledge of semiconductors and microprocessor design. (Lambert Decl., Ex. 1.) Yet, by drawing upon IBM-developed proprietary information in these fields, Mr. Papermaster will harm in unquantifiable ways IBM's ability to compete for the sale of products that could be used in the iPods and iPhones of the future, thus improperly placing Mr. Papermaster in direct competition with his former employer. *See Estee Lauder,* 430 F.Supp.2d at 179 (noting that irreparable harm may be established where there is a substantial risk that the defendant will disclose trade secret information); *Global Switching Inc. v. Kasper,* No. 06-CV-412, 2006 WL 1800001, at * 12 (E.D.N.Y. June 28, 2006) (finding irreparable harm where the plaintiff established that its former employee would be

working in direct competition with it); *Lumex, Inc. v. Highsmith,* 919 F.Supp. 624, 630 (E.D.N.Y.1996) (finding irreparable harm where employee was a "member of the elite strategic planning committee" and therefore "privy to discussions" involving marketing strategy and product lines).

> FN8. For example, IBM has developed new storage technology that allows iPods and other MP3 players to store more data at a lower cost. (Suppl. Adkins Decl. ¶ 8, Ex. 3.)

Two other facts make the likelihood of irreparable harm to IBM more than mere speculation. First, Mr. Papermaster has acknowledged that IBM would suffer "irreparable harm" if he violated the Noncompetition Agreement. (Noncompetition Agreement, § 3.) The Second Circuit has recognized that employment contracts which internally acknowledge such harm "might arguably be viewed as an admission by [the defendant] that plaintiff will suffer irreparable harm were he to breach the contract's non-compete provision." *Ticor Title Ins.,* 173 F.3d at 69; *accord Estee Lauder,* 430 F.Supp.2d at 174. While, there is "no authority indicating that such a contract provision entitles a plaintiff to a *per se* finding of irreparable harm," *Int'l Creative Mgmt.,* 2007 WL 950092, at *6, "the explicit provision in the agreement" and "common sense" indicate that IBM will be irreparably harmed by the disclosure of the important technical and proprietary information that Mr. Papermaster carries in his head, *Global Telesys., Inc. v. KPNQWest, N.V.,* 151 F.Supp.2d 478, 482 (S.D.N.Y.2001).

***10** The second critical fact that underscores the likely threat to IBM from Mr. Papermaster's new job is Apple's purchase of P.A. Semi, a microchip company based in Apple's home state, subsequent to its initial decision not to hire Mr. Papermaster to run the iPod/iPhone Division. After Apple purchased P.A. Semi, but before it hired Mr. Papermaster to head up the iPod/iPhone Division, Apple revealed that it was going to have P.A. Semi "do system-on-chips for iPhones and iPods." (Adkins Decl. ¶ 23.) In other words, Apple announced its intention to have P.A. Semi develop the very type of product that IBM sells to the market generally, and would like to sell to companies like Apple. Several months thereafter, Apple, for reasons that Mr. Papermaster has not explained, changed its mind about Mr. Papermaster's credentials and hired him to run the iPod/iPhone Division.[FN9] The Court accepts that Mr. Papermaster will not be "managing P.A. Semi assets in [his] role at Apple," or "developing the microprocessors that are used in iPod and IPhone products," and that he will procure microprocessors from outside his "group." However, Mr. Papermaster will be responsible for improving and developing the iPod and iPhone, which necessarily will require him to make decisions about what type of microprocessor technology to use in these products. And, while he may procure such technology outside of his "group," his boss has suggested that the source for this technology, while technically out of Mr. Papermaster's group, could be P.A. Semi, an Apple subsidiary that competes directly with IBM. Given that Apple hired Mr. Papermaster, at least in part, because of his chip expertise, it no doubt expects him to use this specialized knowledge to determine the technical specifications for the electronic brains of the products he will oversee. Again, it is inconceivable that Mr. Papermaster will not draw upon his IBM experiences in making those decisions.[FN10]

> FN9. This sequence of events undercuts Mr. Papermaster's claim that he was merely a "Plan B" hire. The theory proffered by Defendant is that Apple initially sought to hire, during the supposed "Plan A" phase of the search process, an executive with consumer electronics experience. This process began in October 2007 and lasted for five months thereafter. (Lambert Decl. ¶ 5.) Only after this phase, the Court is told, did Apple go to Plan B and interview other candidates, including Mr. Papermaster, with "managerial and

leadership skills necessary to lead" the iPod/iPhone Division. (*Id.*)

> Yet, the evidence shows that, in fact, Apple received favorable information about Mr. Papermaster in early January 2008 and interviewed him in February 2008. After that interview, however, Apple did not offer Mr. Papermaster the position in the iPod/iPhone Division, and instead offered him a job in the personal computer area (this despite his asserted lack of knowledge in consumer electronics). Mr. Papermaster has provided little information regarding Plan B, including any internal documents about why Apple determined that Mr. Papermaster was not suitable for the position in the iPod/iPhone Division in February 2008, but that he was in October 2008.

> FN10. Mr. Papermaster notes that he has signed an Intellectual Property Agreement with Apple that prevents him from disclosing to Apple any confidential information he gained while working at IBM. However, Mr. Papermaster made similar promises in the Noncompetition Agreement he signed with IBM, and, in any event, his subsequent agreement with Apple does not blunt the risk of his inevitable disclosure of IBM's confidential information. *See Estee Lauder,* 430 F.Supp.2d at 176 (noting that the defendant's stipulation that he would not provide trade secrets did not remove the threat of irreparable injury to the plaintiff).

In suggesting that Apple's hiring of Mr. Papermaster threatens IBM with irreparable injury, the Court does not mean to suggest that Mr. Papermaster has intentionally acted dishonorably. While his decision not to tell IBM on October 13, 2008 that he already had accepted Apple's offer or that he intended to start at Apple on November 3, 2008 are both curious, the Court has no evidence before it that Mr. Papermaster has disclosed any IBM trade secrets to date. The harm to IBM, however, is more likely to derive from inadvertent disclosure of the IBM trade secrets that have defined Mr. Papermaster's long career. Put another way, what other base of technical know-how could Mr. Papermaster draw upon to perform his new and important job? Thus, while the Court ascribes no ill-will to Mr. Papermaster, the Court finds that the likely inevitability of even inadvertent disclosure is sufficient to establish a real risk of irreparable harm to IBM. *See Payment Alliance Int'l,* 530 F.Supp.2d at 482 ("[E]ven if [the defendant] acted with the best of intentions, he [might] unintentionally transmit information gained through his [former employer] during his day to day contact with his new employer." (internal quotation marks omitted)); *Verizon Commc'ns Inc. v. Pizzirani,* 462 F.Supp.2d 648, 659 (E.D.Pa.2006) (examining non-compete agreement under New York law and finding that because the defendant was working for a direct competitor, it "would strain credulity beyond the breaking point" that the defendant would not "consciously or unconsciously share or draw on insights" gained from his work at his prior employer); *Lumex,* 919 F.Supp. at 632 (finding risk of inevitable disclosure where the defendant was going to work for a competitor and noting that the defendant could not "eradicate [the] trade secrets and [the] confidential information from his mind"); *Bus. Intelligence Servs., Inc. v. Hudson,* 580 F.Supp. 1068, 1072 (S.D.N.Y.1984) (where the defendant had extensive knowledge of the plaintiff's technology, the court found disclosure to be "likely, if not inevitable and inadvertent, if [the defendant] commence [d] employment with [her new employer]").[FN11]

> FN11. Because the Court finds that Plaintiff has met its burden of showing irreparable harm by establishing the likely risk of inevitable disclosure, the Court finds unpersuasive Defendant's argument that if IBM actually had been concerned over the risk that he would divulge trade secrets, it would not have allowed him a

> two-week transition at IBM, during which time he could have saved files, copied records, and taken other steps to misappropriate IBM's trade secrets. IBM reacted the way it did to Mr. Papermaster's disclosure of the Apple offer because it did not know, until three days before his departure, that he had, in fact, accepted Apple's offer on October 10, 2008 and had a start date of November 3, 2008. IBM's reasonable efforts to persuade Mr. Papermaster to remain with IBM hardly are grounds for concluding that there is no risk of inevitable disclosure of IBM's trade secrets should Mr. Papermaster work for Apple.

C. Likelihood of Success on the Merits

***11** "The issue of whether a restrictive covenant not to compete is enforceable by way of an injunction depends in the first place upon whether the covenant is reasonable in time and geographic area." *Ticor Title Ins.*, 173 F.3d at 69; *accord Payment Alliance Int'l,* 530 F.Supp.2d at 484 ("It is well established under New York law that restrictive covenants in employment agreements are enforceable only to the extent that they satisfy the overriding requirement of reasonableness." (internal quotation marks omitted)). "Because of strong public policy militating against the sanctioning of a person's loss of the ability to earn a livelihood, New York law subjects a non-compete covenant by an employee to an overriding limitation of reasonableness which hinges on the facts of each case." *Ticor Title Ins.*, 173 F.3d at 70 (internal quotation marks omitted).

The Court finds that the restriction in the Noncompetition Agreement is "very limited in time" and that the nature of IBM's business "requires that the restriction be unlimited in geographic scope." *See Natsource LLC,* 151 F.Supp.2d at 471-72; *see also Estee Lauder,* 430 F.Supp.2d at 181 (upholding worldwide limitation); *Johnson Controls,* 323 F.Supp.2d at 534 (finding one-year duration of covenant not unreasonably long). In addition to establishing his technical know-how and expertise, IBM has shown that Mr. Papermaster, as a member of the I & VT and TLT, has extensive knowledge concerning IBM's strategic plans and business forecasts, all of which are legitimately protected by the Noncompetition Agreement. *See Lumex,* 919 F.Supp. at 630 (noting employer's interest in enforcing noncompetition agreement when employee attended meetings of a strategic planning committee where marketing and other business plans were discussed). As a result, the Court finds that Plaintiff has established that the trade secrets that Defendant has been exposed to during his long tenure at IBM are likely to remain competitively valuable to IBM and its competitors for more than a year. *See Verizon Commc'ns,* 462 F.Supp.2d at 661 (noting that the "durational reasonableness of a non-compete agreement is judged by the length of time for which the employer's confidential business information will be competitively valuable").

If a covenant by an employee not to compete survives the "reasonableness" test, then enforcement will be granted to the extent necessary: "(1) to prevent an employee's solicitation or disclosure of trade secrets; (2) to prevent an employee's release of confidential information regarding the employer's customers; or (3) in those cases where the employee's services to the employer are deemed special or unique." *Ticor Title Ins.*, 173 F.3d at 70; *accord Global Switching Inc.*, 2006 WL 1800001, at *15 (same). Thus, "New York law strikes a balance by permitting companies to protect their management from being lured to competitors only to the extent necessary to prevent the misuse of trade secrets." *Estee Lauder,* 430 F.Supp.2d at 179.

***12** The Noncompetition Agreement restricts Mr. Papermaster from working for any "Business Enterprise," which includes, "any entity that engages in ... competition with the business units or divisions of the Company in which [Defendant] worked at any time during the two (2) year period prior to the termination of [his] employment." (Noncompetition Agreement § 2(a).) While Mr. Pa-

permaster technically is in violation of this provision based on his work in IBM's Blade Development Unit, because Apple's "Xserve" line competes with IBM's blade servers, this is not the heart of Mr. Papermaster's potential breach. Instead, Mr. Papermaster's breach of the Noncompetition Agreement is due to the fact that Apple is an "entity" that "engages in competition with" the Systems and Technology Group at IBM. As noted above, this Group, which includes the Blade Development Unit that Mr. Papermaster worked in between October 2006 and 2008 and other units in which Mr. Papermaster has worked, develops and manufactures the microprocessors that IBM markets to Apple and others competing with IBM for Apple's business. And, because of its acquisition of P.A. Semi, Apple competes directly with the Systems and Technology Group in the chip market. Thus, the Court finds that IBM is likely to succeed on the claim that Mr. Papermaster's employment with Apple violates the Noncompetition Agreement.

The Noncompetition Agreement further prohibits Mr. Papermaster from working for "any significant competitor." For the reasons outlined above, the Court finds that Apple is a significant competitor of IBM and, because of Mr. Papermaster's expertise, it is likely that enforcement of the Noncompetition Agreement is necessary to prevent his disclosure of trade secrets. In particular, IBM persuasively argues that Mr. Papermaster's knowledge of the IBM "Power" architecture is "unique" and "irreplaceable," a fact that Mr. Papermaster himself acknowledged in his Noncompetition Agreement. (Noncompetition Agreement § 1(a).) As a result, IBM would be at a disadvantage were Mr. Papermaster to use this information while at Apple, even if he were not directly involved in the development or design of microprocessors at Apple. *See Ticor Title Ins.,* 173 F.3d at 72 (holding that "injunctive relief is available to enforce a covenant not to compete" where the employee's services are "special unique or extraordinary ... if the covenant is reasonable, and even though competition does not involve disclosure of trade secrets .... " (omitting internal quotations marks)); *Natsource,* 151 F.Supp.2d at 474 (finding restriction necessary where employee's skill was of a level that could not be duplicated easily and where employer would be greatly harmed if employee were allowed to compete against employer); *Bus. Intelligence Servs.,* 580 F.Supp. at 1073 ("[The defendant] is not directly involved in the development or design of new programs but has information which could be useful in such an undertaking. Within a year, her knowledge of these matters will be outdated and of little use. Prior to that time disclosure of [the defendant's] knowledge to [her new employer] would harm [the plaintiff] and provide a competitive advantage to [her employer].").

***13** For the foregoing reasons, the Court finds that the Noncompetition Agreement is reasonable in duration and geographic scope, and it is necessary to prevent the disclosure of IBM's trade secrets. Thus, it is probable that IBM will prevail on the merits of its claims for specific performance of the Noncompetition Agreement.

D. Balance of Hardships

In the alternative, IBM has established that there are sufficiently serious questions going to the merits of its claims, and that the balance of hardships is decidedly tipped in its favor.

In New York, courts view employment restrictive covenants with suspicion "because enforcement of employee restrictive covenants may result in the loss of an individual's livelihood." *Global Switching Inc.,* 2006 WL 1800001, at *15; *Natsource LLC,* 151 F.Supp.2d at 472 (noting that a court "must weigh the need to protect the employer's legitimate business interests against the employee's concern regarding the possible loss of livelihood" (internal quotation marks omitted)). Here, the Court recognizes that enforcement of the Noncompetition Agreement will work a hardship on Mr. Papermaster. Indeed, Mr. Papermaster has indicated that the position at Apple is a once-in-a-lifetime opportunity for him, as it will involve significantly more responsibility and higher compensation. (Papermaster

Decl. ¶ 19.) On the other hand, at the hearing and in its moving papers, IBM acknowledged that it did not lightly sue its former employee. Further, the Court recognizes that it is difficult, if not impossible, to calculate the monetary damages that would compensate IBM for the disclosure of the sensitive trade secrets at issue in this case, given the difficulty of assessing how much of a competitive advantage such confidential information could provide to Apple. *See Estee Lauder,* 430 F.Supp.2d at 174.

IBM's intellectual property is its most valuable asset, and, in this case, Mr. Papermaster is a "top expert" in one of IBM's key areas of technical know-how. Mr. Papermaster also has been given access to sensitive strategic information. Further, the Court notes that, before it knew that Mr. Papermaster already had accepted Apple's offer, IBM offered to increase Mr. Papermaster's salary to stay employed at IBM, or to pay him a year's salary merely not to work for Apple. IBM also warned Defendant that his acceptance of Apple's offer would constitute a violation of the Noncompetition Agreement. *See Estee Lauder,* 430 F.Supp.2d at 182 (finding that the fact that Estee Lauder had contracted to pay the defendant his salary for the duration of the scope of the non-compete clause assuaged the hardship to him, especially since he could still work in a non-competitive position). Thus, while the Court accepts Mr. Papermaster's view that his offer from Apple represented a once-in-a-lifetime opportunity, Mr. Papermaster also must accept the obligations he undertook when he became a top executive at IBM. Accordingly, the Court finds that IBM's need to protect its legitimate business interests substantially outweighs the harm resulting to Mr. Papermaster from temporarily not working for Apple, and, as a result, the balance of hardship tips decidedly in IBM's favor.

III. Conclusion

***14** For the foregoing reasons, IBM has established irreparable harm and serious questions going to the merits, if not the likelihood of success on the merits, and that the balance of hardships tips decidedly in its favor. As a result, the Court grants IBM's motion for a preliminarily injunction. However, the Court recognizes that the best way to fairly ensure that both Parties' equities are protected "is to have them determined finally as quickly as possible." *See FMC Corp.,* 730 F.2d at 64. As a result, the Court has ordered that an expedited discovery schedule be arranged and that the trial take place as soon as practicable after discovery is completed. This schedule will be discussed at a conference on November 18, 2008, at 10:00 a.m.

Because the Parties both have expressed concern about publicly filing in their entirety the submissions related to the preliminary injunction, the Court will file this Opinion under seal to ensure that no sensitive information is improperly disclosed. However, the Parties are to advise the Court by November 19, 2008, what, if any, redactions should be made before the Court publicly files this Opinion.[FN12]

> FN12. Defendant requested the Court to redact two words of the Opinion, by a letter dated November 19, 2008 that has been filed under seal. Plaintiff orally advised the Court at the November 18, 2008 conference that it had no objection to the public filing of the entire Opinion. The Court granted Defendant's request in an Order dated November 21, 2008, and redacted the Opinion accordingly, resulting in this Amended Opinion.

SO ORDERED.

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(B) circumstances in which a reasonable person would believe that a private area of the individual would not be visible to the public, regardless of whether that person is in a public or private place.

(c) This section does not prohibit any lawful law enforcement, correctional, or intelligence activity.

(Added Pub. L. 108–495, §2(a), Dec. 23, 2004, 118 Stat. 3999.)

SHORT TITLE OF 2004 AMENDMENT

Pub. L. 108–495, §1, Dec. 23, 2004, 118 Stat. 3999, provided that: "This Act [enacting this chapter] may be cited as the 'Video Voyeurism Prevention Act of 2004'."

CHAPTER 89—PROFESSIONS AND OCCUPATIONS

Sec.
1821. Transportation of dentures.

§ 1821. Transportation of dentures

Whoever transports by mail or otherwise to or within the District of Columbia or any Possession of the United States or uses the mails or any instrumentality of interstate commerce for the purpose of sending or bringing into any State or Territory any set of artificial teeth or prosthetic dental appliance or other denture, constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed to practice dentistry under the laws of the place into which such denture is sent or brought, where such laws prohibit;

(1) the taking of impressions or casts of the human mouth or teeth by a person not licensed under such laws to practice dentistry;

(2) the construction or supply of dentures by a person other than, or without the authorization or prescription of, a person licensed under such laws to practice dentistry; or

(3) the construction or supply of dentures from impressions or casts made by a person not licensed under such laws to practice dentistry—

Shall be fined under this title or imprisoned not more than one year, or both.

(June 25, 1948, ch. 645, 62 Stat. 786; Pub. L. 104–294, title VI, §601(a)(8), Oct. 11, 1996, 110 Stat. 3498; Pub. L. 107–273, div. B, title IV, §4004(c), Nov. 2, 2002, 116 Stat. 1812.)

HISTORICAL AND REVISION NOTES

Based on title 18, U.S.C., 1940 ed., §§420f, 420g, and 420h (Dec. 24, 1942, ch. 823, §§1, 2, 3, 56 Stat. 1087).

This section consolidates the offense, penalty, and definitive provisions of sections 420f, 420g, and 420h of title 18, U.S.C., 1940 ed., as subsections (a) and (b).

The definition of "denture" was omitted as unnecessary in view of the phraseology of the revised section, the context of which makes clear the meaning of dentures referred to.

The definition of "Territory" was omitted as unnecessary. The revised section makes clear the places included in the application of the section without the use of definitions.

The definition of "Interstate Commerce" was likewise omitted as unnecessary in view of definition of interstate commerce in section 10 of this title.

Changes of phraseology and arrangement were made, but without change of substance.

AMENDMENTS

2002—Pub. L. 107–273 struck out ", the Canal Zone" after "the District of Columbia" in first par.

1996—Pub. L. 104–294 substituted "fined under this title" for "fined not more than $1,000" in last par.

CHAPTER 90—PROTECTION OF TRADE SECRETS

Sec.
1831. Economic espionage.
1832. Theft of trade secrets.
1833. Exceptions to prohibitions.
1834. Criminal forfeiture.
1835. Orders to preserve confidentiality.
1836. Civil proceedings to enjoin violations.
1837. Applicability to conduct outside the United States.
1838. Construction with other laws.
1839. Definitions.

AMENDMENTS

2002—Pub. L. 107–273, div. B, title IV, §4002(f)(1), Nov. 2, 2002, 116 Stat. 1811, substituted "Applicability to conduct" for "Conduct" in item 1837.

§ 1831. Economic espionage

(a) IN GENERAL.—Whoever, intending or knowing that the offense will benefit any foreign government, foreign instrumentality, or foreign agent, knowingly—

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains a trade secret;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys a trade secret;

(3) receives, buys, or possesses a trade secret, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in any of paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in any of paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined not more than $500,000 or imprisoned not more than 15 years, or both.

(b) ORGANIZATIONS.—Any organization that commits any offense described in subsection (a) shall be fined not more than $10,000,000.

(Added Pub. L. 104–294, title I, §101(a), Oct. 11, 1996, 110 Stat. 3488.)

§ 1832. Theft of trade secrets

(a) Whoever, with intent to convert a trade secret, that is related to or included in a product that is produced for or placed in interstate or foreign commerce, to the economic benefit of anyone other than the owner thereof, and intending or knowing that the offense will, injure any owner of that trade secret, knowingly—

(1) steals, or without authorization appropriates, takes, carries away, or conceals, or by fraud, artifice, or deception obtains such information;

(2) without authorization copies, duplicates, sketches, draws, photographs, downloads, uploads, alters, destroys, photocopies, replicates, transmits, delivers, sends, mails, communicates, or conveys such information;

(3) receives, buys, or possesses such information, knowing the same to have been stolen or appropriated, obtained, or converted without authorization;

(4) attempts to commit any offense described in paragraphs (1) through (3); or

(5) conspires with one or more other persons to commit any offense described in paragraphs (1) through (3), and one or more of such persons do any act to effect the object of the conspiracy,

shall, except as provided in subsection (b), be fined under this title or imprisoned not more than 10 years, or both.

(b) Any organization that commits any offense described in subsection (a) shall be fined not more than $5,000,000.

(Added Pub. L. 104–294, title I, §101(a), Oct. 11, 1996, 110 Stat. 3489.)

§ 1833. Exceptions to prohibitions

This chapter does not prohibit—

(1) any otherwise lawful activity conducted by a governmental entity of the United States, a State, or a political subdivision of a State; or

(2) the reporting of a suspected violation of law to any governmental entity of the United States, a State, or a political subdivision of a State, if such entity has lawful authority with respect to that violation.

(Added Pub. L. 104–294, title I, §101(a), Oct. 11, 1996, 110 Stat. 3489.)

§ 1834. Criminal forfeiture

Forfeiture, destruction, and restitution relating to this chapter shall be subject to section 2323, to the extent provided in that section, in addition to any other similar remedies provided by law.

(Added Pub. L. 104–294, title I, §101(a), Oct. 11, 1996, 110 Stat. 3489; amended Pub. L. 110–403, title II, §207, Oct. 13, 2008, 122 Stat. 4263.)

AMENDMENTS

2008—Pub. L. 110–403 amended section generally. Prior to amendment, section related to forfeiture of property either derived from or used to commit a violation of this chapter.

§ 1835. Orders to preserve confidentiality

In any prosecution or other proceeding under this chapter, the court shall enter such orders and take such other action as may be necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the requirements of the Federal Rules of Criminal and Civil Procedure, the Federal Rules of Evidence, and all other applicable laws. An interlocutory appeal by the United States shall lie from a decision or order of a district court authorizing or directing the disclosure of any trade secret.

(Added Pub. L. 104–294, title I, §101(a), Oct. 11, 1996, 110 Stat. 3490.)

REFERENCES IN TEXT

The Federal Rules of Criminal Procedure, referred to in text, are set out in the Appendix to this title.

The Federal Rules of Civil Procedure, referred to in text, are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

The Federal Rules of Evidence, referred to in text, are set out in the Appendix to Title 28.

§ 1836. Civil proceedings to enjoin violations

(a) The Attorney General may, in a civil action, obtain appropriate injunctive relief against any violation of this chapter.

(b) The district courts of the United States shall have exclusive original jurisdiction of civil actions under this section.

(Added Pub. L. 104–294, title I, §101(a), Oct. 11, 1996, 110 Stat. 3490; amended Pub. L. 107–273, div. B, title IV, §4002(e)(9), Nov. 2, 2002, 116 Stat. 1810.)

AMENDMENTS

2002—Subsec. (a). Pub. L. 107–273, §4002(e)(9)(A), substituted "this chapter" for "this section".

Subsec. (b). Pub. L. 107–273, §4002(e)(9)(B), substituted "this section" for "this subsection".

§ 1837. Applicability to conduct outside the United States

This chapter also applies to conduct occurring outside the United States if—

(1) the offender is a natural person who is a citizen or permanent resident alien of the United States, or an organization organized under the laws of the United States or a State or political subdivision thereof; or

(2) an act in furtherance of the offense was committed in the United States.

(Added Pub. L. 104–294, title I, §101(a), Oct. 11, 1996, 110 Stat. 3490.)

§ 1838. Construction with other laws

This chapter shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by United States Federal, State, commonwealth, possession, or territory law for the misappropriation of a trade secret, or to affect the otherwise lawful disclosure of information by any Government employee under section 552 of title 5 (commonly known as the Freedom of Information Act).

(Added Pub. L. 104–294, title I, §101(a), Oct. 11, 1996, 110 Stat. 3490.)

§ 1839. Definitions

As used in this chapter—

(1) the term "foreign instrumentality" means any agency, bureau, ministry, component, institution, association, or any legal, commercial, or business organization, corporation, firm, or entity that is substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government;

(2) the term "foreign agent" means any officer, employee, proxy, servant, delegate, or representative of a foreign government;

(3) the term "trade secret" means all forms and types of financial, business, scientific,

technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—

(A) the owner thereof has taken reasonable measures to keep such information secret; and

(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, the public; and

(4) the term "owner", with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed.

(Added Pub. L. 104–294, title I, §101(a), Oct. 11, 1996, 110 Stat. 3490.)

CHAPTER 90A—PROTECTION OF UNBORN CHILDREN

Sec.
1841. Protection of unborn children.

§ 1841. Protection of unborn children

(a)(1) Whoever engages in conduct that violates any of the provisions of law listed in subsection (b) and thereby causes the death of, or bodily injury (as defined in section 1365) to, a child, who is in utero at the time the conduct takes place, is guilty of a separate offense under this section.

(2)(A) Except as otherwise provided in this paragraph, the punishment for that separate offense is the same as the punishment provided under Federal law for that conduct had that injury or death occurred to the unborn child's mother.

(B) An offense under this section does not require proof that—

(i) the person engaging in the conduct had knowledge or should have had knowledge that the victim of the underlying offense was pregnant; or

(ii) the defendant intended to cause the death of, or bodily injury to, the unborn child.

(C) If the person engaging in the conduct thereby intentionally kills or attempts to kill the unborn child, that person shall instead of being punished under subparagraph (A), be punished as provided under sections 1111, 1112, and 1113 of this title for intentionally killing or attempting to kill a human being.

(D) Notwithstanding any other provision of law, the death penalty shall not be imposed for an offense under this section.

(b) The provisions referred to in subsection (a) are the following:

(1) Sections 36, 37, 43, 111, 112, 113, 114, 115, 229, 242, 245, 247, 248, 351, 831, 844(d), (f), (h)(1), and (i), 924(j), 930, 1111, 1112, 1113, 1114, 1116, 1118, 1119, 1120, 1121, 1153(a), 1201(a), 1203, 1365(a), 1501, 1503, 1505, 1512, 1513, 1751, 1864, 1951, 1952 (a)(1)(B), (a)(2)(B), and (a)(3)(B), 1958, 1959, 1992, 2113, 2114, 2116, 2118, 2119, 2191, 2231, 2241(a), 2245, 2261, 2261A, 2280, 2281, 2332, 2332a, 2332b, 2340A, and 2441 of this title.

(2) Section 408(e) of the Controlled Substances Act of 1970 (21 U.S.C. 848(e)).

(3) Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283).

(c) Nothing in this section shall be construed to permit the prosecution—

(1) of any person for conduct relating to an abortion for which the consent of the pregnant woman, or a person authorized by law to act on her behalf, has been obtained or for which such consent is implied by law;

(2) of any person for any medical treatment of the pregnant woman or her unborn child; or

(3) of any woman with respect to her unborn child.

(d) As used in this section, the term "unborn child" means a child in utero, and the term "child in utero" or "child, who is in utero" means a member of the species homo sapiens, at any stage of development, who is carried in the womb.

(Added Pub. L. 108–212, §2(a), Apr. 1, 2004, 118 Stat. 568.)

REFERENCES IN TEXT

Section 202 of the Atomic Energy Act of 1954 (42 U.S.C. 2283), referred to in subsec. (b)(3), probably means section 235 of the Atomic Energy Act of 1954, act Aug. 1, 1946, ch. 724, title I, as added by Pub. L. 96–295, title II, §202(a), June 30, 1980, 94 Stat. 786, which is classified to section 2283 of Title 42, The Public Health and Welfare. Section 202 of the Atomic Energy Act of 1954, which related to the authority of the Joint Committee on Atomic Energy, was classified to section 2252 of Title 42 and was repealed by act of Aug. 1, 1946, ch. 724, title I, §302(a), as added Aug. 30, 1954, ch. 1073, §1, as added Sept. 20, 1977, Pub. L. 95–110, §1, 91 Stat. 884; renumbered title I, Oct. 24, 1992, Pub. L. 102–486, title IX, §902(a)(8), 106 Stat. 2944.

SHORT TITLE OF 2004 AMENDMENT

Pub. L. 108–212, §1, Apr. 1, 2004, 118 Stat. 568, provided that: "This Act [enacting this chapter and section 919a of Title 10, Armed Forces] may be cited as the 'Unborn Victims of Violence Act of 2004' or 'Laci and Conner's Law'."

CHAPTER 91—PUBLIC LANDS

Sec.
1851. Coal depredations.
1852. Timber removed or transported.
1853. Trees cut or injured.
1854. Trees boxed for pitch or turpentine.
1855. Timber set afire.
1856. Fires left unattended and unextinguished.
1857. Fences destroyed; livestock entering.
1858. Survey marks destroyed or removed.
1859. Surveys interrupted.
1860. Bids at land sales.
1861. Deception of prospective purchasers.
[1862. Repealed.]
1863. Trespass on national forest lands.
1864. Hazardous or injurious devices on Federal lands.

AMENDMENTS

1990—Pub. L. 101–647, title XXXV, §3554, Nov. 29, 1990, 104 Stat. 4927, struck out item 1862 "Trespass on Bull Run National Forest".

1988—Pub. L. 100–690, title VI, §6254(g), Nov. 18, 1988, 102 Stat. 4367, added item 1864.

D

Health and Wealth: Health Care Reform Law Update, and a Few Words About SOX, Dodd-Frank and FCA Whistleblower Protections

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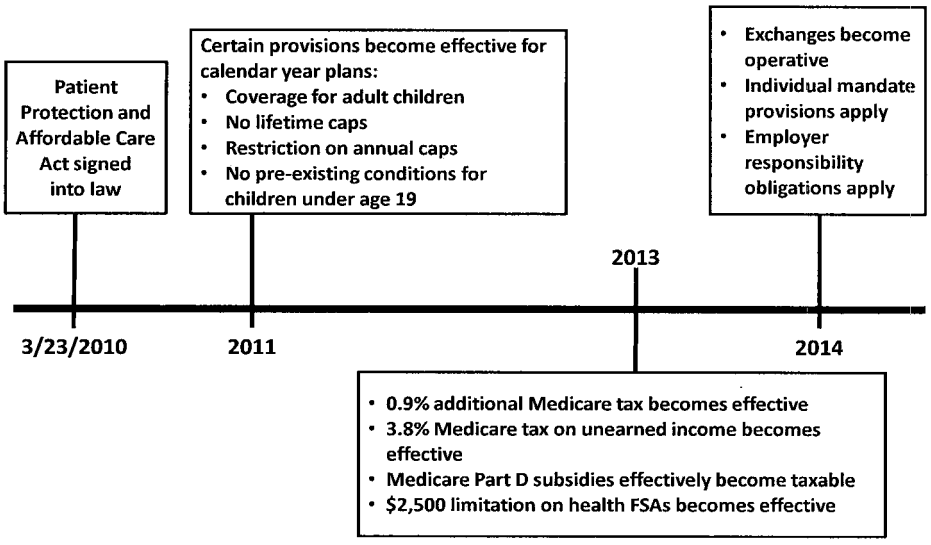
Key Dates



Executive Summary

- First-year requirements that apply to all health plans
- Losing grandfather status
- Maintaining grandfather status
- To grandfather or not to grandfather
- Looking ahead

First-Year Requirements – All Plans

First-Year Requirements – Apply to All Health Plans, Except:

- Stand-alone retiree plans (so far)
- Stand-alone dental plans
- Stand-alone vision plans
- Medical Flexible Spending Accounts (FSAs)

continued

First-Year Requirements

- Effective first full plan year after September 23, 2010
- Exception (delay) for insured collectively bargained plans
- Child coverage extended to age 26
- No lifetime limits on "minimum essential benefits"
- No rescission of coverage absent fraud or material misstatement
- No pre-existing condition exclusion if under age 19 (no age limit beginning plan year commencing in 2014)
- Reporting cost of coverage on W-2s (optional in 2011)

Coverage of Adult Children

- Required extension of dependent coverage until age 26
- Extension of tax-free covered dependent status permitted until year child turns age 27
- Applicable if plan offers coverage for children
- If so, must offer uniform coverage
- Child is defined as a son, daughter, stepson, stepdaughter, eligible foster child, adopted child or child legally placed with the participant for adoption
- Adult child need not be a tax dependent or unmarried

continued

Coverage of Adult Children

- Not required to cover grandchildren
- Limited exception for grandfathered plans: Until 2014, not required to offer coverage to adult children who are eligible for other employer-provided coverage

Coverage of Adult Children

- Payroll problem: May create imputed income for state and local income tax purposes
- Over a dozen states currently have more restrictive definitions of "dependents" for state income tax purposes
- Absent amendment of law or enforcement relief, employers required to treat value of coverage for those who don't meet state definition as imputed income for state income tax purposes

Lifetime and Annual Limits

- No lifetime limits on minimum essential benefits (MEBs)
- Until 2014, annual limits on MEBs may not be less than:
  - $750,000, first full plan year after 9/23/10
  - $1,250,000, second plan year
  - $2,000,000, third plan year
  - No annual limit thereafter
- No restriction on percentage limits (e.g., co-insurance)
- Not applicable to account-based plans (e.g., FSAs)
- No restriction on limiting non-MEBs

Lifetime and Annual Limits

- Defining what are "minimum essential benefits"
- HHS Secretary to issue regulations; Act includes:
  - ambulatory patient services
  - emergency services
  - hospitalization
  - laboratory services
  - maternity and newborn care
  - mental health and substance abuse disorder services
  - pediatric services, including oral and vision care
  - prescription drugs
  - preventive and wellness services, including chronic disease management
  - rehabilitative services and devices

Limitations on Lifetime and Annual Limits

- No guidance yet as to what is covered under "minimum essential benefits" – awaiting regulations
- HHS may waive restricted annual limits for a plan if compliance would result in a significant decrease in access or benefits or a significant premium increase
- Significant potential impact on "mini-med" plans; liberal waiver process recently adopted

Rescissions

- Group plans and insurers may not rescind coverage absent fraud or material misstatement
- 30 days notice required before a rescission
- Prospective cancellation is not a "rescission" (i.e., not restricted)
- Rescission permitted for nonpayment of premiums

Losing Grandfather Status

Losing Grandfather Status Means:

- Additional obligations to provide:
  - Coverage for preventive care services
  - Coverage for emergency services
- Non-discrimination restrictions apply to highly compensated employees under insured plans
  - Loss of executive perks
  - Excise tax for violation
  - However, IRS agreed to an enforcement holiday until guidance is issued
  - Note: Self-insured plans have had a long-standing restriction, unaffected by the Act

continued

Losing Grandfather Status Means:

- Internal claim review and appeal process generally mirrors existing ERISA requirements for employer plans
- New external claim review procedures
  - For self-insured plans, interim safe harbor procedure utilizing independent review organizations
  - Third-party administrators should be on top of this for their self-insured employer/sponsors/clients

continued

Losing Grandfather Status Means:

- Additional reporting requirements on quality of care (reporting applies after HHS regs are issued, by March 2012)
- In all events, grandfather protections end in 2014, and above requirements become effective

Maintaining Grandfather Status

President Obama: "You Get to Keep What You Got" *(sort of)* – How to Maintain Grandfather Status

- For health plans in existence on March 23, 2010
- Provide annual notice to participants of intended grandfather status
  - DOL published model language
- Maintain adequate records in support of grandfather status
- Very limited changes permitted
- Strict qualitative, financial and percentage thresholds

Eliminating Benefits

- Grandfather status lost if plan eliminates all or substantially all benefits to diagnose or treat a particular condition
- Number or percentage of individuals affected apparently is not relevant

Percentage Employee Cost Sharing

- Any increase in the percentage of employee cost-sharing terminates grandfather status (e.g., increasing the employee percentage of co-insurance)
  - Example: From March 23, 2010, health plan is amended to increase employee co-insurance from 20% to 25%
  - Grandfather status terminates

Fixed-Amount Employee Cost Sharing

- Some increase in fixed-amount cost-sharing is permitted (e.g., deductible or out-of-pocket limit)
- Maximum permitted increase:
  - 15 percentage points +
  - Medical inflation from March 23, 2010
- Formula-based increases to the contribution rate may be permitted (e.g., deductible based on a percentage of compensation)

Increase in Fixed-Amount Cost Sharing

- Medical inflation measured via CPI, as increased during any of 12 months prior to plan change
  - Example:
    - 3/23/10: plan deductible of $500
    - On 7/1/11, deductible is increased to $600, 20% over 3/23/10 deductible
    - Medical inflation from 3/23/10 to any of 12 months prior to the increase is 7.5%
    - Maximum percentage increase permitted is 22.5%
    - $100 increase does not terminate grandfather status
- Co-payment maximum is computed differently

Co-Payments: Increase in Fixed-Amount Cost Sharing

- Some increase is permitted.
- Maximum permitted increase is the greater of
  - The maximum percentage increase or
  - $5 increased by medical inflation, from 3/23/10
  - Example
    - On 3/23/10, office visit co-pay is $20
    - On 7/1/11, co-pay is increased to $30
    - Medical inflation from 3/23/10 is 7.5% ($1.50 against $20 co-pay)
    - Maximum permitted co-pay increase is $6.50 to $26.50
    - $10 increase terminates grandfather status

Example

- 3/23/10 employer cost for family coverage is $500 and employer subsidy is $300 (60% of $500); for single coverage the cost is $300 and the subsidy is $300 (100%)
- On 7/1/11, cost of family coverage increases to $600 and single coverage to $350. The employer subsidy for family coverage remains at $300 (50% of $600; a 10 percentage point decrease), but increases to $350 for single coverage (still 100%)
- Grandfather status terminates even though subsidy for single coverage is unchanged

Change in Lifetime or Annual Limits

- When there is no lifetime limit under the plan, the addition of an annual limit terminates grandfather status
- Addition of an annual limit to a plan with a lifetime limit on 3/23/10 terminates grandfather status *if* annual limit is lower than the 3/23/10 lifetime limit
- Any decrease in the 3/23/10 annual limit terminates grandfather status

Other Plan Modifications

- Typical situation is elimination of one of several PPO options or one of several HMO options
- Eliminating a plan option terminates grandfather status for the affected retained option if:
  - No bona fide employment-related business reason for change, and transferee plan fails any of the above tests compared to transferor plan
- Cost is not a "bona fide employment-related business reason"
- Closing a plant with a plant-specific plan option is a "bona fide employment-related business reason" to terminate the option

continued

Other Plan Modifications

- Changing insurance carriers alone does not terminate grandfather status
- Open questions:
  - Change from insured to self-funded arrangement
  - Change in preferred provider network
  - Change in prescription drug formulary

To Grandfather or Not to Grandfather

To Grandfather or Not to Grandfather

- Cost/benefit analysis:
  - Savings from plan modifications

    — vs. —
  - Costs of additional services required if no longer grandfathered
- Notice requirements
- Recordkeeping burdens

To Grandfather or Not to Grandfather

- Non-grandfathered services:
  - Preventive care services
  - Emergency benefit services
  - Non-discrimination in favor of HCEs by insured plans
  - External review procedures of claims

Preventive Care Services

- Non-grandfathered plans must cover certain recommended preventive services, immunizations and screenings without cost sharing in-network (i.e., no co-payments or co-insurance)
- Definition of "recommended" preventive care services was addressed in joint regulations published 7/19/10 (e.g., child disease vaccines, flu vaccines, child obesity screenings)

Preventive Care Services

- Many services are effective in plan years beginning after 9/23/10 (e.g., child immunizations); some are not effective until later (e.g., child obesity screenings, PYs after 1/31/11)
- Regulations clarified that cost-sharing generally may be imposed if an individual elects not to use in-network provider

Emergency Benefit Services

- May not require preauthorization for emergency services nor impose additional requirements on the use of out-of-network emergency services
- Must comply with cost-sharing requirements described in 6/28/2010 regulations for emergency services provided out-of-network; generally, in-network co-payment + out-of-network incremental cost

Non-Discrimination by Insured Plans

- May not discriminate in favor of HCEs
  - As to benefits offered, co-pays, deductibles, etc.
  - As to premium subsidies
- Any violation results in a $100/day excise tax per plan participant (not per HCE)
- Late December 2010, IRS granted holiday on enforcement until guidance is issued
- No individual participant right of action

Looking Ahead

Uniform Summary of Benefits (2012)

- Summary of benefits to be provided to participants by March 23, 2012 and to new hires on or after that date
- Summaries may be delivered via either paper or electronic media
- Material modifications to plan benefits are to be provided at least 60 days before they become effective

Employee Notice (2013)

- Even though the main provisions of the Affordable Care Act do not become fully effective until 2014, current employees in 2013 must be notified by March 1, 2013 of the following:
  - The health insurance Exchange available in his/her area
  - If the plan's share of the costs of benefits is less than 60%, the employee may be eligible for premium credits and cost-share reductions
  - If the employee purchases coverage through an Exchange and the employer is providing minimum essential coverage, the employee will lose the benefit of the employer subsidy under the plan

Employee Notice (2013)

- Beginning March 1, 2013, new employees will be required to receive this notice as part of their new-hire materials

Revenue Provisions

- Plan Years ending after 9/23/2012:
  - Annual $2 per-head fee x the average number of covered lives under the plan
  - Used to fund a "Patient-Centered Outcomes Research Trust Fund"
  - Expires 2018

continued

Revenue Provisions (2013)

- Medicare subsidy/tax deduction ends
- Employee share of Medicare tax increases 0.9%, from 1.45% to 2.35%, on Medicare wages exceeding $200,000 (individual) or $250,000 (married filing jointly)
- A further 3.8% Medicare tax on "unearned income" if AGI is over threshold amount: $200,000 (single, estates, trusts), $250,000 (married filing jointly) or $125,000 (married filing separately)
- FSAs limited to $2,500/year

continued

Revenue Provisions (2018)

- "Cadillac plan" 40% excise tax

2014 – New Mandates Become Effective

- Employer responsibility to provide minimum essential coverage or pay a $2,000 tax per employee, if any employee is eligible for low-income subsidy
- Employer responsibility to pay a $3,000 tax per applicable employee if minimum essential coverage is provided and employee opts for Exchange with subsidy
- Applies to employers averaging at least 50 employees
- Individual responsibility to obtain health insurance (tax that is not enforceable)
- Insurance Exchanges go live
- No pre-existing condition exclusions
- Waiting periods limited to 90 days

A Few Words About: SOX

A Brief Overview

- Public Company Accounting Oversight Board (PCAOB)
- Auditor independence
- Corporate responsibility
- Enhanced financial disclosures
- Analyst conflicts of interest
- Commission resources and authority
- Studies and reports
- Corporate and criminal fraud accountability
- White collar crime penalty enhancement
- Corporate tax returns
- Corporate fraud accountability

A Few Words About: Dodd-Frank

Requirements Include:

- Say on pay
- Shareholder vote on “golden parachutes”
- Disclosure of relationship of pay to performance
- Disclosure of CEO compensation pay ratio
- Independence of compensation committee members
- Independence of compensation committee advisers
- Clawbacks
- Disclosure of hedging policy
- Enhanced compensation structure reporting
- Disclosure of separate chairman CEO policy
- Broker vote
- Proxy access

A Few Words About: FCA Whistleblower Protections

With Examples of Corporate Malfeasance Dominating the News, Blowing the Whistle Is More Popular Than Ever

- Sound policies and conscientious compliance departments can go a long way towards minimizing liability for whistleblower claims
  - Fraud Enforcement and Recovery Act of 2009 (FERA)
  - Which amends the False Claims Act (FCA)
- The law protects whistleblowers from retaliation and rewards them with a percentage of the government's recovery
- The FERA amendments raise the stakes, and employers should take note
- FERA adds contractors and corporate agents

continued

With Examples of Corporate Malfeasance Dominating the News, Blowing the Whistle Is More Popular Than Ever

- The available remedies include reinstatement, double back pay plus interest, and any "special damages" resulting from the retaliation
- FERA covers employees, contractors and agents who make "any lawful attempt" to expose or thwart fraudulent conduct
- FERA authorizes the government attorneys to disclose information collected through the Civil Investigative Demand (CID)
- Most states have "mini" FCA legislation

continued

With Examples of Corporate Malfeasance Dominating the News, Blowing the Whistle Is More Popular Than Ever

- FERA amendments will likely save claims that once would have been untimely. When the government intervenes in an FCA proceeding, it "relates back" to the original filing date of the whistleblower's claim

continued

With Examples of Corporate Malfeasance Dominating the News, Blowing the Whistle Is More Popular Than Ever

- To minimize risk and put your organization in a better position to defend itself against such claims, you should, at a minimum:
  - have the necessary policies in place, including a "Code of Conduct" that references fraud and includes a detailed description of how an employee can report concerns internally
  - provide employees with a 24-hour, toll-free, anonymous complaint line
  - have a designated individual (or team) trained and experienced in conducting investigations; and
  - train your managers on fraud issues relevant to your business and what is expected of them as agents of the organization

VEDDERPRICE®

Chicago ■ New York ■ Washington, D.C.

April 19, 2011

Employee Benefits Briefing

Reporting the Cost of Health Care Coverage: More for the W-2

On March 25, 2011, the Internal Revenue Service published Notice 2011-28, which provides guidance to large employers (defined as employers issuing more than 250 W-2s for calendar year 2011) on how to report the cost of group health coverage on employees' W-2s. Reporting is effective beginning for 2012 (i.e., for W-2s distributed in January 2013).

Background

The Patient Protection and Affordable Care Act of 2010 requires that employers report the cost of group health plan coverage to their employees annually on their W-2s. *See* Internal Revenue Code Section 6051(a)(14). Reporting was originally to begin with the 2011 W-2s (distributed in January 2012), but the IRS postponed the effective date in Notice 2010-69. Although this cost is included on the W-2 (in Box 12), it is informational only and is *not* included in taxable income.

Under Notice 2011-28, large employers (those issuing 250 or more W-2s for calendar year 2011) are required to start reporting the cost of group health plan coverage on the 2012 W-2s (distributed in January 2013).

Notice 2011-28 postpones this reporting requirement for smaller employers. Employers that are required to issue fewer than 250 W-2s for 2011 (distributed in January 2012) are not required to report the cost of group health plan coverage on the 2012 W-2s (distributed in January 2013). This exemption will continue to apply in later years as long as the employer meets the less than 250 W-2 prior-year limit, until the IRS issues further guidance.

Overview

Although Notice 2011-28 addresses a number of special situations that could apply to particular employers, for the vast majority of large employers, the following rules apply:

- *Timing:* The cost of coverage must be included on employee W-2s beginning in 2012 (i.e., W-2s distributed in January 2013).
- *How Reported:* The aggregate cost will be reported in Box 12 of the W-2 and will be identified by code DD.
- *Cost:* The cost of coverage will be equal to the COBRA rate (less any 2 percent administrative charge) for self-insured plans or the insurance premium rate for insured plans, in each case for the coverage tier (e.g., employee only, employee plus spouse, family, etc.) in which the employee participates.
- *Health FSAs:* Employee contributions to health FSAs are disregarded.

Additional Details

1. Plans Subject to Reporting

Reporting applies to all employer-sponsored group health plans. However, the following plans and amounts are not included:

- Long-term care plan
- Free-standing dental plan
- Free-standing vision plan

- Contributions to a multi-employer health plan
- Amounts contributed to any Archer MSA
- Amounts contributed to any Health Savings Account (HSA)
- Amounts contributed to a Health Reimbursement Arrangement (HRA)
- Employee salary-reduction contributions to a Health Flexible Spending Account (FSA) under a Section 125 cafeteria plan

2. Determining Aggregate Cost

The aggregate cost of coverage includes both the employee's premium and any employer subsidy. Cost reporting is done without regard to whether such amounts are pre-tax, post-tax or imputed as income to the employee.

For self-insured plans, the unsubsidized COBRA rate (excluding the 2 percent administrative fee) for the coverage tier (e.g., employee only, employee plus spouse, family, etc.) is the closest proxy to aggregate cost.

For insured plans, the premium charged by the insurance company for the coverage tier (e.g., employee only, employee plus spouse, family, etc.) is the aggregate cost.

3. Terminated Employees

For an employee whose employment terminates during the year, the employer may elect either (i) to report just the cost of active coverage through the termination date or (ii) the cost of coverage (active coverage, plus COBRA or other post-employment coverage) for the entire year. However, whichever method is chosen, the employer must be consistent for all employees whose employment terminates during the year.

Under long-standing IRS regulations, terminated employees may request a W-2 ahead of the normal January processing time (*see* Treasury Regulations § 31.6051-1(d)(1)(i)). However, for any former employee who asks for a mid-year W-2, the employer is *not* required to report the cost of health coverage on the employee's W-2.

In any case in which the employer is not required to file a W-2 for a former employee, the cost reporting rule does not otherwise create a requirement to file a W-2. For example, if an employee is receiving coverage under COBRA (or other post-employment coverage) in a year after the year of termination, and the employer does not issue a W-2 to the retiree/former employee (because no income is reported), the employer is *not* required to issue a W-2 to report the cost of their health coverage.

4. Health FSAs

As noted above, a health FSA may be disregarded when it consists solely of employee salary reduction contributions. However, if the employer matches the health FSA contributions (or otherwise contributes to the health FSA), the employer-provided portion of the benefit *may* be required to be included in the aggregate cost reported on the W-2.

For purposes of determining what, if any, health FSA amounts are to be reported on the W-2, the employer must compare the employee's total salary reductions for qualified benefits under the Section 125 cafeteria plan to what is allocated to his health FSA:

- If the salary reductions *equal or exceed* the amount allocated to the health FSA, *nothing* is reported. For example, assume the employee's total salary reductions under a Section 125 cafeteria plan are $2,000 and the employer provides a $1,000 flex credit. If the employee allocates $1,500 to the health FSA, nothing attributable to the health FSA is reported, because $2,000 is greater than $1,500.
- If the salary reductions *are less* than the amount allocated to the health FSA, the difference is reported. For example, if an employee elects to contribute $700 to a health FSA during the year and the employer matches the employee's contributions with an additional $700, the employer must report the amount of the match ($700) on the W-2.

5. Special Situations

Mid-Year Coverage Changes: If an employee changes coverage tiers mid-year (e.g., changes from employee-only coverage to family coverage), the employer is required to apply a reasonable and consistent methodology for calculating the pro rata portion of full-year aggregate cost attributable to each level of coverage. The same reasonable and consistent methodology should be used if an employee commences coverage or terminates coverage mid-year.

Transfers: If an employee transfers between employers that each provide employer-sponsored health insurance, each employer is responsible for reporting its aggregate cost on its W-2 for that year.

Common Paymaster: If a company utilizes a common paymaster for reporting compensation for its various affiliates, that common paymaster is responsible for aggregating the aggregate cost information for the various affiliates.

If you have any questions regarding this briefing, please contact **Philip L. Mowery** (312-609-7642), **Robert F. Simon** (312-609-7550) or **Paul F. Russell** (312-609-7740).

FEDERAL TAX NOTICE: Treasury Regulations require us to inform you that any federal tax advice contained herein is not intended or written to be used, and cannot be used, by any person or entity for the purpose of avoiding penalties that may be imposed under the Internal Revenue Service.

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The Employee Benefits Group

Vedder Price has one of the nation's largest employee benefits practices, with ongoing responsibility for the design, administration and legal compliance of pension, profit sharing and welfare benefit plans with aggregate assets of several billion dollars. Our employee benefits lawyers have also been involved in major litigation on behalf of benefit plans and their sponsors. Our clients include large national corporations, smaller professional and business corporations, multiemployer trust funds, investment managers and other plan fiduciaries.

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About Vedder Price

Vedder Price P.C. is a national, business-oriented law firm composed of more than 265 attorneys in Chicago, New York and Washington, D.C. The firm combines broad, diversified legal experience with particular strengths in labor and employment law, employee benefits, executive compensation, corporate finance and transactions and commercial litigation.

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Executive Compensation Group Advisory

July 2010

DODD-FRANK ACT RAISES MAJOR EXECUTIVE COMPENSATION ISSUES

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"). Although Dodd-Frank focuses primarily on the financial services industry, it contains a number of new requirements generally applicable to executive compensation paid by public companies:

- **SAY ON PAY:** At least every three years – or more frequently if determined by shareholders – public companies must solicit a non-binding shareholder vote to approve the compensation of their named executive officers. The first say-on-pay approvals (including a separate vote on the frequency of say-on-pay voting) are required beginning with shareholder annual meetings occurring on or after January 21, 2011. While this vote is "non-binding," we expect that shareholder sentiment and companies' desire to avoid a "no" vote will significantly impact future compensation practices. We also expect that the "frequency vote" (required next year and at least once every six years thereafter) will be a hot issue at some companies.

- **SHAREHOLDER VOTE ON "GOLDEN PARACHUTES":** Similarly, any merger proxy statement must include a non-binding shareholder vote to approve named executive officer compensation that is based on or otherwise related to the transaction, unless the compensation was previously subjected to a regular say-on-pay vote. This vote is required beginning with shareholder "merger" meetings occurring on or after January 21, 2011.

- **DISCLOSURE OF RELATIONSHIP OF PAY TO PERFORMANCE:** Information showing the relationship between executive compensation actually paid and the total shareholder return of the company for the applicable period must be included in the annual meeting proxy statement. This requirement may result in a shift back towards long-term compensation tied to company share price fluctuations, such as stock options or stock-settled SARs. This requirement will become effective in accordance with regulations to be issued by the SEC. No deadline is contained in Dodd-Frank.

- **DISCLOSURE OF CEO COMPENSATION PAY RATIO:** Dodd-Frank requires annual disclosure of (1) the median "total compensation" (determined by the SEC proxy disclosure rules under Item 402 of Regulation S-K as in effect on July 20, 2010) of all employees of the company, (2) the total compensation of the CEO, and (3) the ratio of the two numbers. Similar information has been frequently sought by groups via shareholder proposals. Beyond the data collection burden associated with determining this median, we anticipate this provision will have a profound effect on companies' reviews of their executive compensation philosophy and disclosures to explain the pay differential. This requirement will become effective when the SEC amends its executive compensation disclosure rules under Item 402. No deadline is contained in Dodd-Frank.

- **INDEPENDENCE OF COMPENSATION COMMITTEE MEMBERS:** Dodd-Frank now requires that all compensation committee members be "independent," applying similar standards to those currently applied to audit committee members. There are narrow exceptions for certain companies exempted by the SEC and for "controlled companies" having more than 50% of the voting power held by an individual, a group, or another issuer. This requirement will become effective after the SEC has issued rules (due by July 17, 2011) and such rules have become effective at the various listing exchanges.

- **INDEPENDENCE OF COMPENSATION COMMITTEE ADVISERS:** The compensation committee is authorized – but not required – to retain, direct and pay the committee's own legal counsel, compensation consultants and other advisers independent of those advisers retained by management. Companies must provide appropriate funding to pay those advisers, as determined by the compensation committee. When selecting advisers, compensation committees are required to consider adviser independence. Similar to updates to the proxy disclosure rules adopted by the SEC in December 2009, these factors include:

(continued on next page)

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- other services provided to the company by the advising firm;
- the amount of fees paid by the company to the advising firm compared to the advising firm's overall fees;
- policies and procedures of the advising firm that are designed to prevent conflicts of interest;
- any business or personal relationship of the individual adviser or advising firm with a member of the compensation committee; and
- any stock ownership of the company by the individual adviser or advising firm.

This requirement is intended to mitigate the risk or the appearance of conflicts of interest by professionals advising compensation committees on matters relating to executive compensation. This rule, along with the conflicts disclosure rule adopted by the SEC last December, has caused and is likely to continue to cause benefits administration and actuarial firms to divest their executive compensation practices to avoid these conflicts. In addition, it is likely that many compensation committees will rely less on in-house expertise. We also expect an increase in the use of multiple consultants weighing in on a company's executive compensation matters. This requirement will become effective after the SEC has issued rules (due by July 17, 2011) and such rules have become effective at the various listing exchanges.

- **CLAWBACKS:** Although initially fashioned as a requirement to simply disclose "clawback" policies, Dodd-Frank directs the SEC to issue rules requiring the national stock exchanges to mandate their listed companies to establish a policy to recover (i.e., clawback) incentive compensation from current or former executive officers in certain cases following a restatement of financial results. If a company files a restatement that discloses a material noncompliance with any financial reporting requirement, the clawback applies to incentive compensation that was based on the erroneous financial statements and was paid during the three-year period preceding the date the restatement is required. This provision is substantially similar to the clawback requirements applicable to financial institutions receiving government funds under the federal TARP program. No deadline is contained in Dodd-Frank stating when the SEC must issue its rules.

- **DISCLOSURE OF HEDGING POLICY:** Companies will also be required to disclose any company policy permitting employees or directors to purchase derivative financial instruments (e.g., swaps and collars) that are designed to hedge or offset any decrease in the market value of the company's equity securities granted to or otherwise held by the employee or director. This rule does not require companies to disclose, or to specifically monitor or regulate, actual hedging transactions. Companies with insider trading policies that are silent on this point will likely look to clarify their policies one way or the other. The rule will become effective when the SEC issues its rules. No deadline is contained in Dodd-Frank.

- **ENHANCED COMPENSATION STRUCTURE REPORTING:** By April 21, 2011, federal regulators must issue rules or guidance requiring "covered financial institutions" with at least $1 billion in assets to disclose to the appropriate federal regulator the structure of all incentive-based compensation arrangements offered at such institutions, for the regulator to determine if these arrangements provide executives, employees, directors and principal shareholders with excessive compensation, fees, or benefits, and/or could lead to material financial loss to the covered financial institution. Also by April 21, 2011, the regulators are required to issue guidelines or regulations that prohibit incentive arrangements or features that provide excessive compensation or could lead to material financial loss. This mandate has greater reach than the final guidance on sound incentive compensation jointly issued by the Fed, FDIC and OCC in June 2010. Covered financial institutions include banks, broker-dealers, investment advisers, credit unions and Fannie Mae and Freddie Mac.

- **DISCLOSURE OF SEPARATE CHAIRMAN CEO POLICY:** While not an executive compensation matter per se, Dodd-Frank requires the SEC to issue rules by January 17, 2011 requiring company disclosure of the reasons why the company has or has not separated or combined the positions of CEO and board chair. Presumably, the SEC will need to revisit and most likely revise Item 407(h) of Regulation S-K, which was adopted in December 2009 and which requires only why the company determined that the leadership structure is appropriate.

- **BROKER VOTE:** Dodd-Frank prohibits discretionary voting by brokers with respect to executive compensation, director elections, or any other significant matter as determined by the SEC. To vote, brokers must obtain direction from the beneficial owner of the shares.

- **PROXY ACCESS:** Dodd-Frank allows the SEC to move forward with its proxy access project, which will permit shareholders to submit nominees as directors, subject to a procedure established by the SEC.

If you have any questions regarding this Advisory, please contact any of the members of the Executive Compensation Group.

E

Must-Know Court Decisions: 2010-2011

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Can an Employer Monitor Employee Connections?

- City of Ontario v. Quon (6/17/10)
  - Can a public employer monitor an employee's text messages on employer-provided equipment?
  - Police department audit of phone records discovered personal messages
  - Supreme Court found no Fourth Amendment violation because employee knew monitoring was possible, employer had legitimate purpose and monitoring was reasonable in scope
- **Practice Pointers:**
  - Have a policy
  - Reduce expectation of privacy
  - Monitor only when necessary
  - Limit review to business purpose

Is Retaliation Based On Relationship Illegal?

- Thompson v. North American Stainless (1/24/11)
  - Supreme Court holds that an employee who was terminated because his fiancée filed a sex discrimination complaint could bring a retaliation claim under Title VII.

- **Practice Pointer:**
  - Be careful when disciplining co-employees who have a special relationship with complainant.

Does Biased Advice to a Non-biased Decision-maker Create Liability?

- Staub v. Proctor Hospital (3/1/11)
  - Supreme Court holds an employer liable for employment discrimination based on the discriminatory motivation of someone who influenced the decision, but did not make it

- **Practice Pointers:**
  - Decisionmaker should conduct some independent investigations
  - Have the employee admit the investigator is not biased

Is an Oral Complaint Protected Activity?

- Kasten v. Sain-Gobain Performance Plastics Corp. (3/22/11)
  - Supreme Court holds that oral complaint of FLSA violation sufficient to provide employee with non-retaliation protection
- **Practice Pointer:**
  - Treat all complaints and complainants carefully

The "Facebook Firing" Case

- American Medical Response of Connecticut, Inc. and International Brotherhood of Teamsters, Local 443, Case No. 34-CA-12576
- NLRB press release on this case in February 2011
  - NLRB had issued a complaint in October 2010 alleging that an employee's Facebook postings constituted protected concerted activity, and that AMR had violated the National Labor Relations Act by discharging an employee for her postings
  - NLRB stated in a press release that the case had settled, based in part on AMR's agreement that it would not improperly restrict, discipline or discharge employees in connection with their online discussions regarding wages, hours and working conditions with co-workers while not at work

The "Facebook Firing " Case

- **Practice pointers:**
  - All employers—both union and non-union—should ensure that social media and other policies pertaining to online posts make clear that the policies do not prohibit statements regarding employment terms or conditions or communications about unionization
  - Policies that should be reviewed to ensure compliance include confidentiality agreements and policies involving social media, e-mail usage, internet use, off-duty conduct and bulletin board postings

FTC's Endorsement Guidelines

- Employers may be held liable for the following:
  - False or misleading statements that an employee or paid endorser has made while posting about the company's products or services online
  - The failure of the employee or paid endorser to disclose his or her connection to the company if the disclosure would affect how people value the endorsement
  - Liability may attach even if employer is not aware of the posting
- **Practice pointers:**
  - Employers should make reasonable efforts to educate employees about what they can and should say if they mention an employer's products or services online
  - Written policies should require employees to clearly disclose their employment relationship when company products or services are referenced in online posts

Does a Bonus or Premium Payment Affect a Fluctuating Workweek under the FLSA?

- DOL's April 5, 2011 Revised Overtime Regulations indicate that fluctuating workweek pay method would be invalidated by a bonus or premium payment
- **Practice pointer:**
  - If paying non-exempt employees for fluctuating workweek, make sure the employees do not receive bonuses or non-overtime premium payments, such as attendance or safety bonuses

If an Attorney Conducts an Investigation, Has the Privilege Been Waived?

- Sandra T.E. v. South Berwyn School District, 600 F.3d 612 (7th Cir. 2010)
  - The Seventh Circuit held that attorney notes and other documents generated in an investigation were protected by the attorney-client and work product privileges because the investigation was conducted in connection with the provision of legal services
    - Attorney engagement letter specified that the attorneys were hired for legal advice in connection with formulating response to pending litigation
    - No third parties attended the interviews conducted by the attorneys
    - During interviews, attorneys informed witnesses of the identity of their client
    - Attorney documents generated during the investigation were marked privileged

If Attorneys Conduct an Investigation, Are the Attorneys' Communications Privileged?

- **Practice Pointer:**
  - If attorneys are engaged to conduct investigation of wrongdoing, be sure to put safeguards in place to protect the attorney-client and work product privileges as to any communications or documents generated by the attorneys

Disparate Impact Case May Be Timely Even if Challenge to an Employment Practice Is Untimely

- Lewis v. City of Chicago, 130 S. Ct. 2191 (2010)
- Supreme Court held that a plaintiff who did not file a timely charge to a particular employment practice may assert a disparate impact case challenging the subsequent application of that practice

Are Class Action Waivers in Arbitration Agreements Enforceable?

- AT&T Mobility LLC v. Concepcion et ux. (4/27/11)
- Supreme Court holds that waivers of class actions in arbitration agreements are enforceable
- The Court questioned the appropriateness of class arbitrations
- The Court further held that requiring the availability of class-wide arbitration would contravene the key fundamentals of arbitration by undermining the informality and increasing costs and delay
- Stolt-Nielsen S.A. v. AnimalFeeds International Corp. (4/27/10)
- Supreme Court held class proceedings to be improper where an arbitration agreement is silent on the issue

F

Pre-Employment Screening and Selection Procedures: Know Your Rights ... and Theirs

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A recent survey by the Society for Human Resources Management (SHRM) found that 3 out of 4 U.S. employers conduct background checks on job applicants

Current Hot Topics in This Area Include:

- Credit checks
- Criminal records checks
- Use of social media in the hiring process

Use of Credit Checks in the Hiring Process

According to SHRM, 60% of U.S. employers conduct credit checks on job applicants

Why Is This an Issue?

- Declining to hire applicants with a low credit score has been said to trap lower income individuals in debt because their past financial problems make it impossible for them to get a job. Put simply, you can't reestablish your credit if you can't get a job, and you can't get a job if you've got bad credit.
- This practice may also have a disparate impact on racial minorities, women and disabled applicants. (In December 2010, the EEOC sued Kaplan Higher Education over its use of credit histories in the hiring process, claiming that this practice has a disparate impact on black job applicants and is neither job related nor justified by business necessity.)

According to the EEOC, "if an employer's use of credit information disproportionately excludes African-American and Hispanic candidates, the practice would be unlawful unless the employer could establish that the practice is needed for it to operate safely or efficiently."

Equal Employment for All Act

- Proposed **federal** legislation
  - introduced most recently on February 19, 2011
  - referred to Committee on March 23, 2011
- Would amend the FCRA to generally prohibit employers from using consumer credit checks to make adverse hiring or promotion decisions

There are currently 49 proposed bills being debated in 25 states, aimed at imposing restrictions on an employer's right to consider credit histories in the hiring process

Several States Already Have Laws on the Books That Restrict Employer Use of Credit Checks in the Hiring Process:

- Hawaii, Oregon, Washington and Illinois
- Maryland joins the list effective October 1, 2011

continued

What Should Employers Do?

- Make sure you have a legitimate business-related reason for subjecting job applicants to credit checks
- Make sure you are complying with applicable state law and with the FCRA
- Use credit reports sparingly in the hiring process, such as for senior management and finance positions, or other positions that involve access to the sensitive financial information of the employer, its customers or its employees, or where an applicant's credit history is otherwise relevant
- Give applicants an opportunity to correct or explain items in their credit report

continued

What Should Employers Do?

- Remember that the federal Bankruptcy Code prohibits employers from taking adverse employment actions solely because an individual has filed for bankruptcy
- Consult counsel before denying employment to an applicant based on his or her credit history

Use of Criminal Record Checks in the Hiring Process

- Discrimination (e.g., refusal to hire) based on criminal history is not expressly prohibited by Title VII or any other federal EEO law
- BUT, the EEOC is now aggressively challenging employers' use of criminal record information in the hiring process, under a disparate impact theory (i.e., employer's use of criminal background checks discriminates against racial minorities)
- The EEOC now presumes that any policy or practice that causes an adverse employment action to be taken solely because of an individual's conviction record has an impermissible adverse impact
- Thus, in the EEOC's view, it is impermissible/unlawful under Title VII to refuse to hire an applicant solely because he or she has been convicted of a crime

continued

Use of Criminal Record Checks in the Hiring Process

- According to the EEOC, an employer may not make an adverse hiring decision based in whole or in part on a criminal conviction unless this result is justified by "business necessity." The employer must first consider these factors:
  - the nature and gravity of offense(s)
  - the time that has elapsed since the conviction and/or completion of the sentence
  - the nature of the job sought by the applicant

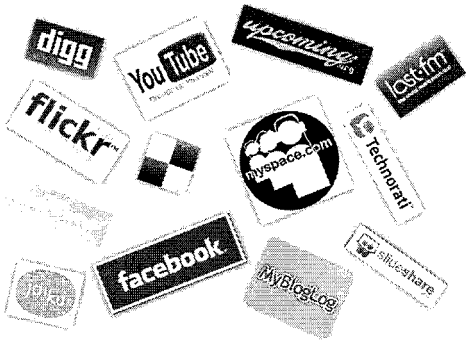
New York Imposes Greater Restrictions on the Use of Criminal Background Checks

- New York Human Rights Law, N.Y. Exec. Law § 296(15) and (16); see also Article 23-A of N.Y. Correction Law
- Employers must consider and balance several different factors before refusing to hire individuals with prior criminal convictions
- Employers cannot deny employment based on criminal conviction unless there is a direct relationship between the crime and the job sought, OR the granting of the employment would involve an unreasonable risk to property or to people's safety or welfare
- Employers must post a copy of Article 23-A conspicuously in the workplace
- Employers must also provide a copy of Article 23-A to individuals subject to background checks.

What Should Employers Do?

- Consult counsel to ensure that criminal history question(s) on the employment application comply with applicable state law
- Inform applicants in writing that a prior conviction will not automatically lead to disqualification
- Comply with the FCRA (get written authorization from applicants before obtaining criminal record report, and allow applicants to see the report if they are not offered employment because of it) and with applicable state law
- Consult counsel before denying employment to an applicant based on criminal history

Use of Social Media in the Hiring Process



Use of Social Media in the Hiring Process

- Employers can (and many do!) access a great deal of information about job applicants by scouring social media such as Facebook, MySpace, Twitter and personal blogs
- But should you??

Potential Benefits of Using Social Media in the Hiring Process

- Lots of information is readily available – for free!
- You may find information that reveals inaccuracies in a candidate's résumé, application, or interview re: prior employment, educational background or other job-related qualifications
- You may find objectionable information, such as evidence of violence or racist attitudes

Potential Risks of Using Social Media in the Hiring Process

- Discrimination claims
  - Social media like Facebook, MySpace, etc., often reveal information about a candidate's legally protected characteristics such as religion, national origin, sexual orientation, disability, military status, marital status, etc.
  - In addition, numerous states have statutes prohibiting employers from denying employment based on lawful outside-of-work activities (subject to some exceptions)
  - Once an employer has viewed this information, it can be very difficult to prove that the employer didn't rely on it in deciding not to hire the candidate

What Should Employers Do?

- Before using social media in the hiring process, make sure you have a job-related reason for doing so
- Be consistent. Follow the same protocol with every applicant to avoid disparate treatment claims. For example, search the same social media for each candidate, seeking the same lawful information in each instance

Do not assume that information gleaned from social media is accurate.
For example, a candidate may have little control over what others post on his or her "wall" or message board.

What Should Employers Do?

- If you use a third party to monitor employees or job applicants by observing social media pages, web postings and other Internet activity (e.g., California-based Social Intelligence), make sure you comply with the FCRA
- Even if conducting a social media search yourself, consider getting the applicant's prior written consent
- Rely on a neutral third party (not someone responsible for making hiring decisions) to conduct any social media search on candidates and to cull information that the employer should not have access to, such as information revealing that the candidate is in a protected class

continued

What Should Employers Do?

- Look only at information that is generally available to the public—never pose as someone else to gain access to an applicant's restricted social networking information (no "pretexting"). Do not "friend" a candidate to get access to his or her nonpublic social networking profiles
- Consult with counsel before denying employment based on information discovered through social media

Pre-Employment Testing

Pre-Employment Testing

- Employers are increasingly frustrated by:
  - The poor education and low skill level of job applicants
  - Employee turnover – training of new hires is costly
  - Increase in the number and cost of workers' compensation claims

continued

Pre-Employment Testing

- Employers, therefore, have a strong incentive to use pre-employment testing in the hiring process:
  - Skills and abilities tests to measure an applicant's cognitive ability and knowledge base
  - Personality tests to measure an individual's work habits, aptitude and likely interest in and fit with the job
  - Physical capability tests to measure strength and agility and risk of on-the-job injury

continued

Pre-Employment Testing

- The legal risks and potential liability, however, can be high:
  - Tests can impact large numbers of applicants; testing, therefore, is susceptible to class action and pattern or practice suits
  - The EEOC and OFCCP see challenges to testing as opportunities to gain relief for many protected group members
  - The OFCCP, especially, is making challenges to testing an enforcement priority

Basic Legal Requirements and Standards Under Title VII

- The basic requirement under Title VII is well established: a test with adverse impact must be job related and consistent with business necessity
  - What is job related?
    - A test must measure the skills necessary for successful job performance, and differences in test scores should differentiate between those applicants/employees who do and do not possess the necessary skills, i.e., individuals with high scores are expected to perform well, and vice versa

Adverse Impact and Validation

Validation

UGESP?

continued

Adverse Impact and Validation

- Uniform Guidelines on employee selection procedures – adopted jointly by the EEOC, the Department of Justice and the Department of Labor
- Uniform Guidelines set technical standards for establishing job relatedness and validation of tests. *See* 29 C.F.R. §1607.1 *et seq.*
  - Although the Guidelines are not always strictly applied by the courts, a well-constructed validation study has become the *sine qua non* for establishing job relatedness, and the courts have looked to the Guidelines as the standard in evaluating the sufficiency of employer validation studies

continued

Adverse Impact

- Triggering the Validation Requirement – Adverse Impact
  - The 80% Rule
    - Courts deal with this differently, some recognizing the statistical limitations of this approach
    - The Supreme Court has required a showing of statistically significant disparity in selection rates. Courts demonstrate a wide range of sophistication in dealing with statistical significance
  - If the overall selection rate yields adverse impact, the individual components of the selection process must be examined to determine what caused the adverse impact, e.g., using a test on a pass/fail basis or multicomponent screening processes
  - Also note – adverse impact is employer specific – the fact that test has adverse impact in other applications or *vice versa* is not determinative

Validation

- Criterion related, content and construct
- The underpinning of a validation study is the "job analysis," which identifies the critical skills necessary for job performance (29 C.F.R. § 1607.14(C)(4)), with the possible exception of some personality tests – which are validated based on criterion-related validity

continued

Validation

- An important interpretation issue under the Guidelines that may affect the type or scope of job analysis and validation study is to what extent must test validation focus on the specific job(s) for which the test is being used as a selection criterion?

continued

Validation

- To what extent may an employer rely on a showing of validity generalization by a test publisher's "meta" analysis?
  - Or, must the employer provide employer specific proof of validation and job relatedness?
  - The Guidelines allow the portability and use by an employer of other validity studies (29 C.F.R. § 1607.7), i.e., generalized validity
  - Provided there is sufficient evidence that the jobs included in the "meta" analysis are similar in terms of tasks, skill requirements, etc., to the employer's jobs for which the test is being used

continued

Validation

- The key will be a job analysis that demonstrates the similarity of skills required for the various jobs
  - Another consideration: the similarity of applicant/employee demographics at various locations
- Generally, an employer will be able to rely on a validation study covering one group of jobs (or one location in a multi-unit operation) to justify the use of a test for selection into other jobs (or at other locations where there are no significant differences between the studied and unstudied jobs). 29 C.F.R. § 1607.7(C)

Validation

- The Guidelines also provide that an employer may not use a test to screen out applicants for entry level jobs and defend the test on the basis that it measures skills that are necessary for higher level jobs but are not required to perform the entry level job unless:
  - progression to the next level is routine and likely to occur within a reasonable period of time (not to exceed five years), and
  - the knowledge, skills and abilities required for advancement are not principally developed through on-the-job experience or training. 29 C.F.R. §§ 1607.5(B), (F)
- This is obviously important in defining which jobs to include in job analyses

Pass/Fail Score Determination

- If a test is issued as a pass/fail screen with a cutoff score, the employer must justify the setting of the cutoff score
  - Employer must show that the cutoff score is set at a level that measures normal and reasonable expectations of acceptable on-the-job performance. 29 C.F.R. § 1607.5(H); see United States v. Delaware (cutoff score must be set equal to the minimum qualifications necessary for successful job performance)

Pass/Fail Score Determination

- In practice, the courts have approved cutoff scores where the employer can show that the cut score was established by using a "professional estimate of the requisite ability levels" to perform the job or, at the very least, by locating a logical breakpoint in the distribution of scores. But see United States v. Delaware (where court required a close correlation between cut score and performance rating criterion and rejected cut score validation where rating criterion did not correspond to "minimally competent")

Personality Tests

- Personality tests may also be subject to attack under the Americans with Disabilities Act (ADA) if a personality test is deemed to be a "medical examination"
  - If so, the test may not be given until after a conditional offer of employment has been made
  - The EEOC has issued ADA Guidelines setting out its criteria for determining whether such tests are to be considered "medical examinations"

Personality Tests

- A psychological test which yields results that are or may be interpreted by a health care professional and/or yields a medical diagnosis will likely be considered a medical examination; see, e.g., Karraker v. Rent-A-Center, Inc., 411 F.3d 831 (7th Cir. 2005)

Personality – Privacy Challenges Tests

- There are a number of court decisions which have ruled that personality tests requiring test takers to reveal their opinions regarding such private matters as religious beliefs or sexual preference may violate privacy guarantees under state constitutions or other state privacy laws. Bennett v. County of Suffolk, 78 F.E.P. Cases 1536 (E.D. N.Y. 1998); Soroka v. Dayton Hudson, 18 Cal. App. 4th 1200, rev. dismissed, 24 Cal. Rptr., 862 P.2d 148 (1993); see also Staples v. Rent-A-Center (N.D. Cal. 2000).

Personality Tests

- In addition, a personality test may run afoul of the ADA where certain questions are found to elicit information regarding the existence, nature or severity of the test taker's disability. This may be of particular concern with tests containing questions regarding a test taker's past or current use of alcohol or prior drug use

Physical Strength or Capability Tests

- Employers have an incentive to screen applicants for physical capabilities for many factory and material handling jobs to reduce on-the-job injuries
- The EEOC v. Dial Corp. decision (No. 3-02-CV-10109, D. Iowa 2005) is instructive of the potential pitfalls in using a homegrown physical strength test
- Dial's industrial nurses developed a test that accurately recreated the lifting required of workers on a sausage-stuffing line, leading to significant adverse impact

continued

Physical Strength or Capability Tests

- Dial argued that the test was content-valid, but the test did not accurately reflect the frequency of required lifting within the measured time period
- Dial also argued that the test was criterion-valid because it was shown that the test reduced on-the-job injuries, but there was no showing that before the test female workers suffered injuries at a higher rate than male workers, and Dial could not show that the post-test reduction in injuries was attributable to the test or other recently initiated safety changes

What Should Employers Do (and Not Do)?

- Do not create homegrown tests without outside expert assistance – remember EEOC v. Dial Corp.
- Do not indiscriminately purchase and use tests from a third-party vendor without establishing the job relatedness of the purchased tests to your jobs
- Do not deviate from the third-party vendor's instructions and guidelines in administering, scoring and/or making selections based on the tests

continued

What Should Employers Do (and Not Do)?

- Perform due diligence in using third-party tests:
  - Review actual validation studies, not just sales materials
  - Review adverse impact data
  - Review personality test questions for invasion-of-privacy concerns
  - Require the third-party vendor to render an opinion that its test is job related to your positions either through a formal job task analysis or, at least, a linkage study demonstrating that the job requirements in your workforce are similar to those of the job requirements reviewed in the vendor's "generalized validation" or "meta" analyses
  - Obtain the vendor's commitment to defend the validity of its test in the event of legal challenge

continued

What Should Employers Do (and Not Do)?

- Document the need for employees to be able to read written material in English – ideally, include in a job task analysis
- Consider not administering a test on a pass/fail basis
  - Remember that the required passing score must be tied to minimum satisfactory job performance
  - Use a test at all facilities only after reviewing and documenting that the positions and job requirements are similar across all facilities. Do not rely on a job task analysis at only one facility
- Continue to monitor rate and type of workers' compensation claims after institution of physical capabilities test, if you are using such a test
- Do not permit supervisors to evade or modify hiring procedures for friends and neighbors

continued

What Should Employers Do (and Not Do)?

- Continue to monitor hiring for adverse impact
- Title VII (2000e.2(k)(1)(A)(ii)) provides that a plaintiff can prevail, even if an employer establishes that a test causing adverse impact is job related, by showing that there are alternative practices that will satisfy the employer's business needs without (or with lower) adverse impact
- UGESP appears to place burden on employer, as part of its validation study, to consider alternatives with less adverse impact
  - The EEOC and OFCCP are taking the position that employers are required to do this
- Review and document consideration of alternative selection tools and procedures that meet business requirements but have less adverse impact

112TH CONGRESS
1ST SESSION

H. R. 321

To amend the Fair Credit Reporting Act to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions.

IN THE HOUSE OF REPRESENTATIVES

JANUARY 19, 2011

Mr. COHEN (for himself, Mr. NADLER, Ms. NORTON, Mr. JACKSON of Illinois, Mr. HASTINGS of Florida, Mr. MEEKS, Ms. BALDWIN, Mr. GRIJALVA, Ms. JACKSON LEE of Texas, Ms. SUTTON, Mr. SERRANO, Ms. FUDGE, Mr. HONDA, Ms. CLARKE of New York, Ms. SCHAKOWSKY, Mr. HINCHEY, Mr. DAVIS of Illinois, Mr. FILNER, Mr. AL GREEN of Texas, Ms. EDWARDS, Ms. WOOLSEY, and Mr. ELLISON) introduced the following bill; which was referred to the Committee on Financial Services

---

A BILL

To amend the Fair Credit Reporting Act to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Equal Employment for All Act".

"(B) for making an adverse action, as described in section 603(k)(1)(B)(ii).

"(2) SOURCE OF CONSUMER REPORT IRRELEVANT.—The prohibition described in paragraph (1) shall apply even if the consumer consents or otherwise authorizes the procurement or use of a consumer report for employment purposes or in connection with an adverse action with respect to such consumer.

"(3) EXCEPTIONS.—Notwithstanding the prohibitions set forth in this subsection, and consistent with the other sections of this Act, an employer may use a consumer report with respect to a consumer in the following situations:

"(A) When the consumer applies for, or currently holds, employment that requires national security or FDIC clearance.

"(B) When the consumer applies for, or currently holds, employment with a State or local government agency which otherwise requires use of a consumer report.

"(C) When the consumer applies for, or currently holds, a supervisory, managerial, professional, or executive position at a financial institution.

subsection (b)" after "subparagraph (B)"; and

(ii) in paragraph (3)(A), by inserting "and subject to the restrictions set forth in subsection (b)" after "subparagraph (B)";

(C) in subsection (d)(1), as redesignated by subsection (a)(2) of this section, by striking "subsection (e)" in both places it appears and inserting "subsection (f)";

(D) in subsection (f), as redesignated by subsection (a)(2) of this section—

(i) in paragraph (1), by striking "subsection (e)(1)(B)" and inserting "subsection (d)(1)(B)"; and

(ii) in paragraph (5), by striking "subsection (e)(1)(B)" and inserting "subsection (d)(1)(B)".

(3) In section 607(e)(3)(A) (15 U.S.C. 1681e(e)(3)(A)), by striking "604(b)(4)(E)(i)" and inserting "604(e)(4)(E)(i)".

(4) In section 609 (15 U.S.C. 1681g)—

(A) in subsection (a)(3)(C)(i), by striking "604(b)(4)(E)(i)" and inserting "604(e)(4)(E)(i)"; and

NEW YORK

New York Executive Law § 296 – Human Rights Law – Unlawful discriminatory practices

15. It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of "good moral character" which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article [fig 1] twenty-three-A of the correction law.

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, however, that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law.

New York Correction Law – Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses

§ 750 – Definitions

For the purposes of this article, the following terms shall have the following meanings:

(1) "Public agency" means the state or any local subdivision thereof, or any state or local department, agency, board or commission.

(2) "Private employer" means any person, company, corporation, labor organization or association which employs ten or more persons.

(3) "Direct relationship" means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license or employment sought.

(4) "License" means any certificate, license, permit or grant of permission required by the laws of this state, its political subdivisions or instrumentalities as a condition for the lawful practice of any occupation, employment, trade, vocation, business, or profession. Provided,

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

2. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

§ 754 - Written statement upon denial of license or employment

At the request of any person previously convicted of one or more criminal offenses who has been denied a license or employment, a public agency or private employer shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial.

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Labor and Employment Law
OFCCP
Testing Litigation
Trade and Professional Standard Setting Services

Education

- J.D., Stanford University, 1973
- M.A. (Economics), Stanford University, 1977
- B.A., Carleton College, 1969

Thomas G. Abram represents both private and public employers in a broad range of labor relations and personnel matters. He also represents health care professional licensing and certification organizations and test publishers. His litigation experience includes over four dozen employment discrimination and employee benefits class action-type lawsuits as well as licensing examination, desegregation, voting rights and antitrust lawsuits and labor arbitration. He has worked with a wide variety of expert witnesses on testing, statistical and economic issues in connection with such litigation. Mr. Abram also has extensive experience in preparing and defending affirmative action plans.

Mr. Abram was an Assistant Professor at Boston College Law School and has been a Lecturer in Industrial Relations at the University of Chicago Graduate School of Business. He is the author of numerous articles for journals and professional publications, and has lectured extensively on a wide range of employment law and licensing and certification examination matters.

Mr. Abram was recognized by *The Legal 500* as part of a report that ranked the firm among the top 10 U.S. Labor and Employment firms. Mr. Abram was selected for inclusion from 2009 to 2011 in *Illinois Super Lawyers*.

Bar Admissions

- Illinois, 1973
- U.S. District Court, Northern District of Illinois, including Trial Bar, 1973
- U.S. District Court, Northern District of Indiana, 1986
- U.S. District Court, Central District of Illinois, 1990
- U.S. District Court, District of North Dakota, 2003
- U.S. District Court, District of Colorado, 2009
- U.S. Court of Appeals, Seventh Circuit, 1984
- U.S. Court of Appeals, Sixth Circuit, 1996
- U.S. Court of Appeals, Third Circuit, 2006
- U.S. Court of Appeals, Fifth Circuit, 2010
- U.S. Supreme Court, 2003

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Education

- J.D., Northwestern University School of Law, 1987
- B.S., *summa cum laude*, Illinois State University, 1982

Amy L. Bess is a shareholder in the Washington, D.C. office of Vedder Price P.C. and a member of the firm's Labor and Employment Practice Area. Her employment litigation experience includes the representation of employers before state and federal courts and administrative agencies, defending against claims of race, sex, disability and age discrimination, sexual harassment, whistleblowing, restrictive covenant disputes, wrongful termination and wage and hour violations. She regularly counsels clients in all of these areas, drafts and negotiates employment and severance agreements, conducts on-site workplace investigations, presents training seminars and speaks to employer groups on avoiding workplace problems.

Ms. Bess has first-chair bench trial, jury trial and arbitration experience and is regularly involved in mediations. She also is experienced in the defense of complex class action litigation, including pattern or practice litigation brought by the U.S. Equal Employment Opportunity Commission.

Bar Admissions

- Illinois
- District of Columbia
- U.S. District Court, Northern District of Illinois
- U.S. District Court, District of Columbia
- U.S. District Court, Central District of Illinois
- U.S. District Court, District of Maryland
- U.S. District Court, District of Colorado
- U.S. Court of Appeals, District of Columbia Circuit
- U.S. Court of Appeals, Fourth Circuit
- U.S. Court of Appeals, Eighth Circuit

Affiliations

- Member, American Bar Association, Labor and Employment Section
- Member, District of Columbia Bar, Labor and Employment Section
- Member, District of Columbia Bar Board of Governors, currently serving third year of three year elected term
- Secretary, Women's Bar Association Foundation of the District of Columbia
- Member, Women's Bar Association of the District of Columbia (served three year elected term on Board of Directors)
- Board Member and General Counsel, Everybody Wins! DC, children's literacy non-profit organization

Representative Experience

- Served as lead counsel to a national retailer in a significant pattern-or-practice litigation of claims filed by the U.S. Equal Employment Opportunity Commission on behalf of a class of former employees under the Americans with Disabilities Act, in which the EEOC alleged that the retailer's workers' compensation leave of absence policies violated the ADA.

- Represents the largest hospital in the Washington, D.C. area in connection with a litigation and U.S. Department of Justice investigation of claims brought pursuant to Title III of the Americans with Disabilities Act.
- Represents hospital systems in connection with whistleblower claims brought under the Federal False Claims Act, as well as in connection with various employment claims and ADA Title III issues.
- Served as lead defense counsel on behalf of a software manufacturer and two of its computer engineers in a five-week bench trial involving claims of misappropriation of trade secrets and confidential information, conspiracy and tortious interference.
- Obtained complete defense jury verdict in federal court jury trial involving claims by former independent contractor alleging breach of contact and tort claims.
- Obtained a complete defense ruling by the trial court on all claims, and affirmance by the Virginia Supreme Court. *MicroStrategy, Inc. v. Wenfeng Li et al.*, 601 S.E.2d 580 (Va. 2004).

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Education

- J.D., Georgetown University Law Center, 1999
- B.A. (Government and Politics), University of Maryland, 1996

Scot A. Hinshaw joined Vedder Price P.C. as a senior associate of the firm's Labor and Employment Practice.

Mr. Hinshaw's experience focuses on litigation and advice matters, wage and hour, non-compete and other employment-based statutes. His experience includes defending employers in race, sex, age, disability and national origin discrimination cases in both state and federal courts as both lead and co-counsel. Mr. Hinshaw also advises clients on compliance with the Fair Labor Standards Act, the Worker Adjustment and Retraining Notification Act, the Family and Medical Leave Act, the Employee Retirement Income Security Act, the National Labor Relations Act and the Americans with Disabilities Act. He has extensive experience in advising businesses concerning non-compete and trade secret issues, drafting and revising employee handbooks and policies along with representing unionized employers in all aspects of the collective bargaining relationship.

Mr. Hinshaw has presented on various employment issues, including the following recent speeches: Community Bankers Association of Illinois, *Hot Topics in Employment Law* (November 2010); Bureau of National Affairs Webinar, *What You Need to Know: A Labor and Employment Legislative Update* (February 2010); Maryland Association of Affirmative Action Officers, *The New Amendments and ADA Compliance* (September 2009); and Army-Navy Country Club, *Downsizing in a Tough Economy* (November 2008).

Bar Admissions

- Maryland, 1999
- District of Columbia, 2000
- Illinois, *admission pending*
- U.S. District Court, District of Maryland, 2000
- U.S. District Court, District of Columbia, 2000
- U.S. District Court, Eastern District of Michigan, 2006
- U.S. District Court, Western District of Michigan, 2008
- U.S. Court of Appeals, District of Columbia Circuit, 2003
- U.S. Court of Appeals, Sixth Circuit, 2007
- U.S. Court of Appeals, Fourth Circuit, 2009
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Education

- J.D., University of Chicago, Associate Editor, *The University of Chicago Law Review*

Chair, Labor and Employment Law Practice
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Alan M. Koral is a Vedder Price P.C. shareholder and heads the firm's Labor and Employment Practice Area in the New York office. He represents and counsels domestic and international corporations with respect to litigation matters, administrative hearings and investigations, as well as general employment and labor law.

Mr. Koral has written and lectured extensively on labor and employment law matters. He has written numerous articles and is the author of two books, *Conducting the Lawful Employment Interview* (4th ed. 1992) and *Employee Privacy Rights* (1988), and has edited Chapter 7 (on religious discrimination) of the second edition of Schlei & Grossman's *Employment Discrimination Law* (1983).

In 1985, Mr. Koral was appointed by Governor Mario Cuomo to the New York State Human Rights Advisory Council, and was later appointed by Governor Pataki to the New York Human Rights 50th Anniversary Advisory Committee. He serves on the Advisory Committee for labor and employment programs of the Practising Law Institute and the National Advisory Board of the *Hofstra Labor and Employment Law Journal*.

Mr. Koral was Chair of the New York State Bar Association's Labor and Employment Law Section, 2008–2009, and has been a member of the Section's Executive Committee for many years. He is currently co-chair of the International Employment Law Committee of the International Law Section of the American Bar Association and is also a member of the Equal Employment Opportunity Law Committee of the American Bar Association's Labor and Employment Law Section. In 2011, Mr. Koral was appointed Vice Chair of the American Bar Association's International Sexual Orientation and Gender Identity Issues Network and reappointed as a member of the Steering Group of the American Bar Association's International Litigation Committee. He was also appointed as Liaison Officer of the International Bar Association's Lesbian, Gay, Bisexual and Transgender Issues Working Group within the International Bar Association's Discrimination Law Committee.

Mr. Koral is a Fellow of the American College of Labor and Employment Law and is a member of the Board of Visitors of the CUNY School of Law and St. John's University Law School Labor and Employment Law Board of Advisors. Mr. Koral was selected for inclusion from 2006 to 2010 in *New York Super Lawyers*. He is also listed in *Who's Who in American Law* and *Who's Who*.

Bar Admissions

- Illinois, 1975
- New York, 1977
- U.S. District Court, Northern District of Illinois (including Trial Bar), 1975
- U.S. District Court, Southern District of New York, 1977
- U.S. District Court, Northern District of New York, 1981
- U.S. District Court, Eastern District of New York, 1981
- U.S. Court of Appeals, Eleventh Circuit, 1987
- U.S. Court of Appeals, Second Circuit, 1990
- U.S. Court of Appeals, Third Circuit, 1995
- U.S. Court of Appeals, Fourth Circuit, 1995

Affiliations

- Co-Chair, International Employment Law Committee, American Bar Association International Law Section
- Member, Equal Employment Opportunity Law Committee, American Bar Association Labor and Employment Law Section
- Member, Executive Committee, New York State Bar Association Labor and Employment Law Section
- Vice Chair, American Bar Association, International Sexual Orientation and Gender Identity Issues Network
- Member, Steering Group, American Bar Association International Litigation Committee
- Liaison Officer, International Bar Association, Lesbian, Gay, Bisexual and Transgender Issues Working Group (within the International Bar Association's Discrimination Law Committee)
- Member, National Advisory Board, *Hofstra Labor and Employment Law Journal*
- Member, Advisory Committee, Practising Law Institute

Publications

- Author, "New 'Wage Theft' Law Imposes Greater Wage-Hour Responsibilities on NY Employers and Increases Penalties for Violations," *Labor and Employment Law Bulletin*, January 19, 2011
- Co-author, "New York Extends Bereavement Benefits to Same-Sex Partners," *Labor and Employment Law*, November 2010
- Co-author, "New York's New Domestic Workers Bill of Rights Provides Broad Protection for Domestic Employees," *Labor and Employment Law Bulletin*, September 22, 2010
- Co-author, "Recent Trend Towards Increasingly Liberal Reading of NYC Human Rights Law: What Employers Need to Know," BNA's *Employment Discrimination Report*, 2010
- Author, "Trying the Court's Patience Instead of the Case: Common Litigation Mistakes," Vedder Price P.C., 2010
- Co-author, "Pending 'Healthy Workplace' Legislation May Put Bullies and Their New York, New Jersey and Illinois Employers at Risk," *Labor and Employment Law*, August 2010
- Co-author, "New York Employers Have Heightened Obligation to Engage in Interactive Process with Disabled Individuals," *Labor and Employment Law*, April 2010
- Featured, "Q&A: Alan Koral on Internships and Labor Law," *Photo District News*, March 2010

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Wrongful Discharge

Education

- J.D., St. John's University Law School, 1981, Editor, Law Review
- B.A., Lehman College - City University of New York, 1978

Neal I. Korval is the managing shareholder of the New York Office of Vedder Price P.C. He is a member of the firm's Labor and Employment Practice Area and the Employee Benefits Group. Mr. Korval is also a member of the firm's Board of Directors. He represents and counsels corporations on all aspects of labor and employment law, including NLRB matters, EEO litigation and advice, drafting and litigation concerning restrictive covenants and trade secrets, employee benefits administration and ERISA litigation.

Mr. Korval is a member of the American Bar Association. He has served on the Committee on Rights of People with Disabilities of the New York City Bar Association and the Committee on Practice and Procedure Before the NLRB of the New York State Bar Association. He currently serves on the Committee on Collective Bargaining and Labor Arbitration of the New York State Bar Association. Mr. Korval lectures frequently on winning arbitrations, complying with EEO laws and sound personnel management.

Mr. Korval was selected for inclusion from 2007 to 2010 in *New York Super Lawyers*.

Bar Admissions

- New York, 1982
- U.S. District Court, Eastern District of New York, 1982
- U.S. District Court, Southern District of New York, 1982

Affiliations

- Member, St. John's University Law School Labor and Employment Law Board of Advisors

Recent Publications

- Co-author, "The Supreme Court Sharpens the Claws of the 'Cat's Paw' Theory," *Labor and Employment Law*, May 2011
- Co-author, "Recent EEOC Lawsuits Reinforce Need for Flexible Extended Leave Policies," *Labor and Employment Law,* November 2010
- Co-author, "Labor Board Lacked Authority to Issue More Than 600 Decisions," *Labor Law Bulletin*, June 18, 2010
- Co-author, "Health Care Reform Act Requires Breaks for Nursing Mothers," *Labor and Employment Law*, April 2010

VEDDER PRICE®

PHILIP L. MOWERY

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Emphasis

Benefit Plans

ERISA

Executive Compensation

Education

- J.D., University of Chicago Law School, 1988
- A.B., University of Chicago, 1985

Chair, Employee Benefits Group

Philip L. Mowery joined the Chicago office of Vedder Price P.C. in the Employee Benefits Group in 1988 and became a shareholder in 1995. He counsels a variety of corporations in the manufacturing and service industries on all aspects of employee benefits law, including the design, tax qualification, legal compliance, interpretation and communication of retirement plans and welfare benefit plans. He also counsels employers and executives in the negotiation and implementation of executive compensation agreements and programs.

Mr. Mowery is a member of the American Bar Association and is a frequent speaker before legal and other professional organizations. Mr. Mowery was selected for inclusion in 2006, and from 2009 to 2011 in *Illinois Super Lawyers*.

Recent Publications

- Co-author, "Roth Conversions Inside Savings Plans: Option Now Available," *Employee Benefits Briefing*, September 30, 2010
- Co-author, "Health Care Dependent Coverage Regulations Issued," *Employee Benefits Briefing*, May 21, 2010
- Co-author, "Retiree Reinsurance Regulations Issued: Program Effective June 1, 2010," *Employee Benefits Briefing*, May 12, 2010
- Co-author, "IRS Issues Guidance on Tax Treatment of Health Care Coverage for Adult Children Under Age 27," *Employee Benefits Briefing*, April 30, 2010
- Co-author, "New Stopgap Extension of Cobra Subsidies—Further Extension Pending," *Employee Benefits Briefing*, April 19, 2010
- Co-author, "Health Care Reform Enacted: Reconciliation Continues," *Employee Benefits Briefing*, March 23, 2010
- Co-author, "Stopgap Extension of Cobra Subsidies—Further Extension Likely," *Employee Benefits Briefing*, March 3, 2010
- Co-author, "Health Care Reform Enacted... Now the Learning Curve Begins," *The Illinois Manufacturer*, Spring 2010
- Co-author, "The Senate's Turn at Shaping Health Care Reform—Reconciliation Awaits," *Employee Benefits Briefing*, January 2010
- Co-author, "Health Care Reform Passed by the U.S. House of Representatives—Future Unknown," *Employee Benefits Briefing*, November 2009

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Emphasis

Labor and Employment
Discrimination Law
Employment Agreements
Employment Class Action Defense
Employment Counseling
Employment Litigation
Fair Labor Standards Act
Supervisor Training
Workplace Security
Wrongful Discharge

Education

- J.D., Yale Law School, 1991
- A.B., *magna cum laude*, Brown University (Phi Beta Kappa), 1988

Laura Sack is a shareholder at Vedder Price P.C. and a member of the firm's Labor and Employment Practice Area. For the past 20 years, Ms. Sack's practice has been devoted exclusively to representing management in labor and employment law matters. Her practice currently includes litigating employment cases before state and federal courts, representing clients before administrative agencies, designing and conducting employee training programs, and counseling management on labor and employment law issues.

Following a one-year clerkship with the Honorable Raymond J. Pettine, U.S. District Court Judge for the District of Rhode Island, Ms. Sack joined the labor and employment law group of Simpson Thacher & Bartlett in New York City. Ms. Sack spent more than five years at Simpson Thacher, representing employers ranging from multinational financial institutions to local nonprofit organizations. During her tenure at Simpson Thacher, Ms. Sack spent several months working in-house as interim labor and employment counsel to Philip Morris Management Corp.

In 1998, Ms. Sack joined the law department of Witco Corporation, a global specialty chemical manufacturer headquartered in Greenwich, Connecticut. As Witco's Senior Attorney, Human Resources Counsel, Ms. Sack was responsible for the company's labor and employment, employee benefits and immigration matters worldwide. Ms. Sack joined Kauff McClain & McGuire LLP (a boutique management-side labor and employment law firm based in New York City) later in 1998 and became a partner in 2000. Ms. Sack joined Vedder Price as a shareholder in January 2009.

Ms. Sack was on the faculty of the Practising Law Institute's 2010 Annual Institute on Employment Law, where she spoke on the topic of "Personnel, Investigative and Health Records." She has also been selected to speak at a variety of other labor and employment law seminars, including those sponsored by the New York State Bar Association and the Cornell University ILR School. Her article, "The FTC's Revised Endorsement Guides Highlight the Need for Employers to Adopt Appropriate Social Media Policies," was published in the Summer 2010 American Bar Association *Employment Law & Litigation* newsletter. In recent years, Ms. Sack has been quoted in *Business Insurance*, *Fortune*, *Best Life* and *HR Magazine*, and she has been published in the *New Jersey CPA* magazine.

Ms. Sack has been recognized by her peers as a leading lawyer in her field, as evidenced by having achieved a rating of AV Preeminent in the Martindale-Hubbell Law Directory, the highest rating given to participating attorneys. Ms. Sack is a past member of the Sex and Law Committee of the New York City Bar Association, and a past member of the Editorial Advisory Board of Employment Law 360.

Selected Practice Highlights

Training:

Ms. Sack has designed and delivered harassment-free workplace training programs for executives, supervisors and employees across the U.S., including New York, Connecticut, Massachusetts, Pennsylvania, Georgia, Texas, Illinois, Ohio and California. She has provided such training across a broad spectrum of industries, including construction, telecommunications, banking and other financial services, entertainment and media, advertising, manufacturing, nonprofit and retail. Ms. Sack regularly provides training on a variety of other topics as well, including worker classification, litigation avoidance, union avoidance/awareness and other personnel issues.

Special Projects:

Ms. Sack is regularly called upon to conduct internal investigations and to conduct human resources and legal compliance audits for clients. She also regularly assists clients in the creation and implementation of expense reduction programs, including reductions in force. Her work in this area runs the gamut, from counseling senior executives on the legal implications of staff reductions, to coaching managers on making sound business judgments regarding position eliminations, to drafting severance plans, separation agreements, WARN notices, internal and external communications, and board resolutions.

Litigation Highlights

Ms. Sack's numerous litigation victories include the following:

- obtaining dismissal on summary judgment of a federal complaint alleging harassment and discrimination on the basis of race and gender (including disparate pay, wrongful discharge and retaliation claims), following the EEOC's finding of "reasonable cause" against the employer with regard to those claims;
- obtaining dismissal on summary judgment of a federal Family and Medical Leave Act (FMLA) retaliation and interference complaint where the plaintiff was discharged shortly after she requested FMLA leave;
- obtaining dismissal of a Sarbanes-Oxley whistleblower complaint filed with the U.S. Department of Labor without a hearing, and before any discovery had been taken, and getting the dismissal affirmed on appeal;
- obtaining pre-discovery dismissal of a federal complaint alleging discrimination and harassment based on the plaintiff's sex, national origin and perceived sexual orientation;
- obtaining dismissal on summary judgment of a federal complaint alleging race-based pay disparities;
- obtaining dismissal on summary judgment of a federal complaint alleging discrimination and harassment on the basis of age, race, sex and disability; retaliation; interference with FMLA rights; and intentional infliction of emotional distress;
- obtaining dismissal prior to discovery of a federal sex and race discrimination action where the plaintiff had signed an employment agreement containing an arbitration provision;
- obtaining dismissal on summary judgment of federal race and retaliation claims asserted by a union employee who was laid off and subsequently recalled to work;
- obtaining dismissal of a breach of contract action filed in New York state court by a former in-house lawyer. The dismissal was subsequently affirmed on appeal;

- obtaining dismissal on summary judgment of a federal complaint alleging sexual harassment and retaliation filed by the employee of a client's outside security company. The court granted summary judgment after concluding that there was no evidence the client was actually involved in any discriminatory or retaliatory conduct;
- obtaining dismissal on summary judgment of a federal complaint filed in the Southern District of Ohio alleging age discrimination, retaliation, breach of contract and promissory estoppel. The dismissal was subsequently affirmed by the Sixth Circuit Court of Appeals;
- obtaining dismissal of a state court action alleging breach of contract and defamation. The plaintiff alleged that his employer had (i) violated the procedures outlined in its sexual harassment policy when it terminated his employment; and (ii) defamed him following his discharge. The case was dismissed on the grounds that (i) plaintiff's defamation claim was time-barred; and (ii) the employer's personnel policies did not create an employment contract under New York law;
- obtaining a Second Circuit Court of Appeals decision affirming a lower court's dismissal on summary judgment of a complaint alleging race discrimination and retaliation;
- winning a labor arbitration filed on behalf of a university professor who objected to the university's decision not to increase her salary. The arbitrator confirmed that the professor's time to file a grievance under the governing collective bargaining agreement began to run when she first learned of the challenged employment decision;
- obtaining dismissal prior to discovery of a lawsuit alleging violation of the plaintiff's federal civil rights, criminal conspiracy to deprive him of those rights, defamation, religious discrimination in violation of state and local law, and breach of contract. The Second Circuit Court of Appeals subsequently confirmed that the plaintiff had no viable federal claims;
- obtaining pre-discovery dismissal of a complaint in which the plaintiff claimed he was discharged in violation of the Americans with Disabilities Act (ADA). The plaintiff had attached to his complaint a doctor's note stating he could not lift more than 30 pounds. The court granted the motion to dismiss on the grounds that the plaintiff's lifting restriction did not render him "disabled";
- obtaining dismissal on summary judgment of a federal complaint alleging race and age discrimination. Twice in the course of the litigation, Ms. Sack successfully sought sanctions against the plaintiff's attorney: first, for failing to timely provide responses to discovery requests; and second, for refusing to withdraw the plaintiff's constitutional claims against his former private-sector employer;
- obtaining dismissal on summary judgment of a class action claim for severance pay filed in federal court in Erie, Pennsylvania following the sale of a manufacturing facility; and
- securing a federal court order compelling the plaintiff in a discrimination case to produce documents and information regarding her efforts to secure alternative employment while working for the defendant, and allowing the defendant to subpoena third parties regarding the plaintiff's job search while she was employed by the defendant. Winning these discovery disputes proved critical to the case, and the discovery elicited following the court order was extremely damaging to the plaintiff's case.

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Emphasis

Discrimination Law
Employment Agreements
Employment Class Action Defense
Employment Counseling
Employment Litigation
Fair Labor Standards Act
Labor and Employment Law
Supervisor Training
Workplace Security
Wrongful Discharge

Education

- J.D., Georgetown University Law Center, 2001
- B.A., University of Michigan, 1998

Roy P. Salins joined Vedder Price P.C.'s Litigation and Labor & Employment Practice Areas in January 2009.

Mr. Salins's practice focuses on all aspects of litigation in federal and state courts and administrative agencies, and in FINRA, AAA and other arbitrations. Mr. Salins also devotes a large portion of his practice to pre litigation advice and preventive law counseling across a wide spectrum of client needs, including contract disputes, regulatory matters and all areas of labor and employment law.

Before joining Vedder Price, Mr. Salins was a senior associate at Kauff McGuire & Margolis LLP, and he spent five years as an associate in the Labor and Employment Department at Proskauer Rose LLP in New York City, during which time he spent several months working as interim labor and employment counsel to Bristol-Myers Squibb Company.

Mr. Salins is a graduate of the University of Michigan, and he received his law degree from Georgetown University Law Center.

Bar Admissions

- New York, 2002
- U.S. District Court, Southern District of New York, 2003
- U.S. District Court, Eastern District of New York, 2003
- U.S. District Court, Western District of New York, 2009

Affiliations

- Member, Committee on Labor and Employment Law of the New York City Bar Association

Litigation and Arbitration Highlights:

Mr. Salins's numerous litigation victories include the following:

- won summary judgment for cable television station in equal pay, sex discrimination, sexual harassment and retaliation action brought by a former advertising salesperson;
- won FINRA arbitration for investment bank against hedge fund that had used the bank as its prime broker;
- won summary judgment for investment bank in equal pay act, sex discrimination and retaliation action brought by a former senior vice president;
- won summary judgment for national retail clothing store in FMLA interference and FMLA retaliation action brought by a former store manager;
- won summary judgment for a private university in race, ethnicity and religious discrimination and retaliation action brought by a former campus coordinator;
- won summary judgment for radio station in pay discrimination case brought by an advertising salesperson;
- won motion to dismiss Sarbanes-Oxley retaliation claim;
- won summary judgment in AAA arbitration, obtaining dismissal of discriminatory failure to pay bonus claim;

- obtained enforcement by the U.S. District Court for the Southern District of New York of two-year post-employment restrictive covenant; and
- obtained enforcement by New York State Court of two-month garden leave provision.

Recent Publications

- Author, "Trade Secrets: At the Crossroads of Intellectual Property and Labor and Employment Law," *Journal of Commercial Biotechnology*, April 2011
- Co-author, "Misclassified Maintenance Worker Figures to Clean Up: Judge Holds He Was Not an Independent Contractor," *Labor and Employment Law*, January 2011
- Co-author, "New Credit-Checking Legislation Signed Into Law," *Labor and Employment Law Bulletin*, August 16, 2010
- Co-author, "Employers Relying on Background Checks Face Increased Scrutiny," *Labor and Employment Law*, August 2010
- Co-author, "FTC's New 'Endorsement' Rules Highlight the Need for Employers to Adopt Appropriate Social Media Policies," *Labor and Employment Law*, April 2010

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Emphasis

Labor and Employment
Discrimination
Arbitration
Wage and Hour
Training and Counseling

Education

- J.D., Brooklyn Law School, 1988 (Order of the Barristers)
- B.S., Cornell University, 1980

Jonathan A. Wexler is a shareholder at Vedder Price P.C. and a member of the firm's Labor and Employment Practice Area of the New York office. He represents private-sector, not-for-profit, and public-sector clients in litigation matters in federal and state courts, and before such administrative agencies as the Equal Employment Opportunity Commission, the New York State Division of Human Rights, the National Labor Relations Board, and the New York Department of Labor.

Mr. Wexler has arbitrated statutory claims as well as grievances under collective bargaining agreements and has negotiated labor contracts on behalf of employers. Mr. Wexler counsels clients concerning labor and employment law matters, including EEO laws, restrictive covenants, trade secrets, wage and hour matters, and employee benefits issues, and has prepared personnel policies, employment agreements, and separation agreements for numerous clients.

Mr. Wexler is a member of the Labor and Employment Section of the New York State Bar Association. He has lectured and conducted training in the areas of effective supervision, sexual harassment and compliance with employment laws.

Mr. Wexler was selected for inclusion from 2009 to 2010 in *New York Super Lawyers*.

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Emphasis

Arbitration / Grievances / Mediation
Collective Bargaining
Discrimination Law
Employment Agreements
Employment Class Action Defense
Employment Counseling
Employment Litigation
Fair Labor Standards Act
Labor and Employment Law
Labor Relations
Legal Services for the Retail Industry
Strike Support
Wrongful Discharge

Education

- J.D., *with honors*, DePaul University, 1993
- B.A., *cum laude*, Northern Illinois University, 1990

Chair, Labor and Employment Law Practice Area

Thomas M. Wilde is Chair of the Labor and Employment Practice Area at Vedder Price P.C. and a member of the firm's Board of Directors. He represents employers in all types of labor and employment litigation including defending wrongful discharge, discrimination, harassment and wage and hour claims.

Mr. Wilde provides practical, cost-effective guidance to clients in dealing with employee relations issues including workforce reductions; discipline and discharge; harassment and workplace investigations; disability accommodation; FMLA compliance and employee leaves of absence; and policy development and administration. Mr. Wilde also has extensive experience with labor relations matters including arbitrations and collective bargaining.

Mr. Wilde is a member of Vedder Price's FLSA Task Force and has significant experience representing employers in wage and hour class and collective actions, Department of Labor audits and investigations. Mr. Wilde also conducts wage and hour compliance audits to help clients reduce the risk of wage and hour claims.

Mr. Wilde has been named in *Chambers USA: America's Leading Lawyers in Business.* Mr. Wilde was selected for inclusion from 2009 to 2011 in *Illinois Super Lawyers*. He is a member of the Labor and Employment Section and the Federal Labor Standards Legislation Committee of the American Bar Association. He regularly speaks to industry and association groups on a variety of labor and employment topics.

Bar Admissions

- Illinois, 1993
- Massachusetts, 1995
- U.S. District Court, Northern District of Illinois, 1994
- U.S. District Court, Central District of Illinois, 1998
- U. S. District Court, Northern District of Indiana, 2001
- U.S. District Court, Southern District of Illinois, 2002
- U.S. District Court, Eastern District of Wisconsin, 2003
- U.S. Court of Appeals, Sixth Circuit, 1997
- U.S. Court of Appeals, Seventh Circuit, 1998

Affiliations

- Member, American Bar Association (Labor & Employment Section & Federal Labor Standards Legislation Committee)
- Member, Human Resources Management Association, Chicago
- Member, Northwest Human Resources Council

Recent Publications

- Co-author, "Supreme Court Continues Expansive Interpretation of Retaliation Claims," *Labor and Employment Law*, May 2011

- Co-author, "EEOC Issues Final ADA Amendments Act Regulations," *Labor and Employment Law Bulletin*, March 28, 2011
- Co-author, "Recent EEOC Lawsuits Reinforce Need for Flexible Extended Leave Policies," *Labor and Employment Law*, November 2010
- Co-author, "Watch What You Delete: Employers Must Act to Preserve Documents and Electronically Stored Information Earlier Than They Might Think," *Labor and Employment Law*, August 2010
- Co-author, "Can Anything Be Done to Stop the Avalanche of Wage and Hour Litigation? A Few Class Action Avoidance Options," *Labor and Employment Law*, April 2010

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Emphasis

Collective Bargaining
Discrimination Law
Employment Agreements
Employment Counseling
Employment Litigation
Fair Labor Standards Act
Labor Relations
Strike Support
Supervisor Training
Workplace Security
Wrongful Discharge

Education

- J.D., Fordham University School of Law, 1996 (Member, *Fordham Urban Law Journal* and Fordham Moot Court Board)
- B.A., Lafayette College, 1993

Lyle Zuckerman is a shareholder at Vedder Price P.C. and a member of the firm's Labor and Employment Practice Area. For over 14 years, he has represented management in all disciplines of labor and employment law.

Mr. Zuckerman's expertise includes traditional labor law (grievance arbitration, NLRB proceedings, secondary boycotts and work stoppages, union organizing campaigns and contract negotiations) as well as the full range of employment law matters. In this regard, Mr. Zuckerman defends employment discrimination and breach of contract matters before federal and state courts and administrative agencies, and in arbitrations before FINRA and the AAA. He also devotes a significant portion of his practice to the prosecution and defense of claims involving the breach of post-employment restrictive covenants, including seeking emergency injunctive relief. Mr. Zuckerman regularly counsels and litigates on behalf of clients in diverse industries, including education, entertainment and media, retail, financial services and manufacturing.

Prior to joining Vedder Price, Mr. Zuckerman was a partner at Kauff McGuire & Margolis, and an associate at Proskauer Rose and Morgan Lewis & Bockius. He also served as Associate General Counsel for St. John's University in Queens, New York, a major metropolitan Catholic university with 30,000 students and 3,000 employees, for which he had sole responsibility for labor, employment and civil rights matters. During law school, Mr. Zuckerman clerked for the National Labor Relations Board Division of Judges. Mr. Zuckerman is a member of the Management Attorneys' Conference and the National Association of College and University Attorneys.

Bar Admissions

- New York, 1996
- U.S. District Court, Southern District of New York, 1997
- U.S. District Court, Eastern District of New York, 1997
- U.S. Court of Appeals, Second Circuit, 2000

Affiliations

- Member, Management Attorneys' Conference
- Member, National Association of College and University Attorneys (NACUA)
- Member, New York City Bar Association

Litigation Highlights

Mr. Zuckerman's numerous litigation victories include the following:

- won summary judgment for an investment bank, resulting in dismissal of all claims, including sex discrimination in pay, age discrimination and retaliatory discharge by a former female executive. *Kearney v. ABN AMRO, Inc.,* _F. Supp. 2d_, 2010 WL 3621517 (S.D.N.Y. 2010);
- won summary judgement in favor of a leading Catholic university in a case involving religion, race and retaliatory discharge claims. *Tomasino v. St. John's University,* 2010 WL 3721047 (E.D.N.Y. 2010);
- obtained a preliminary injunction enforcing a two-year post-employment restrictive covenant in favor of an electronic payment processing company and against a senior-level employee who resigned his employment with the intent of commencing employment with a competitor. *Payment Alliance International, Inc. v. Ferreira*, 530 F. Supp. 2d 477 (S.D.N.Y. 2007);
- won summary judgment for LaSalle Bank, and successfully defended the appeal, in a case alleging violations of ERISA and breach of fiduciary duty in connection with the denial of employment benefits. *Gilbert v. LaSalle Bank Corp.*, 2008 WL 4406357 (S.D.N.Y. 2008), 2010 WL 3584171 (2nd Cir. 2010);
- won summary judgment in favor of a national building services company on federal race and age harassment, and retaliation claims. *Rabel v. American Building Maintenance*, 2002 WL 389156 (S.D.N.Y. 2002). Dismissal was subsequently affirmed on appeal;
- won dismissal, on jurisdictional grounds, of a state court breach of employment contract action against an affiliate of a Big Four accounting firm;
- obtained summary judgment in favor of a jewelry importer and its principal who were sued by the principal's former employer for unfair competition and breach of a non-disclosure agreement;
- secured a temporary restraining order against an investment bank's former broker for breach of a post-employment restrictive covenant; and
- in an emergency appeal to the Appellate Division, First Department, obtained an order requiring a former employee to return former employer's confidential documents, resulting in a favorable settlement that included reimbursement of attorneys' fees in full.

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VEDDERPRICE

Vedder Price is a thriving, business-oriented law firm that has a proud tradition of maintaining long-term relationships with our clients, many of whom have been with us since we were founded in 1952. We are an active, growing firm with offices in Chicago, New York and Washington, D.C., composed of over 265 attorneys who practice in three general areas: corporate law, labor and employment law and general litigation.

Corporate Services

The corporate practice of Vedder Price is the firm's largest practice area and provides legal services to clients ranging from large, publicly held corporations to small, emerging companies, as well as numerous partnerships and individuals. This highly regarded practice efficiently handles all types of business and financial matters for clients including:

- Antitrust
- Bankruptcy and Reorganizations
- Business Immigration
- Corporate and Commercial Finance
- Environmental
- Equipment Finance
- Estate Planning and Administration
- Executive Compensation
- Financial Institutions
- Fund Formation
- Health Law
- Insurance and Risk Management
- Intellectual Property
- International Transactions
- Investment Management
- Mergers and Acquisitions
- Project Finance
- Real Estate, Land Use and Zoning
- Records Management and eDiscovery
- Securities
- Tax
- Trade and Professional Association Law
- Venture Capital and Private Equity

Labor and Employment

Vedder Price is acknowledged as having one of the premier labor and employment law practices in the country. Clients of this practice include large national corporations, smaller professional and business corporations, multi-employer trust funds, investment managers and other plan fiduciaries in matters involving:

- Arbitration
- Collective Bargaining
- Employment Discrimination
- Equal Employment Opportunity
- ERISA and Employee Benefits
- NLRB Proceedings
- Occupational Safety and Health Law
- Union Welfare Plan Litigation
- Wrongful Discharge Cases

Litigation

Attorneys in our litigation practice handle client matters in trial and appellate courts, before administrative agencies and in arbitration and other alternative dispute resolution contexts. Our litigation attorneys have extensive experience in representing clients in matters involving:

- Alternative Dispute Resolution
- Antitrust and Unfair Competition
- Bankruptcy
- Business Torts
- Commercial Disputes
- Construction Law
- Contracts and General Business
- Distribution, Dealer Termination and Franchise Matters
- Environmental
- ERISA
- Federal Tax
- Financial Institutions
- Health Law/Medicare–Medicaid
- Insurance Coverage and Defense
- Intellectual Property
- Lender Liability
- Manufacturer Liability
- Product Liability and Toxic Tort
- Professional Liability
- Real Estate and Condemnation
- Records Management and eDiscovery
- Restrictive Covenants and Trade Secrets
- Securities Litigation and Shareholder Disputes
- Trust and Fiduciary
- White Collar Criminal Defense

Commitment to Diversity

Diversity is a high priority at Vedder Price. We are committed to enhancing the diversity of our workforce and promoting the likelihood of success for all people at Vedder Price to the best of our ability. We dedicate time, energy and financial resources to achieve our goal. Our focus includes the recruitment, hiring, retention, training, professional development and advancement of a diverse group of attorneys and other employees on the basis of demonstrated merit and performance. We also maintain and enhance an inclusive culture at Vedder Price in which individual differences are respected and appreciated, recognized as a source of strength for the firm and valued as qualities that enrich our working environment and our ability to serve our clients.

Tradition of Public Service

In addition to serving our clients, many of our attorneys participate in or otherwise support legal assistance for the indigent and other forms of community service. Vedder Price has a long history of support for pro bono services. One of the firm's founders helped establish the Legal Assistance Foundation of Chicago, and his commitment to pro bono activities was

instilled in the firm and continues to this day. Additionally, the firm strongly endorses bar association and other professional activities. A number of our attorneys have served on and chaired committees of the American, Illinois and Chicago Bar Associations. The Chair of the firm's Construction Law Practice Group served as the first woman President of the Seventh Circuit Bar Association. A Litigation Shareholder served as President of the Chicago Inn of Court. Other attorneys have authored treatises or undertaken various teaching, writing and speaking responsibilities and continue to do so. The firm encourages and supports the public service activities of its attorneys.