# Emerging Trends in Employment Law: Hot Pants & Hard Bodies in the Workplace

Moderator introduction (10 minutes)

Part I: "We Are Fit" (20 minutes)

- The business partners meet
- Staffing the club
- Uniforms

Moderator opens discussion of issues with audience

Part II: Employees Are So Much Trouble! (20 minutes)

- What's wrong with her?
- Why keep her?
- Overtime? But you're a 1099 employee!

Further discussion of issues with audience

Part III: Uh oh, now the lawyers are involved! (20 minutes)

- The plaintiffs' attorney gets involved
- FLSA issues
- How far do the bosses' practices go?

Further discussion of issues with audience

Discrimination & retaliation under NY Law: Kasandra Zaeri, Hofstra Law School

Part IV: The employers see their lawyer (20 minutes)

- Wage notices
- FLSA problems
- Preventing further claims
- The handbook and policies

Questions (10 minutes)

CERTILMAN BALIN ATTORNEYS

Proven attorneys. Powerful advocates.

# Elizabeth E. Schlissel

Associate

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Elizabeth Schlissel is an Associate in the Litigation Practice Group at Certilman Balin Adler & Hyman, LLP.

Ms. Schlissel handles a broad range of commercial and employment litigation, including defense of employment-related claims under federal and state statutes, contracts, business divorce, real estate, trade secrets, and partnership disputes.

Prior to joining the firm, Ms. Schlissel was an Assistant District Attorney at the Nassau County District Attorney's office. During her tenure, she developed extensive criminal trial experience and prosecuted a wide range of criminal cases including assaults and drug offenses. Ms. Schlissel also served in the Appeals Bureau where she gained significant appellate experience.

Ms. Schlissel was also a litigation associate at an insurance defense firm; served as a legal intern for The Honorable Dorothy Eisenberg, United States Bankruptcy Court, EDNY; served as an intern for The Honorable Leonard B. Austin, Supreme Court of the State of New York, County of Nassau; and was a Summer Associate at Forchelli, Curto, Crowe, Deegan, Schwartz, Mineo & Cohn, LLP.

She earned her Juris Doctor from Hofstra University School of Law in 2009 where she competed in national trial competition as a member of the Hofstra Law School Mock Trial Team and was a member of the National Institute for Trial Advocacy (NITA). Ms. Schlissel earned her Bachelor of Arts from Boston University in 2006.

She is a member of the New York State Bar Association, Nassau County Bar Association, and American Inn of Court, Theodore Roosevelt Chapter, and the Commercial Litigation Committee.

Ms. Schlissel is admitted to practice in the State of New York and in both the Eastern and Southern Districts of New York.

JASPAN SCHLESINGER LLP
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# Stanley A. Camhi

## Partner

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Stanley A. Camhi is co-chair of the Firm's Litigation Practice Group and its Appellate Practice Group, where he practices in the area of general civil litigation with an emphasis on employment related matters and insurance defense work. His practice includes the defense of employment discrimination claims in both the public and private sector, including claims brought under Title VII, the Age Discrimination in Employment Act, the Americans with Disabilities Act, the State Human Rights Law, and the Civil Rights Acts. Rated AV, the highest Martindale-Hubbell peer rating for lawyers, Mr. Camhi has also lectured on the topic of wrongful discharge and privacy in the workplace.

From 1980 until 1986, when he joined Jaspan Schlesinger LLP, Mr. Camhi was an Assistant Attorney General for the State of New York. In 1983, the Attorney General appointed him to serve as Chief of a Litigation Section where he supervised a staff of ten attorneys primarily responsible for defending Title VII and other discrimination claims brought against the State. As an Assistant Attorney General, Mr. Camhi defended the State of New York and its agencies against lawsuits brought in both federal and state court. His responsibilities included all phases of pre-trial discovery and motion practice as well as trial and appellate work.

Prior to becoming an Assistant Attorney General, Mr. Camhi practiced law for five years with a Capitol Hill law firm in Washington, D.C. where he was primarily responsible for handling the firm's litigation in both the federal and local courts of the District of Columbia.

Mr. Camhi was a recipient of the Long Island Business News Leadership in Law Award in 2012 and was named to the 2014 and 2016 New York Metro area Super Lawyers list. Mr. Camhi received the recognition in the practice area of general litigation. The Super Lawyers list is issued by Thomson Reuters. A description of the selection

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methodology can be found at http://www.superlawyers.com/about/selection_process.html He also serves on the Board of the Long Island Chapter of the American Foundation for Suicide Prevention.

Mr. Camhi received his Juris Doctor degree from the Emory University School of Law where he graduated with distinction and was awarded the Order of the Coif based upon his academic achievements. Upon graduation he was admitted to practice law in Georgia.

In 1976, Mr. Camhi was admitted to practice law in both the District of Columbia and Virginia. In 1980, he was also admitted to practice in New York. In addition, Mr. Camhi is admitted to practice law in several federal district courts where he has tried numerous cases. He also argued numerous appeals in the United States Court of Appeals for the Second Circuit and the New York appellate courts. He is also admitted to practice before the United States Supreme Court. In addition, he is a member of New York State Bar Association, the Nassau County Bar Association and the Theodore Roosevelt Inn of Court of the American Inns of Court.

## EDUCATION

- B.A., George Washington University - 1972
- J.D., Emory University School of Law, with honors - 1975

## BAR ADMISSIONS

- District of Columbia
- Georgia
- New York
- Virginia

SYNERGIST
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Jess Bunshaft most recently served as the Chief Human Resources Officer for Human Resources at Goodwill Industries of Greater New York and Northern New Jersey, and he heads the consulting organization Synergist Workforce Solutions LLC.

He has worked in human resources management for over twenty years. Prior to joining Goodwill Industries of Greater New York and Northern New Jersey, Mr. Bunshaft served as the Vice President for Labor & Employee Relations for Catholic Health Services of Long Island, a network of six hospitals, three nursing homes and affiliated operations, staffed by over 17,500 employees.

In addition to his HR experience, he is an attorney, admitted to practice in New York, and began his career as a Deputy County Attorney for Nassau County, becoming the Senior Trial Attorney in Tort & Civil Rights Litigation. He also is admitted to practice before the federal courts in New York, the US Court of Appeals for the Federal Circuit, the US Court of Appeals for the Armed Forces and the United States Supreme Court.

His extensive HR experience includes a broad range of disciplines, including employee benefits, compensation, engagement, employee relations, recruitment & retention initiatives, HRIS, employee development, labor relations, mediation, and labor negotiations with a diverse array of labor organizations, most recently having negotiated a three-year collective bargaining agreement with the International Association of Machinists and Aerospace Workers.

Mr. Bunshaft obtained his undergraduate degree from the Johns Hopkins University, his law degree from Hofstra Law School, and graduate education in HR Administration from the School of Management at NYIT, where he currently serves as a member of the Advisory Council. He has served as a member of the Theodore Roosevelt Inn of Court's Board for many years, is the past president of the Association of Healthcare HR Administrators of Greater New York and has lectured on a variety of legal and HR-related topics over the years.

SEYFARTH SHAW


# Meredith-Anne Berger

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## Biography

**Practices & Sectors**

**Labor & Employment**

Employment Litigation

Workplace Counseling & Solutions

New Jersey Practice Group

Wage & Hour Litigation

Wage & Hour Class and Collective Actions

Meredith-Anne Berger is an associate in the Labor and Employment group in Seyfarth Shaw's New York office. Ms. Berger is an innovative litigator whose practice focuses on complex employment litigation, defending management against claims of discrimination, harassment, and retaliation under federal, state, and city laws, single plaintiff and class and collective action claims brought under wage and hour laws. Ms. Berger represents employers in state and federal courts in New York, New Jersey, and Connecticut, as well as federal and state agencies, including the Equal Employment Opportunity Commission, New York State Division of Human Rights and New York City Human Rights Commission. Ms. Berger represents clients in many industries, including banking and finance, retail, energy, telecommunications, and higher education.

Ms. Berger counsels and advises clients on new developments in the law, tracking the development of laws from proposed legislation through enforcement. Ms. Berger also counsels employers on preventative practices to minimize workplace disputes, including advising employers on issues relating to personnel handbooks and policies, and conducts investigations in response to internal complaints. In particular, Ms. Berger has experience advising clients on compliance with payroll debit card laws and other wage and hour laws, workplace privacy issues, and paid leave laws.

Ms. Berger has co-authored articles in *Law360* and is a frequent contributor to Seyfarth's blogs and firm publications. Ms. Berger was elected to the Theodore Roosevelt Inn of Court in 2014. Ms. Berger is a panelist and presenter at firm sponsored-events and legal associations, including the Inn of Court and the New York State Bar Association.

Ms. Berger joined the firm initially as part of the Labor & Employment Department's Fellowship program, an innovative training-focused program for law students with an affinity for labor and employment law. While earning her JD/MBA, Ms. Berger served as Editor-in-Chief of the Hofstra Labor & Employment Law Journal and as an intern to the Honorable Joanna Seybert, United States District Judge for the Eastern District of New York.

### Education

- J.D., Hofstra University School of Law, *cum laude* (2014)
  Editor-in-Chief, Hofstra Labor and Employment Law Journal, Dean's List, Certificate of Excellence in Contracts, Business Law Honors Concentration
- M.B.A., Hofstra University, with distinction (2014)
- B.A., Barnard College, Columbia University, Departmental Honors (2011)

### Admissions

- New York
- Connecticut
- New Jersey

### Courts

- U.S. District Court for the Eastern, Northern, Southern and Western Districts of New York

- U.S. District Court for the District of Connecticut
- U.S. District Court for the District of New Jersey

## Affiliations

- Theodore Roosevelt American Inn of Court
- New York City Bar Association (Labor & Employment Law Committee, Student Member (2014-2015); Current Member, New Lawyer Council))
- ASAFE/NYC Bar Association Securities, Finance Law and Business Seminar Series (2014)

## Presentations

- “Hot Topics in Labor and Employment Law,” Webcast, presented by the New York State Bar Association, New York, NY (March 1, 2017)
- “New York Employment Law: 2017 Forecast,” Breakfast Briefing, presented by Seyfarth Shaw LLP, New York, NY (February 15, 2017)
- "Navigating Employee Privacy Issues in the Workplace," Webinar, presented by Seyfarth Shaw LLP (November 2, 2016)
- “FLSA Refresher- Focus on Today, be prepared for Tomorrow,” presented byHR Forum, Seyfarth Shaw LLP, New York, NY (April 14, 2016)
- "Guidance on Performance Management and Separation Agreements," HR Forum, presented by Seyfarth Shaw LLP, New York, NY (October 29, 2015)

## Publications

- Co-Author, “Proposed Regulations Issued for New York Paid Family Leave Law,” *Management Alert,* Seyfarth Shaw LLP (March 10, 2017)
- Co-Author, “SEC Claws Back Award for Dawdling Whistleblower, as Feds Signal Changes in Award Eligibility,” *One Minute Memo,* Seyfarth Shaw LLP (March 9, 2017)
- Co-Author, "New York Industrial Board of Appeals Rescinds Payroll Debit Card and Direct Deposit Regulations," *One Minute Memo*, Seyfarth Shaw LLP (February 21, 2017)
- Co-Author, “New Jersey Senate Fails to Override Veto on Salary History Inquiry Ban, and Proposes Two New Pay Equity Bills, With Another Pending in the Senate,” *One Minute Memo*, Seyfarth Shaw LLP (January 27, 2017)
- Co-Author, “Freelance Isn’t Free Act Signed by Mayor De Blasio,” *One Minute Memo*, Seyfarth Shaw LLP (December 2, 2016)
- Co-Author, “‘Freelance Isn’t Free” Says the New York City Council,” *Management Alert,* Seyfarth Shaw LLP (November 8, 2016)
- Co-Author, “Conscientious Objectors to Arbitration Policy Can Bring Their Cases in Court,” *One Minute Memo*, Seyfarth Shaw LLP (October 28, 2016)
- Co-Author, “FINRA Brushes Back Courts and Others Crowding Its Home Plate for Exclusive Dispute Resolution,” *Financial Services Employment Blog,* Seyfarth Shaw LLP (October 17, 2016)
- Co-Author, “Second Circuit “Purrs” On Cat’s Paw Liability Case,” *Employment Law Lookout,* Seyfarth Shaw LLP (October 6, 2016)
- Co-Author, “Final Payroll Card and Direct Deposit Regulations Issued by New York DOL,” *One Minute Memo,* Seyfarth Shaw LLP (September 13, 2016)
- Co-Author, “No Double Dipping: Court Rejects Lehman Traders’ Claims for Additional Comp,” *Financial Services Employment Blog*, Seyfarth Shaw LLP (July 14, 2016)
- Co-Author, “NJ Supreme Court Finds For Employees In Two Recent Cases: Expands Definition Of “Marital Status” and Allows Hearsay To Undercut Independent Harassment

Investigation," *One Minute Memo,* Seyfarth Shaw LLP (June 29, 2016)

- Co-Author, "8 Key Components Of An Effective BYOD Policy," *Law360* (June 17, 2016)
- Co-Author, "SEC Issues Near Record-Breaking Whistleblower Award," *Workplace Whistle Blower*, Seyfarth Shaw LLP (June 17, 2016)
- Co-Author, "Connecticut Bans (Another) Box, Expanding Protections for Applicants With Criminal Backgrounds," *Management Alert*, Seyfarth Shaw LLP (June 10, 2016)
- Co-Author, "NYCCHR Issues Info Card Regarding Discrimination Based on Gender Identity and Expression," *Management Alert*, Seyfarth Shaw LLP (June 6, 2016)
- Co-Author, "Federal Reserve Bank Ruled a Federal Supervisory Agency Under the BSA," *Workplace Whistleblower,* Seyfarth Shaw LLP (May 31, 2016)
- Co-Author, "Money Doesn't Grow on Trees in the Garden State, but New Jersey Senate Committee Advances Bill for $15 Minimum Wage," *One Minute Memo,* Seyfarth Shaw LLP (May 19, 2016)
- Co-Author, "Family Matters: New York State Minimum Wage Increase & Paid Family Leave," *Management Alert*, Seyfarth Shaw LLP (April 19, 2016)
- Co-Author, "A Standardized Test Is Here: Connecticut Supreme Court Brings Clarity to the 'ABC' Test for Independent Contractor Status," *Management Alert*, Seyfarth Shaw LLP (March 15, 2016)
- Co-Author, "Financial Industry in the Hot Seat with Democrats' Proposed Bill Expanding Whistleblower Protections," *Financial Services Employment Arbitration Q&A*, Seyfarth Shaw LLP (March 2016)
- Co-Author, "New York City Human Rights Law Amended, Expanding Protection to 'Caregivers'," *One Minute Memo*, Seyfarth Shaw LLP (January 8, 2016)
- Co-Author, "If Pain, Yes Gain — Part XV: Court Rejects Pittsburgh Paid Sick Days Act," *One Minute Memo*, Seyfarth Shaw LLP (January 5, 2016)
- Co-Author, "If Pain, Yes Gain — Part XII: Paid Sick Leave Spreading in New Jersey," *Management Alert*, Seyfarth Shaw LLP (November 17, 2015)
- Co-Author, "Connecticut Supreme Court Expands Protection for Would-Be Whistleblowers," *One Minute Memo*, Seyfarth Shaw LLP (October 8, 2015)
- Co-Author, "Full Court Press for Interns at Second Circuit?," *Wage & Hour Litigation Blog*, Seyfarth Shaw LLP (August 19, 2015)
- Co-Author, "Second Circuit Teaches Unpaid Interns a Lesson," *Wage & Hour Litigation Blog*, Seyfarth Shaw LLP (July 2, 2015)
- Co-Author, "New Jersey Supreme Court to Review Decision Upholding Controversial Legislative Ban on Job Ads Requiring Current Employment," *Workplace Class Action Blog*, Seyfarth Shaw LLP (June 27, 2014)
- "ERISA and the Affordable Care Act: A Primer," JURIST-Dateline (November 29, 2013)

## Media Mentions

- Quoted, "Art Institute of Pittsburgh employees' discrimination claims allowed to go to court," *PennRecord* (November 10, 2016)

# Andrew J. Turro

Member of the Firm

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**Practice Areas**

Litigation & Dispute Resolution

Employment Law

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**Education**

Union University, Albany Law School
J. D., 1981

University of Chicago
M.A., 1977

State University of New York at Buffalo
B.A., 1976
*magna cum laude*

**Memberships**

American Bar Association

New York State Bar Association

Nassau County Bar Association

American Inn of Court, Nassau Chapter, Master

**Admissions**

New York State

U.S. Supreme Court

U.S. Court of Appeals for the Second and Fourth Circuits

U.S. District Court, Northern, Southern, Eastern, and Western Districts of New York

Andrew J. Turro is a Member of Meyer, Suozzi, English & Klein, P.C.'s Litigation & Dispute Resolution Department, Employment Law practice and heads the firm's Equine & Racing Law practice, which was featured in *Long Island Business News* in February 2015. Mr. Turro has extensive experience in state and federal appellate and trial litigation, in both the civil and criminal areas. His litigation practice covers a broad range of complex commercial, civil, employment, criminal and labor-related matters. Mr. Turro represents professionals (i.e., lawyers, doctors, and other medical care providers) in professional disciplinary proceedings as well as businesses and individuals before various state and federal agencies. Mr. Turro's practice also includes several substantial equine law matters in which he has represented both individuals and professional groups before the New York State Gaming Commission (formerly the Racing and Wagering Board) and the New York State Courts.

Mr. Turro has represented large international companies as well as local businesses and individuals. An accomplished litigator, Mr. Turro has achieved successful results for his clients in several seminal cases impacting on issues involving landowner liability, the valuation of a municipality's tax assessments on environmentally impaired properties, such as Superfund sites, and attacks on the legality of regulations promulgated by governmental agencies. In his employment law practice, Mr. Turro represents clients in a variety of State and Federal matters, including employment discrimination claims arising under Title VII, the ADA, and the State Human Rights Law as well as Minimum Wage/Overtime claims under the Fair Labor Standards Act and New York State Labor laws. Mr. Turro also provides advice to clients in connection with employment contracts, severance agreements, comprehensive restrictive covenants, and a variety of commercial contracts. He has also authored numerous articles covering topics including the valuation of contaminated real property, the nature and scope of various legal privileges recognized by the courts, and on various employment-related legal issues.

In addition to his litigation experience, Mr. Turro also acts as general outside corporate counsel, advising corporate clients on a broad range of legal matters including employment issues, business strategy matters, and compliance with local and federal rules and regulations.

Notable experience includes:

- Successfully prevailed before the New York State Appellate Division, Third Department, in a challenge on behalf of a race horse trainer, which resulted in the dismissal of entire case in which the NYS Gaming Commission alleged over 1,700 drugging violations.

- Successfully prevailed in challenge before the New York State Supreme Court attacking the legality of the New York State Racing and Wagering Board's Out of-Competition drug testing regulations for race horses.
- Prevailed in a New York State Supreme Court election law case involving the New York State Thoroughbred Horsemen's Association.
- In a case of first impression prevailed on appeal before the New York State Court of Appeals in a challenge against a municipality's real estate valuation of environmentally contaminated property.
- Prevailed on appeal before the New York State Appellate Division, Second Department, in defending property owner against claim of landlord liability based upon the intentional shooting of tenant.
- Obtained favorable result on behalf of medical doctor before medical disciplinary board.
- Obtained favorable result from New York State Appellate Division, Second Department, reducing disciplinary sanctions imposed on practicing attorney.
- Obtained favorable resolution on behalf of numerous municipal employees based upon racial and ethnic discrimination against New York City Fire Department, Sanitation Department and Police Department.
- Acts as general outside corporate counsel to a substantial recycling business, provides ongoing oversight of all legal affairs of the company, including employment, regulatory, acquisitions, operating agreements, independent contractor agreements, and related matters.

Mr. Turro also coordinates the pro bono program at the Meyer, Suozzi firm. Under his supervision, the firm's pro bono program has become involved in a wide range of matters providing legal assistance to numerous local not-for-profit and charitable organizations (i.e., Island Harvest, the Long Island Arts in Education Roundtable, the Nassau County Museum of Art), legal organizations designed primarily to address the needs of persons of limited needs (i.e., Nassau/Suffolk Law Services Committee, Inc. and the Nassau County Coalition Against Domestic Violence), as well as individuals such as families and students with special education needs.In 2013, Mr. Turro was named an Access to Justice Champion by the Nassau County Bar Association for his dedication in providing legal representation on a pro bono basis.

From 2001 through 2012, Mr. Turro also served as a member and the Chairman of the Nassau County Board of Ethics, the Board that reviews and issues opinions on conflicts of interest and other ethical issues involving county workers. Mr. Turro also serves as a member of both the Nassau County Bar Association's Ethics Committee and Grievance Committee and previously served as Chief Assistant Counsel to the Governor's Judicial Screening Committee for the Second Department. From 1994 through 2014, Mr. Turro was also an adjunct member of the law faculty of New York Law School where he taught upper level appellate writing and advocacy courses.

Active in civic and community affairs and groups throughout the Long Island area, Mr. Turro has been a member of the Nassau/Suffolk Law Services' Executive Committee and Advisory Council. Mr. Turro also sits on the Advisory Board of Island Harvest. He previously served as a committee member of the Rockville Centre We Care Fund, as a Deputy Village Attorney to Rockville Centre, and as a coach in the Rockville Centre Soccer Club and the Rockville Centre Little League.

Before joining Meyer, Suozzi, English & Klein, P.C. in 1987, Mr. Turro served as an Assistant District Attorney in New York County and clerked for the United States Court of Appeals for the Fourth Circuit. At the Manhattan District Attorney's office, Mr. Turro split his time as a felony trial prosecutor and as a member of its Appeals Bureau. As an Assistant District Attorney, Mr. Turro was responsible for investigating and prosecuting felonies from grand jury presentation through verdict and for the briefing and oral argument of felony appeals in the state appellate courts and of federal habeas cases before the Second Circuit. At the District Attorney's office, Mr. Turro also headed the office's pro bono Appellate Program. During his tenure as a federal law clerk at the Fourth Circuit, Mr. Turro worked extensively reviewing civil rights claims arising under Section 1983 and Title VII, administrative determinations of federal agencies, and direct criminal appeals.

Mr. Turro is rated "AV Preeminent" by Martindale-Hubbell, the highest level in professional excellence. In 2016, Mr. Turro was named a "Top Ten Legal Eagle" from *Long Island Pulse Magazine* as one of the ten top attorneys on Long Island. Mr. Turro has also been the recipient of the Touro Law Center Pro Bono Attorney of the Year Award (2004) and of the Nassau/Suffolk Law Services' Partner in Justice Award. In 2014, Mr. Turro was named a finalist in *SmartCEO's* ESQ Awards for the Industry Practice: Equine and Racing Law.

*U.S. Equal Employment Opportunity Commission*

# Facts About the Americans with Disabilities Act

Title I of the Americans with Disabilities Act of 1990 prohibits private employers, state and local governments, employment agencies and labor unions from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. The ADA covers employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations. The ADA's nondiscrimination standards also apply to federal sector employees under section 501 of the Rehabilitation Act, as amended, and its implementing rules.

An individual with a disability is a person who:

- Has a physical or mental impairment that substantially limits one or more major life activities;
- Has a record of such an impairment; or
- Is regarded as having such an impairment.

A qualified employee or applicant with a disability is an individual who, with or without reasonable accommodation, can perform the essential functions of the job in question. Reasonable accommodation may include, but is not limited to:

- Making existing facilities used by employees readily accessible to and usable by persons with disabilities.
- Job restructuring, modifying work schedules, reassignment to a vacant position;
- Acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, and providing qualified readers or interpreters.

An employer is required to make a reasonable accommodation to the known disability of a qualified applicant or employee if it would not impose an "undue hardship" on the operation of the employer's business. Reasonable accommodations are adjustments or modifications provided by an employer to enable people with disabilities to enjoy equal employment opportunities. Accommodations vary depending upon the needs of the

individual applicant or employee. Not all people with disabilities (or even all people with the same disability) will require the same accommodation. For example:

- A deaf applicant may need a sign language interpreter during the job interview.
- An employee with diabetes may need regularly scheduled breaks during the workday to eat properly and monitor blood sugar and insulin levels.
- A blind employee may need someone to read information posted on a bulletin board.
- An employee with cancer may need leave to have radiation or chemotherapy treatments.

An employer does not have to provide a reasonable accommodation if it imposes an "undue hardship." Undue hardship is defined as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

An employer is not required to lower quality or production standards to make an accommodation; nor is an employer obligated to provide personal use items such as glasses or hearing aids.

An employer generally does not have to provide a reasonable accommodation unless an individual with a disability has asked for one. if an employer believes that a medical condition is causing a performance or conduct problem, it may ask the employee how to solve the problem and if the employee needs a reasonable accommodation. Once a reasonable accommodation is requested, the employer and the individual should discuss the individual's needs and identify the appropriate reasonable accommodation. Where more than one accommodation would work, the employer may choose the one that is less costly or that is easier to provide.

Title I of the ADA also covers:

- **Medical Examinations and Inquiries**
  Employers may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform specific job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in similar jobs. Medical examinations of employees must be job related and consistent with the employer's business needs.

Medical records are confidential. The basic rule is that with limited exceptions, employers must keep confidential any medical information they learn about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional. For example, an employee's request for a reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.

- **Drug and Alcohol Abuse**
  Employees and applicants currently engaging in the illegal use of drugs are not covered by the ADA when an employer acts on the basis of such use. Tests for illegal drugs are not subject to the ADA's restrictions on medical examinations. Employers may hold illegal drug users and alcoholics to the same performance standards as other employees.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on disability or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADA.

Federal Tax Incentives to Encourage the Employment of People with Disabilities and to Promote the Accessibility of Public Accommodations

The Internal Revenue Code includes several provisions aimed at making businesses more accessible to people with disabilities. The following provides general – non-legal – information about three of the most significant tax incentives. (Employers should check with their accountants or tax advisors to determine eligibility for these incentives or visit the Internal Revenue Service's website, www.irs.gov, for more information. Similar state and local tax incentives may be available.)

- **Small Business Tax Credit (Internal Revenue Code Section 44: Disabled Access Credit)**
  Small businesses with either $1,000,000 or less in revenue or 30 or fewer full-time employees may take a tax credit of up to $5,000 annually for the cost of providing reasonable accommodations such as sign language interpreters, readers, materials in alternative format (such as Braille or large print), the purchase of adaptive equipment, the modification of existing equipment, or the removal of architectural barriers.

- **Work Opportunity Tax Credit (Internal Revenue Code Section 51)**
  Employers who hire certain targeted low-income groups, including individuals referred from vocational rehabilitation agencies and individuals receiving Supplemental Security Income (SSI) may be eligible for an annual tax credit of up to $2,400 for each qualifying employee who works at least 400 hours during the tax year. Additionally, a maximum credit of $1,200 may be available for each qualifying summer youth employee.

- **Architectural/Transportation Tax Deduction (Internal Revenue Code Section 190 Barrier Removal):**
  This annual deduction of up to $15,000 is available to businesses of any size for the costs of removing barriers for people with disabilities, including the following: providing accessible parking spaces, ramps, and curb cuts; providing wheelchair-accessible telephones, water fountains, and restrooms; making walkways at least 48 inches wide; and making entrances accessible.

U.S. Equal Employment Opportunity Commission

FACT SHEET

# Age Discrimination

The Age Discrimination in Employment Act of 1967 (ADEA) protects individuals who are 40 years of age or older from employment discrimination based on age. The ADEA's protections apply to both employees and job applicants. Under the ADEA, it is unlawful to discriminate against a person because of his/her age with respect to any term, condition, or privilege of employment, including hiring, firing, promotion, layoff, compensation, benefits, job assignments, and training. The ADEA permits employers to favor older workers based on age even when doing so adversely affects a younger worker who is 40 or older.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on age or for filing an age discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under the ADEA.

The ADEA applies to employers with 20 or more employees, including state and local governments. It also applies to employment agencies and labor organizations, as well as to the federal government. ADEA protections include:

## ■ Apprenticeship Programs

It is generally unlawful for apprenticeship programs, including joint labor-management apprenticeship programs, to discriminate on the basis of an individual's age. Age limitations in apprenticeship programs are valid only if they fall within certain specific exceptions under the ADEA or if the EEOC grants a specific exemption.

## ■ Job Notices and Advertisements

The ADEA generally makes it unlawful to include age preferences, limitations, or specifications in job notices or advertisements. A job notice or advertisement may specify an age limit only in the rare circumstances where age is shown to be a "bona fide occupational qualification" (BFOQ) reasonably necessary to the normal operation of the business.

## ■ Pre-Employment Inquiries

The ADEA does not specifically prohibit an employer from asking an applicant's age or date of birth. However, because such inquiries may deter older workers from applying for employment or may otherwise indicate possible intent to discriminate based on age, requests for age information will be closely scrutinized to make sure that the inquiry was made for a lawful purpose, rather than for a purpose prohibited by the ADEA. If the information is needed for a lawful purpose, it can be obtained after the employee is hired.

FIND THIS ARTICLE ON THE WEB AT:
Facts About Age Discrimination FSE/9
http://www.eeoc.gov/eeoc/publications/age.cfm

SEE ALSO:
Filing a Charge of Discrimination
http://www.eeoc.gov/employees/charge.cfm

## Benefits

The Older Workers Benefit Protection Act of 1990 (OWBPA) amended the ADEA to specifically prohibit employers from denying benefits to older employees. Congress recognized that the cost of providing certain benefits to older workers is greater than the cost of providing those same benefits to younger workers, and that those greater costs might create a disincentive to hire older workers. Therefore, in limited circumstances, an employer may be permitted to reduce benefits based on age, as long as the cost of providing the reduced benefits to older workers is no less than the cost of providing benefits to younger workers.
Employers are permitted to coordinate retiree health benefit plans with eligibility for Medicare or a comparable state-sponsored health benefit.

## Waivers of ADEA Rights

An employer may ask an employee to waive his/her rights or claims under the ADEA. Such waivers are common in settling ADEA discrimination claims or in connection with exit incentive or other employment termination programs. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

- be in writing and be understandable;
- specifically refer to ADEA rights or claims;
- not waive rights or claims that may arise in the future;
- be in exchange for valuable consideration in addition to anything of value to which the individual already is entitled;
- advise the individual in writing to consult an attorney before signing the waiver; and
- provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.

If an employer requests an ADEA waiver in connection with an exit incentive or other employment termination program, the minimum requirements for a valid waiver are more extensive. *See* Understanding Waivers of Discrimination Claims in Employee Severance Agreements" at *http://www.eeoc.gov/policy/docs/qanda_severance-agreements.html*

*The U.S. Equal Employment Opportunity Commission*

# Federal Laws Prohibiting Job Discrimination Questions And Answers

## Federal Equal Employment Opportunity (EEO) Laws

### I. What Are the Federal Laws Prohibiting Job Discrimination?

- Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin;
- the Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
- the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are 40 years of age or older;
- Title I and Title V of the Americans with Disabilities Act of 1990, as amended (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;
- Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government;
- Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits employment discrimination based on genetic information about an applicant, employee, or former employee; and
- the Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination.

The U.S. Equal Employment Opportunity Commission (EEOC) enforces all of these laws. EEOC also provides oversight and coordination of all federal equal employment opportunity regulations, practices, and policies.

Other federal laws, not enforced by EEOC, also prohibit discrimination and reprisal against federal employees and applicants. The Civil Service Reform Act of 1978 (CSRA) contains a number of prohibitions, known as prohibited personnel practices, which are designed to promote overall fairness in federal personnel actions. 5 U.S.C. 2302. The CSRA prohibits any employee who has authority to take certain personnel actions from discriminating for or against employees or applicants for employment on the bases of race, color, national origin, religion, sex, age or disability. It also provides that certain personnel actions can not be based on attributes or conduct that do not adversely affect employee performance, such as marital status and political affiliation. The Office of Personnel Management (OPM) has interpreted the prohibition of discrimination based on conduct to include discrimination based on sexual orientation. The CSRA also prohibits reprisal against federal employees or applicants for whistle-blowing, or for exercising an appeal, complaint, or grievance right. The CSRA is enforced by both the Office of Special Counsel (OSC) and the Merit Systems Protection Board (MSPB).

*Additional information about the enforcement of the CSRA may be found on the OPM web site at http://www.opm.gov/er/address2/guide01.htm; from OSC at (202) 653-7188 or at http://www.osc.gov/; and from MSPB at (202) 653-6772 or at http://www.mspb.gov/ .*

## Discriminatory Practices

### II. What Discriminatory Practices Are Prohibited by These Laws? Under Title VII, the ADA, GINA, and the ADEA, it is illegal to discriminate in any aspect of employment, including:

- hiring and firing;
- compensation, assignment, or classification of employees;
- transfer, promotion, layoff, or recall;
- job advertisements;
- recruitment;
- testing;
- use of company facilities;
- training and apprenticeship programs;
- fringe benefits;
- pay, retirement plans, and disability leave; or
- other terms and conditions of employment.

Discriminatory practices under these laws also include:

- harassment on the basis of race, color, religion, sex, national origin, disability, genetic information, or age;
- retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices;
- employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities, or based on myths or assumptions about an individual's genetic information; and
- denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

Employers are required to post notices to all employees advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

*Note: Many states and municipalities also have enacted protections against discrimination and harassment based on sexual orientation, status as a parent, marital status and political affiliation. For information, please contact the EEOC District Office nearest you.*

### III. What Other Practices Are Discriminatory Under These Laws?

**Title VII**

Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating against individuals because of their race, color, national origin, religion, or sex.

**National Origin Discrimination**

- It is illegal to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group.
- A rule requiring that employees speak only English on the job may violate Title VII unless an employer shows that the requirement is necessary for conducting business. If the employer believes such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule.

The Immigration Reform and Control Act (IRCA) of 1986 requires employers to assure that employees hired are legally authorized to work in the U.S. However, an employer who requests employment verification only for individuals of a particular national origin, or individuals who appear to be or sound foreign, may violate both Title VII and IRCA; verification must be obtained from all applicants and employees. Employers who impose citizenship requirements or give preferences to U.S. citizens in hiring or employment opportunities also may violate IRCA.

*Additional information about IRCA may be obtained from the Office of Special Counsel for Immigration-Related Unfair Employment Practices at 1-800-255-7688 (voice), 1-800-237-2515 (TTY for employees/applicants) or 1-800-362-2735 (TTY for employers) or at [http://www.usdoj.gov/crt/osc](http://www.usdoj.gov/crt/osc).*

**Religious Accommodation**

- An employer is required to reasonably accommodate the religious belief of an employee or prospective employee, unless doing so would impose an undue hardship.

**Sex Discrimination**

Title VII's broad prohibitions against sex discrimination specifically cover:

- Sexual Harassment - This includes practices ranging from direct requests for sexual favors to workplace conditions that create a hostile environment for persons of either gender, including same sex harassment. (The "hostile environment" standard also applies to harassment on the bases of race, color, national origin, religion, age, and disability.)
- Pregnancy Based Discrimination - Pregnancy, childbirth, and related medical conditions must be treated in the same way as other temporary illnesses or conditions.

*Additional rights are available to parents and others under the Family and Medical Leave Act (FMLA), which is enforced by the U.S. Department of Labor. For information on the FMLA, or to file an FMLA complaint, individuals should contact the nearest office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. The Wage and Hour Division is listed in most telephone directories under U.S. Government, Department of Labor or at [http://www.dol.gov/esa/public/whd_org.htm](http://www.dol.gov/esa/public/whd_org.htm).*

**Age Discrimination in Employment Act**

The ADEA's broad ban against age discrimination also specifically prohibits:

- statements or specifications in job notices or advertisements of age preference and limitations. An age limit may only be specified in the rare circumstance where age has been proven to be a bona fide occupational qualification (BFOQ);
- discrimination on the basis of age by apprenticeship programs, including joint labor-management apprenticeship programs; and
- denial of benefits to older employees. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

**Equal Pay Act**

The EPA prohibits discrimination on the basis of sex in the payment of wages or benefits, where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions.

Note that:

- Employers may not reduce wages of either sex to equalize pay between men and women.
- A violation of the EPA may occur where a different wage was/is paid to a person who worked in the same job before or after an employee of the opposite sex.
- A violation may also occur where a labor union causes the employer to violate the law.

**Titles I and V of the Americans with Disabilities Act, as amended**

The ADA prohibits discrimination on the basis of disability in all employment practices. It is necessary to understand several important ADA definitions to know who is protected by the law and what constitutes illegal discrimination:

Individual with a Disability

An individual with a disability under the ADA is a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having a disability. An entity subject to the ADA regards someone as having a disability when it takes an action prohibited by the ADA based on an actual or perceived impairment, except if the impairment is both transitory (lasting or expected to last six months or less) and minor. Major life activities are basic activities that most people in the general population can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, learning, thinking, and eating. Major life activities also include the operation of a major bodily function, such as functions of the immune system normal cell growth, brain, neurological, and endocrine functions.

"Qualified"

An individual with a disability is "qualified" if he or she satisfies skill, experience, education, and other job-related requirements of the position held or desired, and who, with or without reasonable accommodation, can perform the essential functions of that position.

Reasonable Accommodation

Reasonable accommodation may include, but is not limited to, making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring; modification of work schedules; providing additional unpaid leave; reassignment to a vacant position; acquiring or modifying equipment or devices; adjusting or modifying examinations, training materials, or policies; and providing qualified readers

or interpreters. Reasonable accommodation may be necessary to apply for a job, to perform job functions, or to enjoy the benefits and privileges of employment that are enjoyed by people without disabilities. An employer is not required to lower production standards to make an accommodation. An employer generally is not obligated to provide personal use items such as eyeglasses or hearing aids. A person who only meets the "regarded as" definition of disability is not entitled to receive a reasonable accommodation.

Undue Hardship

An employer is required to make a reasonable accommodation to a qualified individual with a disability unless doing so would impose an undue hardship on the operation of the employer's business. Undue hardship means an action that requires significant difficulty or expense when considered in relation to factors such as a business' size, financial resources, and the nature and structure of its operation.

Prohibited Inquiries and Examinations

Before making an offer of employment, an employer may not ask job applicants about the existence, nature, or severity of a disability. Applicants may be asked about their ability to perform job functions. A job offer may be conditioned on the results of a medical examination, but only if the examination is required for all entering employees in the same job category. Medical examinations of employees must be job-related and consistent with business necessity.

Drug and Alcohol Use

Employees and applicants currently engaging in the illegal use of drugs are not protected by the ADA when an employer acts on the basis of such use. Tests for illegal use of drugs are not considered medical examinations and, therefore, are not subject to the ADA's restrictions on medical examinations. Employers may hold individuals who are illegally using drugs and individuals with alcoholism to the same standards of performance as other employees.

**The Civil Rights Act of 1991**

The Civil Rights Act of 1991 made major changes in the federal laws against employment discrimination enforced by EEOC. Enacted in part to reverse several Supreme Court decisions that limited the rights of persons protected by these laws, the Act also provides additional protections. The Act authorizes compensatory and punitive damages in cases of intentional discrimination, and provides for obtaining attorneys' fees and the possibility of jury trials. It also directs the EEOC to expand its technical assistance and outreach activities.

**Title II of the Genetic Information Nondiscrimination Act of 2008**

GINA prohibits discrimination against applicants, employees, and former employees on the basis of genetic information. This includes a prohibition on the use of genetic information in all employment decisions; restrictions on the ability of employers and other covered entities to request or to acquire genetic information, with limited exceptions; and a requirement to maintain the confidentiality of any genetic information acquired, with limited exceptions.

## Employers And Other Entities Covered By EEO Laws

### IV. Which Employers and Other Entities Are Covered by These Laws?

Title VII, the ADA, and GINA cover all private employers, state and local governments, and education institutions that employ 15 or more individuals. These laws also cover private and public employment agencies, labor organizations, and joint labor management committees

controlling apprenticeship and training.

The ADEA covers all private employers with 20 or more employees, state and local governments (including school districts), employment agencies and labor organizations.

The EPA covers all employers who are covered by the Federal Wage and Hour Law (the Fair Labor Standards Act). Virtually all employers are subject to the provisions of this Act.

Title VII, the ADEA, GINA, and the EPA also cover the federal government. In addition, the federal government is covered by Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, which incorporate the requirements of the ADA. However, different procedures are used for processing complaints of federal discrimination. For more information on how to file a complaint of federal discrimination, contact the EEO office of the federal agency where the alleged discrimination occurred.

The CSRA (not enforced by EEOC) covers most federal agency employees except employees of a government corporation, the Federal Bureau of Investigation, the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and as determined by the President, any executive agency or unit thereof, the principal function of which is the conduct of foreign intelligence or counterintelligence activities, or the General Accounting Office.

## The EEOC'S Charge Processing Procedures

Federal employees or applicants for employment should see the fact sheet about Federal Sector Equal Employment Opportunity Complaint Processing.

### V. Who Can File a Charge of Discrimination?

- Any individual who believes that his or her employment rights have been violated may file a charge of discrimination with EEOC.
- In addition, an individual, organization, or agency may file a charge on behalf of another person in order to protect the aggrieved person's identity.

### VI. How Is a Charge of Discrimination Filed?

- A charge may be filed by mail or in person at the nearest EEOC office. Individuals may consult their local telephone directory (U.S. Government listing) or call 1-800-669-4000 (voice) or 1-800-669-6820 (TTY) to contact the nearest EEOC office for more information on specific procedures for filing a charge.
- Individuals who need an accommodation in order to file a charge (e.g., sign language interpreter, print materials in an accessible format) should inform the EEOC field office so appropriate arrangements can be made.
- Federal employees or applicants for employment should see the fact sheet about Federal Sector Equal Employment Opportunity Complaint Processing.

### VII. What Information Must Be Provided to File a Charge?

- The complaining party's name, address, and telephone number;

- The name, address, and telephone number of the respondent employer, employment agency, or union that is alleged to have discriminated, and number of employees (or union members), if known;
- A short description of the alleged violation (the event that caused the complaining party to believe that his or her rights were violated); and
- The date(s) of the alleged violation(s).
- Federal employees or applicants for employment should see the fact sheet about Federal Sector Equal Employment Opportunity Complaint Processing.

## VIII. What Are the Time Limits for Filing a Charge of Discrimination?

All laws enforced by EEOC, except the Equal Pay Act, require filing a charge with EEOC before a private lawsuit may be filed in court. There are strict time limits within which charges must be filed:

- A charge must be filed with EEOC within 180 days from the date of the alleged violation, in order to protect the charging party's rights.
- This 180-day filing deadline is extended to 300 days if the charge also is covered by a state or local anti-discrimination law. For ADEA charges, only state laws extend the filing limit to 300 days.
- These time limits do not apply to claims under the Equal Pay Act, because under that Act persons do not have to first file a charge with EEOC in order to have the right to go to court. However, since many EPA claims also raise Title VII sex discrimination issues, it may be advisable to file charges under both laws within the time limits indicated.
- To protect legal rights, it is always best to contact EEOC promptly when discrimination is suspected.
- Federal employees or applicants for employment should see the fact sheet about Federal Sector Equal Employment Opportunity Complaint Processing.

## IX. What Agency Handles a Charge that is also Covered by State or Local Law?

Many states and localities have anti-discrimination laws and agencies responsible for enforcing those laws. EEOC refers to these agencies as "Fair Employment Practices Agencies (FEPAs)." Through the use of "work sharing agreements," EEOC and the FEPAs avoid duplication of effort while at the same time ensuring that a charging party's rights are protected under both federal and state law.

- If a charge is filed with a FEPA and is also covered by federal law, the FEPA "dual files" the charge with EEOC to protect federal rights. The charge usually will be retained by the FEPA for handling.
- If a charge is filed with EEOC and also is covered by state or local law, EEOC "dual files" the charge with the state or local FEPA, but ordinarily retains the charge for handling.

## X. What Happens after a Charge is Filed with EEOC?

The employer is notified that the charge has been filed. From this point there are a number of ways a charge may be handled:

- A charge may be assigned for priority investigation if the initial facts appear to support a violation of law. When the evidence is less strong,

the charge may be assigned for follow up investigation to determine whether it is likely that a violation has occurred.

- EEOC can seek to settle a charge at any stage of the investigation if the charging party and the employer express an interest in doing so. If settlement efforts are not successful, the investigation continues.
- In investigating a charge, EEOC may make written requests for information, interview people, review documents, and, as needed, visit the facility where the alleged discrimination occurred. When the investigation is complete, EEOC will discuss the evidence with the charging party or employer, as appropriate.
- The charge may be selected for EEOC's mediation program if both the charging party and the employer express an interest in this option. Mediation is offered as an alternative to a lengthy investigation. Participation in the mediation program is confidential, voluntary, and requires consent from both charging party and employer. If mediation is unsuccessful, the charge is returned for investigation.
- A charge may be dismissed at any point if, in the agency's best judgment, further investigation will not establish a violation of the law. A charge may be dismissed at the time it is filed, if an initial in-depth interview does not produce evidence to support the claim. When a charge is dismissed, a notice is issued in accordance with the law which gives the charging party 90 days in which to file a lawsuit on his or her own behalf.
- Federal employees or applicants for employment should see the fact sheet about Federal Sector Equal Employment Opportunity Complaint Processing.

## XI. How Does EEOC Resolve Discrimination Charges?

- If the evidence obtained in an investigation does not establish that discrimination occurred, this will be explained to the charging party. A required notice is then issued, closing the case and giving the charging party 90 days in which to file a lawsuit on his or her own behalf.
- If the evidence establishes that discrimination has occurred, the employer and the charging party will be informed of this in a letter of determination that explains the finding. EEOC will then attempt conciliation with the employer to develop a remedy for the discrimination.
- If the case is successfully conciliated, or if a case has earlier been successfully mediated or settled, neither EEOC nor the charging party may go to court unless the conciliation, mediation, or settlement agreement is not honored.
- If EEOC is unable to successfully conciliate the case, the agency will decide whether to bring suit in federal court. If EEOC decides not to sue, it will issue a notice closing the case and giving the charging party 90 days in which to file a lawsuit on his or her own behalf. In Title VII and ADA cases against state or local governments, the Department of Justice takes these actions.
- Federal employees or applicants for employment should see the fact sheet about Federal Sector Equal Employment Opportunity Complaint Processing.

## XII. When Can an Individual File an Employment Discrimination Lawsuit in Court?

A charging party may file a lawsuit within 90 days after receiving a notice of a "right to sue" from EEOC, as stated above. Under Title VII, the ADA, and GINA, a charging party also can request a notice of "right to sue" from EEOC 180 days after the charge was first filed with the Commission, and may then bring suit within 90 days after receiving this notice. Under the ADEA, a suit may be filed at any time 60 days after filing a charge with EEOC, but not later than 90 days after EEOC gives notice that it has completed action on the charge.

Under the EPA, a lawsuit must be filed within two years (three years for willful violations) of the discriminatory act, which in most cases is

payment of a discriminatory lower wage.

Federal employees or applicants for employment should see the fact sheet about Federal Sector Equal Employment Opportunity Complaint Processing.

### XIII. What Remedies Are Available When Discrimination Is Found?

The "relief" or remedies available for employment discrimination, whether caused by intentional acts or by practices that have a discriminatory effect, may include:

- back pay,
- hiring,
- promotion,
- reinstatement,
- front pay,
- reasonable accommodation, or
- other actions that will make an individual "whole" (in the condition s/he would have been but for the discrimination).

Remedies also may include payment of:

- attorneys' fees,
- expert witness fees, and
- court costs.

Under most EEOC-enforced laws, compensatory and punitive damages also may be available where intentional discrimination is found. Damages may be available to compensate for actual monetary losses, for future monetary losses, and for mental anguish and inconvenience. Punitive damages also may be available if an employer acted with malice or reckless indifference. Punitive damages are not available against the federal, state or local governments.

In cases concerning reasonable accommodation under the ADA, compensatory or punitive damages may not be awarded to the charging party if an employer can demonstrate that "good faith" efforts were made to provide reasonable accommodation.

An employer may be required to post notices to all employees addressing the violations of a specific charge and advising them of their rights under the laws EEOC enforces and their right to be free from retaliation. Such notices must be accessible, as needed, to persons with visual or other disabilities that affect reading.

The employer also may be required to take corrective or preventive actions to cure the source of the identified discrimination and minimize the chance of its recurrence, as well as discontinue the specific discriminatory practices involved in the case.

## The Commission

### XIV. What Is EEOC and How Does It Operate?

EEOC is an independent federal agency originally created by Congress in 1964 to enforce Title VII of the Civil Rights Act of 1964. The Commission is composed of five Commissioners and a General Counsel appointed by the President and confirmed by the Senate. Commissioners are appointed for five-year staggered terms; the General Counsel's term is four years. The President designates a Chair and a Vice-Chair. The Chair is the chief executive officer of the Commission. The Commission has authority to establish equal employment policy and to approve litigation. The General Counsel is responsible for conducting litigation.

EEOC carries out its enforcement, education and technical assistance activities through 53 field offices serving every part of the nation.

The nearest EEOC field office may be contacted by calling: 1-800-669-4000 (voice) or 1-800-669-6820 (TTY).

## Information And Assistance Available From EEOC

### XV. What Information and Other Assistance Is Available from EEOC?

EEOC provides a range of informational materials and assistance to individuals and entities with rights and responsibilities under EEOC-enforced laws. Most materials and assistance are provided to the public at no cost. Additional specialized training and technical assistance are provided on a fee basis under the auspices of the EEOC Education, Technical Assistance, and Training Revolving Fund Act of 1992. For information on educational and other assistance available, contact the nearest EEOC office by calling: 1-800-669-4000 (voice) or 1-800-669-6820 (TTY).

The EEOC has a number of fact sheets and other publications available free of charge. These may be downloaded from the Publications page.

Information about EEOC and the laws it enforces also can be found at the following internet address: http://www.eeoc.gov.

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*This page was last modified on November 21, 2009.*

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# Facts About Race/Color Discrimination

Title VII of the Civil Rights Act of 1964 protects individuals against employment discrimination on the basis of race and color as well as national origin, sex, or religion.

It is unlawful to discriminate against any employee or applicant for employment because of race or color in regard to hiring, termination, promotion, compensation, job training, or any other term, condition, or privilege of employment. Title VII also prohibits employment decisions based on stereotypes and assumptions about abilities, traits, or the performance of individuals of certain racial groups.

Title VII prohibits both intentional discrimination and neutral job policies that disproportionately exclude minorities and that are not job related.

Equal employment opportunity cannot be denied because of marriage to or association with an individual of a different race; membership in or association with ethnic based organizations or groups; attendance or participation in schools or places of worship generally associated with certain minority groups; or other cultural practices or characteristics often linked to race or ethnicity, such as cultural dress or manner of speech, as long as the cultural practice or characteristic does not materially interfere with the ability to perform job duties.

**Race-Related Characteristics and Conditions**

Discrimination on the basis of an immutable characteristic associated with race, such as skin color, hair texture, or certain facial features violates Title VII, even though not all members of the race share the same characteristic.

Title VII also prohibits discrimination on the basis of a condition which predominantly affects one race unless the practice is job related and consistent with business necessity. For example, since sickle cell anemia predominantly occurs in African-Americans, a policy which excludes individuals with sickle cell anemia is discriminatory unless the policy is job related and consistent with business necessity. Similarly, a "no-beard" employment policy may discriminate against African-American men who have a predisposition to pseudofolliculitis barbae (severe shaving bumps) unless the policy is job-related and consistent with business necessity.

**Color Discrimination**

Even though race and color clearly overlap, they are not synonymous. Thus, color discrimination can occur between persons of different races or ethnicities, or between persons of the same race or ethnicity. Although Title VII does not define "color," the courts and the Commission read "color" to have its commonly understood meaning – pigmentation, complexion, or skin shade or tone. Thus, color discrimination occurs when a person is discriminated against based on the lightness, darkness, or other color characteristic of the person. Title VII prohibits race/color discrimination against all persons, including Caucasians.

Although a plaintiff may prove a claim of discrimination through direct or circumstantial evidence, some courts take the position that if a white person relies on circumstantial evidence to establish a reverse discrimination claim, he or she must meet a heightened standard of proof. The Commission, in contrast, applies the same standard of proof to all race discrimination claims, regardless of the victim's race or the type of evidence used. In either case, the ultimate burden of persuasion remains always on the plaintiff.

Employers should adopt "best practices" to reduce the likelihood of discrimination and to address impediments to equal employment opportunity.

Title VII's protections include:

- **Recruiting, Hiring, and Advancement**
  Job requirements must be uniformly and consistently applied to persons of all races and colors. Even if a job requirement is applied consistently, if it is not important for job performance or business needs, the requirement may be found unlawful if it excludes persons of a certain racial group or color significantly more than others. Examples of potentially unlawful practices include: (1) soliciting applications only from sources in which all or most potential workers are of the same race or color; (2) requiring applicants to have a certain educational background that is not important for job performance or business needs; (3) testing applicants for knowledge, skills or abilities that are not important for job performance or business needs.

  Employers may legitimately need information about their employees or applicants race for affirmative action purposes and/or to track applicant flow. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use separate forms or otherwise keep the information about an

applicant's race separate from the application. In that way, the employer can capture the information it needs but ensure that it is not used in the selection decision.

Unless the information is for such a legitimate purpose, pre-employment questions about race can suggest that race will be used as a basis for making selection decisions. If the information is used in the selection decision and members of particular racial groups are excluded from employment, the inquiries can constitute evidence of discrimination.

- **Compensation and Other Employment Terms, Conditions, and Privileges**
  Title VII prohibits discrimination in compensation and other terms, conditions, and privileges of employment. Thus, race or color discrimination may not be the basis for differences in pay or benefits, work assignments, performance evaluations, training, discipline or discharge, or any other area of employment.

- **Harassment**
  Harassment on the basis of race and/or color violates Title VII. Ethnic slurs, racial "jokes," offensive or derogatory comments, or other verbal or physical conduct based on an individual's race/color constitutes unlawful harassment if the conduct creates an intimidating, hostile, or offensive working environment, or interferes with the individual's work performance.

- **Retaliation**
  Employees have a right to be free from retaliation for their opposition to discrimination or their participation in an EEOC proceeding by filing a charge, testifying, assisting, or otherwise participating in an agency proceeding.

- **Segregation and Classification of Employees**
  Title VII is violated where minority employees are segregated by physically isolating them from other employees or from customer contact. Title VII also prohibits assigning primarily minorities to predominantly minority establishments or geographic areas. It is also illegal to exclude minorities from certain positions or to group or categorize employees or jobs so that certain jobs are generally held by minorities. Title VII also does not permit racially motivated decisions driven by business concerns – for example, concerns about the effect on employee relations, or the negative reaction of clients or customers. Nor may race or color ever be a bona fide occupational qualification under Title VII.

  Coding applications/resumes to designate an applicant's race, by either an employer or employment agency, constitutes evidence of discrimination where minorities are

excluded from employment or from certain positions. Such discriminatory coding includes the use of facially benign code terms that implicate race, for example, by area codes where many racial minorities may or are presumed to live.

- **Pre-Employment Inquiries and Requirements**
  Requesting pre-employment information which discloses or tends to disclose an applicant's race suggests that race will be unlawfully used as a basis for hiring. Solicitation of such pre-employment information is presumed to be used as a basis for making selection decisions. Therefore, if members of minority groups are excluded from employment, the request for such pre-employment information would likely constitute evidence of discrimination.

  However, employers may legitimately need information about their employees' or applicants' race for affirmative action purposes and/or to track applicant flow. One way to obtain racial information and simultaneously guard against discriminatory selection is for employers to use "tear-off sheets" for the identification of an applicant's race. After the applicant completes the application and the tear-off portion, the employer separates the tear-off sheet from the application and does not use it in the selection process.

  Other pre-employment information requests which disclose or tend to disclose an applicant's race are personal background checks, such as criminal history checks. Title VII does not categorically prohibit employers' use of criminal records as a basis for making employment decisions. Using criminal records as an employment screen may be lawful, legitimate, and even mandated in certain circumstances. However, employers that use criminal records to screen for employment must comply with Title VII's nondiscrimination requirements.

U.S. Equal Employment Opportunity Commission

# FACT SHEET

## Religious Discrimination

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against individuals because of their religion in hiring, firing, and other terms and conditions of employment. The Act also requires employers to reasonably accommodate the religious practices of an employee or prospective employee, unless to do so would create an undue hardship upon the employer (see also 29 CFR l605). A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to practice his religion. Flexible scheduling, voluntary substitutions or swaps, job reassignments and lateral transfers are examples of accommodating an employee's religious beliefs.

Employers generally should not schedule examinations or other selection activities in conflict with a current or prospective employee's religious needs, inquire about an applicant's future availability at certain times, maintain a restrictive dress code, or refuse to allow observance of a Sabbath or religious holiday, unless the employer can show that not doing so would cause an undue hardship.

An employer can claim undue hardship when asked to accommodate an applicant's or employee's religious practices if allowing such practices requires more than ordinary administrative costs, diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work, or if the proposed accommodation conflicts with another law or regulation. Undue hardship also may be shown if the request for an accommodation violates the terms of a collective bargaining agreement or job rights established through a seniority system.

An employee whose religious practices prohibit payment of union dues to a labor organization cannot be required to pay the dues, but may pay an equal sum to a charitable organization.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on religion or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

FIND THIS ARTICLE ON THE WEB AT:

Facts About Religious Discrimination FSE/3
http://www.eeoc.gov/eeoc/publications/index.cfm

SEE ALSO:

Filing a Charge of Discrimination
http://www.eeoc.gov/employees/charge.cfm

# Equal Employment Opportunity is

# THE LAW

## Private Employers, State and Local Governments, Educational Institutions, Employment Agencies and Labor Organizations

Applicants to and employees of most private employers, state and local governments, educational institutions, employment agencies and labor organizations are protected under Federal law from discrimination on the following bases:

### RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN

Title VII of the Civil Rights Act of 1964, as amended, protects applicants and employees from discrimination in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment, on the basis of race, color, religion, sex (including pregnancy), or national origin. Religious discrimination includes failing to reasonably accommodate an employee's religious practices where the accommodation does not impose undue hardship.

### DISABILITY

Title I and Title V of the Americans with Disabilities Act of 1990, as amended, protect qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, barring undue hardship.

### AGE

The Age Discrimination in Employment Act of 1967, as amended, protects applicants and employees 40 years of age or older from discrimination based on age in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment.

### SEX (WAGES)

In addition to sex discrimination prohibited by Title VII of the Civil Rights Act, as amended, the Equal Pay Act of 1963, as amended, prohibits sex discrimination in the payment of wages to women and men performing substantially equal work, in jobs that require equal skill, effort, and responsibility, under similar working conditions, in the same establishment.

### GENETICS

Title II of the Genetic Information Nondiscrimination Act of 2008 protects applicants and employees from discrimination based on genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers' acquisition of genetic information and strictly limits disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.

### RETALIATION

All of these Federal laws prohibit covered entities from retaliating against a person who files a charge of discrimination, participates in a discrimination proceeding, or otherwise opposes an unlawful employment practice.

### WHAT TO DO IF YOU BELIEVE DISCRIMINATION HAS OCCURRED

There are strict time limits for filing charges of employment discrimination. To preserve the ability of EEOC to act on your behalf and to protect your right to file a private lawsuit, should you ultimately need to, you should contact EEOC promptly when discrimination is suspected:

The U.S. Equal Employment Opportunity Commission (EEOC), 1-800-669-4000 (toll-free) or 1-800-669-6820 (toll-free TTY number for individuals with hearing impairments). EEOC field office information is available at www.eeoc.gov or in most telephone directories in the U.S. Government or Federal Government section. Additional information about EEOC, including information about charge filing, is available at www.eeoc.gov.

## Employers Holding Federal Contracts or Subcontracts

Applicants to and employees of companies with a Federal government contract or subcontract are protected under Federal law from discrimination on the following bases:

### RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN

Executive Order 11246, as amended, prohibits job discrimination on the basis of race, color, religion, sex or national origin, and requires affirmative action to ensure equality of opportunity in all aspects of employment.

### INDIVIDUALS WITH DISABILITIES

Section 503 of the Rehabilitation Act of 1973, as amended, protects qualified individuals from discrimination on the basis of disability in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. Disability discrimination includes not making reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, barring undue hardship. Section 503 also requires that Federal contractors take affirmative action to employ and advance in employment qualified individuals with disabilities at all levels of employment, including the executive level.

### DISABLED, RECENTLY SEPARATED, OTHER PROTECTED, AND ARMED FORCES SERVICE MEDAL VETERANS

The Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212, prohibits job discrimination and requires affirmative action to employ and advance in employment disabled veterans, recently separated veterans (within three years of discharge or release from active duty), other protected veterans (veterans who served during a war or in a campaign or expedition for which a campaign badge has been authorized), and Armed Forces service medal veterans (veterans who, while on active duty, participated in a U.S. military operation for which an Armed Forces service medal was awarded).

### RETALIATION

Retaliation is prohibited against a person who files a complaint of discrimination, participates in an OFCCP proceeding, or otherwise opposes discrimination under these Federal laws.

Any person who believes a contractor has violated its nondiscrimination or affirmative action obligations under the authorities above should contact immediately:

The Office of Federal Contract Compliance Programs (OFCCP), U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210, 1-800-397-6251 (toll-free) or (202) 693-1337 (TTY). OFCCP may also be contacted by e-mail at OFCCP-Public@dol.gov, or by calling an OFCCP regional or district office, listed in most telephone directories under U.S. Government, Department of Labor.

## Programs or Activities Receiving Federal Financial Assistance

### RACE, COLOR, NATIONAL ORIGIN, SEX

In addition to the protections of Title VII of the Civil Rights Act of 1964, as amended, Title VI of the Civil Rights Act of 1964, as amended, prohibits discrimination on the basis of race, color or national origin in programs or activities receiving Federal financial assistance. Employment discrimination is covered by Title VI if the primary objective of the financial assistance is provision of employment, or where employment discrimination causes or may cause discrimination in providing services under such programs. Title IX of the Education Amendments of 1972 prohibits employment discrimination on the basis of sex in educational programs or activities which receive Federal financial assistance.

### INDIVIDUALS WITH DISABILITIES

Section 504 of the Rehabilitation Act of 1973, as amended, prohibits employment discrimination on the basis of disability in any program or activity which receives Federal financial assistance. Discrimination is prohibited in all aspects of employment against persons with disabilities who, with or without reasonable accommodation, can perform the essential functions of the job.

If you believe you have been discriminated against in a program of any institution which receives Federal financial assistance, you should immediately contact the Federal agency providing such assistance.

U.S. Equal Employment Opportunity Commission

# FACT SHEET

## Sexual Harassment

Sexual harassment is a form of sex discrimination that violates Title VII of the Civil Rights Act of 1964. Title VII applies to employers with 15 or more employees, including state and local governments. It also applies to employment agencies and to labor organizations, as well as to the federal government.

Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when this conduct explicitly or implicitly affects an individual's employment, unreasonably interferes with an individual's work performance, or creates an intimidating, hostile, or offensive work environment.

Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

- The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
- The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
- The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
- Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
- The harasser's conduct must be unwelcome.

It is helpful for the victim to inform the harasser directly that the conduct is unwelcome and must stop. The victim should use any employer complaint mechanism or grievance system available.

When investigating allegations of sexual harassment, EEOC looks at the whole record: the circumstances, such as the nature of the sexual advances, and the context in which the alleged incidents occurred. A determination on the allegations is made from the facts on a case-by-case basis.

Prevention is the best tool to eliminate sexual harassment in the workplace. Employers are encouraged to take steps necessary to prevent sexual harassment from occurring. They should clearly communicate to employees that sexual harassment will not be tolerated. They can do so by providing sexual harassment training to their employees and by establishing an effective complaint or grievance process and taking immediate and appropriate action when an employee complains.

It is also unlawful to retaliate against an individual for opposing employment practices that discriminate based on sex or for filing a discrimination charge, testifying, or participating in any way in an investigation, proceeding, or litigation under Title VII.

FIND THIS ARTICLE ON THE WEB AT:
Facts About Sexual Harassment FSE/4
http://www.eeoc.gov/facts/fs-sex.html

SEE ALSO:
Filing a Charge of Discrimination
http://www.eeoc.gov/employees/charge.cfm

U.S. Department of Labor
Wage and Hour Division

U.S. Wage and Hour Division
(Revised May 2014)

# Fact Sheet #13: Am I an Employee?: Employment Relationship Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information concerning the meaning of "employment relationship" and the significance of that determination in applying provisions of the Fair Labor Standards Act (FLSA).

## Determining Whether an Employment Relationship Exists: Is a Worker an Employee or Independent Contractor?

In order for the FLSA's minimum wage and overtime provisions to apply to a worker, the worker must be an "employee" of the employer, meaning that an employment relationship must exist between the worker and the employer. The FLSA defines "employ" as including to "suffer or permit to work", representing the broadest definition of employment under the law because it covers work that the employer directs or allows to take place. Applying the FLSA's definition, workers who are economically dependent on the business of the employer, regardless of skill level, are considered to be employees, and most workers are employees. On the other hand, independent contractors are workers with economic independence who are in business for themselves.

A number of "economic realities" factors are helpful guides in resolving whether a worker is truly in business for himself or herself, or like most, is economically dependent on an employer who can require (or allow) employees to work *and* who can prevent employees from working. The Supreme Court has indicated that there is no single rule or test for determining whether an individual is an employee or independent contractor for purposes of the FLSA. The Court has held that the totality of the working relationship is determinative, meaning that all facts relevant to the relationship between the worker and the employer must be considered.

While the factors considered can vary, and while no one set of factors is exclusive, the following factors are generally considered when determining whether an employment relationship exists under the FLSA *(i.e.*, whether a worker is an employee, as opposed to an independent contractor):

**1) The extent to which the work performed is an integral part of the employer's business.** If the work performed by a worker is integral to the employer's business, it is more likely that the worker is economically dependent on the employer and less likely that the worker is in business for himself or herself. For example, work is integral to the employer's business if it is a part of its production process or if it is a service that the employer is in business to provide.

**2) Whether the worker's managerial skills affect his or her opportunity for profit and loss.** Managerial skill may be indicated by the hiring and supervision of workers or by investment in equipment. Analysis of this factor should focus on whether the worker exercises managerial skills and, if so, whether those skills affect that worker's opportunity for both profit and loss.

**3) The relative investments in facilities and equipment by the worker *and* the employer.** The worker must make some investment compared to the employer's investment (and bear some risk for a loss) in order for there to be an indication that he/she is an independent contractor in business for himself or herself. A worker's investment in tools and equipment to perform the work does not necessarily indicate independent contractor status, because such tools and equipment may simply be required to perform the work for the employer. If a worker's business investment compares favorably enough to the employer's that they appear to be sharing risk of loss, this factor indicates that the worker may be an independent contractor.

**4) The worker's skill and initiative.** Both employees and independent contractors may be skilled workers. To indicate possible independent contractor status, the worker's skills should demonstrate that he or she exercises independent business judgment. Further, the fact that a worker is in open market competition with others would suggest independent contractor status. For example, specialized skills possessed by carpenters, construction workers, and electricians are not themselves indicative of independent contractor status; rather, it is whether these workers take initiative to operate as independent businesses, as opposed to being economically dependent, that suggests independent contractor status.

**5) The permanency of the worker's relationship with the employer.** Permanency or indefiniteness in the worker's relationship with the employer suggests that the worker is an employee, as opposed to an independent contractor. However, a worker's lack of a permanent relationship with the employer does not necessarily suggest independent contractor status because the impermanent relationship may be due to industry-specific factors, or the fact that an employer routinely uses staffing agencies.

**6) The nature and degree of control by the employer.** Analysis of this factor includes who sets pay amounts and work hours and who determines how the work is performed, as well as whether the worker is free to work for others and hire helpers. An independent contractor generally works free from control by the employer (or anyone else, including the employer's clients). This is a complex factor that warrants careful review because both employees and independent contractors can have work situations that include minimal control by the employer. However, this factor does not hold any greater weight than the other factors. For example, a worker's control of his or her own work hours is not necessarily indicative of independent contractor status; instead, the worker must control meaningful aspects of the working relationship. Further, the mere fact that a worker works from home or offsite is not indicative of independent contractor status because the employer may exercise substantial control over the working relationship even if it exercises less day-to-day control over the employee's work at the remote worksite.

There are certain factors which are immaterial in determining the existence of an employment relationship. For example, the fact that the worker has signed an agreement stating that he or she is an independent contractor is not controlling because the reality of the working relationship – and not the label given to the relationship in an agreement – is determinative. Likewise, the fact that the worker has incorporated a business and/or is licensed by a State/local government agency has little bearing on determining the existence of an employment relationship. Additionally, the Supreme Court has held that employee status is not determined by the time or mode of pay.

**Requirements Under the FLSA**

When an employer-employee relationship exists, and the employee is engaged in work that is subject to the FLSA, the employee must be paid at least the Federal minimum wage of $7.25 per hour, effective July 24, 2009, and in most cases overtime at time and one-half his/her regular rate of pay for all hours worked in excess of 40 per week. The FLSA also has youth employment provisions which regulate the employment of minors under the age of eighteen, as well as recordkeeping requirements.

**Where to Obtain Additional Information**

**For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).**

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

**U.S. Department of Labor**
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

**1-866-4-USWAGE**
TTY: 1-866-487-9243
**Contact Us**

**U.S. Department of Labor**
Wage and Hour Division

Important information regarding recent overtime litigation in the U.S. District Court of Eastern District of Texas.

U.S. Wage and Hour Division
(Revised July 2008)

# Fact Sheet #17A: Exemption for Executive, Administrative, Professional, Computer & Outside Sales Employees Under the Fair Labor Standards Act (FLSA)

This fact sheet provides general information on the exemption from minimum wage and overtime pay provided by Section 13(a)(1) of the Fair Labor Standards Act as defined by Regulations, 29 CFR Part 541.

The FLSA requires that most employees in the United States be paid at least the federal minimum wage for all hours worked and overtime pay at time and one-half the regular rate of pay for all hours worked over 40 hours in a workweek.

However, Section 13(a)(1) of the FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. Section 13(a)(1) and Section 13(a)(17) also exempt certain computer employees. To qualify for exemption, employees generally must meet certain tests regarding their job duties and be paid on a salary basis at not less than $455 per week. Job titles do not determine exempt status. In order for an exemption to apply, an employee's specific job duties and salary must meet all the requirements of the Department's regulations.

See other fact sheets in this series for more information on the exemptions for executive, administrative, professional, computer and outside sales employees, and for more information on the salary basis requirement.

## Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

## Administrative Exemptions

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

**Professional Exemption**
To qualify for the **learned professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the **creative professional** employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

**Computer Employee Exemption**
To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated **either** on a salary or fee basis (as defined in the regulations) at a rate not less than $455 per week **or**, if compensated on an hourly basis, at a rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:
  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;
  2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;
  3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or
  4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

**Outside Sales Exemption**
To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

**Highly Compensated Employees**
Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the

FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

**Blue Collar Workers**

The exemptions provided by FLSA Section 13(a)(1) apply only to "white collar" employees who meet the salary and duties tests set forth in the Part 541 regulations. The exemptions do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. FLSA-covered, non-management employees in production, maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the FLSA, and are not exempt under the Part 541 regulations no matter how highly paid they might be.

**Police, Fire Fighters, Paramedics & Other First Responders**

The exemptions also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

**Other Laws & Collective Bargaining Agreements**

The FLSA provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the FLSA. Similarly, employers may, on their own initiative or under a collective bargaining agreement, provide a higher wage, shorter workweek, or higher overtime premium than provided under the FLSA. While collective bargaining agreements cannot waive or reduce FLSA protections, nothing in the FLSA or the Part 541 regulation relieves employers from their contractual obligations under such bargaining agreements.

**Where to Obtain Additional Information**

**For additional information, visit our Wage and Hour Division Website: http://www.wagehour.dol.gov and/or call our toll-free information and helpline, available 8 a.m. to 5 p.m. in your time zone, 1-866-4USWAGE (1-866-487-9243).**

When the state laws differ from the federal FLSA, an employer must comply with the standard most protective to employees. Links to your state labor department can be found at www.dol.gov/whd/contacts/state_of.htm.

This publication is for general information and is not to be considered in the same light as official statements of position contained in the regulations.

**U.S. Department of Labor**
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

**1-866-4-USWAGE**
TTY: 1-866-487-9243
**Contact Us**

GET THE FACTS ON

# MISCLASSIFICATION

## UNDER THE FAIR LABOR STANDARDS ACT

### Employee or Independent Contractor?

The Fair Labor Standards Act (FLSA) provides minimum wage and overtime pay protections to nearly all workers in the U.S. Some employers incorrectly treat workers who are employees under this federal law as independent contractors. We call that "misclassification." If you are misclassified as an independent contractor, your employer may try to deny you benefits and protections to which you are legally entitled.

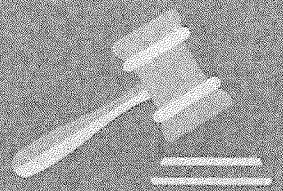
Please refer to **Fact Sheet 13** for more information on the factors used to determine whether you're an employee or an independent contractor.


**WAGE AND HOUR DIVISION**
UNITED STATES DEPARTMENT OF LABOR

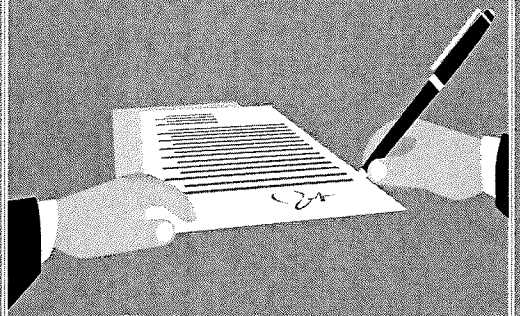
**1-866-4US-WAGE**
dol.gov/whd



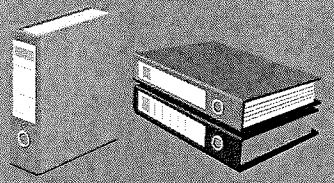
Receiving a 1099 does not make you an independent contractor under the FLSA.



Even if you are an independent contractor under another law (for example, tax law or state law), you may still be an employee under the FLSA.



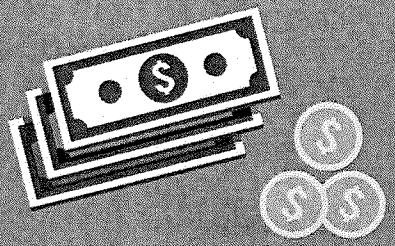
Signing an independent contractor agreement does not make you an independent contractor under the FLSA.



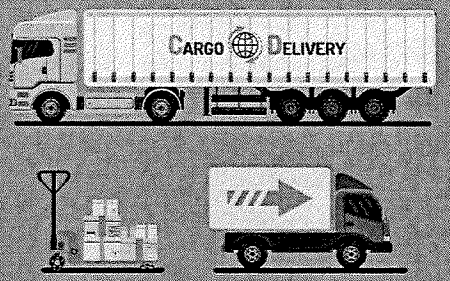
Having an employee identification number (EIN) or paperwork stating that you are performing services as a Limited Liability Company (LLC) or other business entity does not make you an independent contractor under the FLSA.


Employers may not misclassify an employee for any reason, even if the employee agrees.

You are not an independent contractor under the FLSA merely because you work offsite or from home with some flexibility over work hours.



Whether you are paid by cash or by check, on the books or off, you may still be an employee under the FLSA.




"Common industry practice" is not an excuse to misclassify you under the FLSA.

| General Minimum Wage Rate Schedule | | | | | | |
|---|---|---|---|---|---|---|
| Location | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
| NYC Large Employers (of 11 or more) | $11.00 | $13.00 | $15.00 | $15.00 | $15.00 | $15.00 |
| NYC Large Employers (10 or less) | $10.50 | $12.00 | $13.50 | $15.00 | $15.00 | $15.00 |
| Long Island & Westchester | $10.00 | $11.00 | $12.00 | $13.00 | $14.00 | $15.00 |
| Remainder of New York State | $9.70 | $10.40 | $11.10 | $11.80 | $12.50 | TBD |

| **Food Service Employees (Other than Fast Food Employees)** | | | | | | |
|---|---|---|---|---|---|---|
| Location | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
| NYC Large Employers (of 11 or more) | $7.50 cash wage, $3.50 credit, $11.00 total | $8.65 cash wage, $4.35 credit, $13.00 total | $10.00 cash wage, $5.00 credit, $15.00 total | $10.00 cash wage, $5.00 credit, $15.00 total | $10.00 cash wage, $5.00 credit, $15.00 total | $10.00 cash wage, $5.00 credit, $15.00 total |
| NYC Small Employers (10 or less) | $7.50 cash wage, $3.00 credit, $10.50 total | $8.00 cash wage, $4.00 credit, $12.00 total | $9.00 cash wage, $4.50 credit, $13.50 total | $10.00 cash wage, $5.00 credit, $15.00 total | $10.00 cash wage, $5.00 credit, $15.00 total | $10.00 cash wage, $5.00 credit, $15.00 total |
| Long Island & Westchester | $7.50 cash wage, $2.50 credit, $10.00 total | $7.50 cash wage, $3.50 credit, $11.00 total | $8.00 cash wage, $4.00 credit, $12.00 total | $8.65 cash wage, $4.35 credit, $13.00 total | $9.35 cash wage, $4.65 credit, $14.00 total | $10.00 cash wage, $5.00 credit, $15.00 total |
| Remainder of New York State | $7.50 cash wage, $2.20 credit, $9.70 total | $7.50 cash wage, $2.90 credit, $10.40 total | $7.50 cash wage, $3.60 credit, $11.10 total | $7.85 cash wage, $3.95 credit, $11.80 total | $8.35 cash wage, $4.15 credit, $12.50 total | TBD* |

| **Service Employees (Other than at Resort Hotels)** | | | | | | |
|---|---|---|---|---|---|---|
| Location | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
| NYC Large Employers (of 11 or more) | $9.15 cash wage, $1.85 credit, $2.40 tip threshold | $10.85 cash wage, $2.15 credit, $2.80 tip threshold | $12.50 cash wage, $2.50 credit, $3.25 tip threshold | $12.50 cash wage, $2.50 credit, $3.25 tip threshold | $12.50 cash wage, $2.50 credit, $3.25 tip threshold | $12.50 cash wage, $2.50 credit, $3.25 tip threshold |
| NYC Small Employers (10 or less) | $8.75 cash wage, $1.75 credit, $2.30 tip threshold | $10.00 cash wage, $2.00 credit, $2.60 tip threshold | $11.25 cash wage, $2.25 credit, $2.95 tip threshold | $12.50 cash wage, $2.50 credit, $3.25 tip threshold | $12.50 cash wage, $2.50 credit, $3.25 tip threshold | $12.50 cash wage, $2.50 credit, $3.25 tip threshold |
| Long Island & Westchester | $8.35 cash wage, $1.65 credit, $2.15 tip threshold | $9.15 cash wage, $1.85 credit, $2.40 tip threshold | $10.00 cash wage, $2.00 credit, $2.60 tip threshold | $10.85 cash wage, $2.15 credit, $2.80 tip threshold | $11.65 cash wage, $2.35 credit, $3.05 tip threshold | $12.50 cash wage, $2.50 credit, $3.25 tip threshold |
| Remainder of New York State | $8.10 cash wage, $1.60 credit, $2.10 tip threshold | $8.65 cash wage, $1.75 credit, $2.25 tip threshold | $9.25 cash wage, $1.85 credit, $2.40 tip threshold | $9.85 cash wage, $1.95 credit, $2.55 tip threshold | $10.40 cash wage, $2.10 credit, $2.70 tip threshold | TBD* |

| **Minimum Salary Basis Schedule** | | | | | | |
|---|---|---|---|---|---|---|
| Location | 12/31/16 | 12/31/17 | 12/31/18 | 12/31/19 | 12/31/20 | 12/31/21 |
| NYC Large Employers (of 11 or more) | $825.00 | $975.00 | $1,125.00 | $1,125.00 | $1,125.00 | $1,125.00 |
| NYC Large Employers (10 or less) | $787.50 | $900.00 | $1,012.50 | $1,125.00 | $1,125.00 | $1,125.00 |
| Long Island & Westchester | $750.00 | $825.00 | $900.00 | $975.00 | $1,050.00 | $1,125.00 |
| Remainder of New York State | $727.50 | $780.00 | $832.00 | $885.00 | $937.50 | TBD* |


Division of Labor Standards
Harriman State Office Campus
Albany, NY 12240

**EMPLOYMENT POSTERS INFORMATION**

In response to your request for required employment posters, we are pleased to send the following, which are within the jurisdiction of the Division of Labor Standards and are mandated by New York State Labor Law:

☐ **MINIMUM WAGE POSTER**

☐ **WORKING HOURS FOR MINORS:** Prepare and conspicuously display your own notice showing the daily starting and ending times, including meal periods, for every day each minor is scheduled to work. A copy of "Permitted Working Hours for Minors Under 18 Years of Age" (LS-171) is enclosed.

☐ **NOTICE OF FRINGE BENEFITS AND HOURS POSTING:** Either prepare and conspicuously display your own notice delineating your company's policy concerning fringe benefits and working hours or distribute a copy of your policy to each employee. "Notice Requirements for Fringe Benefits and Hours" (LS-606) is enclosed.

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Albany, NY 12240
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Buffalo, NY 14202
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SEYFARTH SHAW

# One Minute Memo®


## SCOTUS Issues Decision in Pregnancy Accommodation Discrimination Case Against UPS

*By Camille Olson, Tracy Billows, Paul Kehoe and Ashley Laken*

In a 6-3 decision handed down this morning in *Young v. United Parcel Service, Inc.*, No. 12-1226, the U.S. Supreme Court overturned a Fourth Circuit decision that affirmed a grant of summary judgment to UPS in a Pregnancy Discrimination Act lawsuit brought against it by Young, a female delivery driver. The Supreme Court remanded the case to the Fourth Circuit to determine whether Young created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than it treated other non-pregnant employees were pretextual.

First, a brief summary of the facts: When Young became pregnant, her doctor advised her that she could not lift more than 20 pounds, but UPS required drivers like Young to be able to lift up to 70 pounds. UPS told Young that she could not work while under a lifting restriction. Young then filed a federal lawsuit claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. In response to UPS's motion for summary judgment, Young pointed to UPS policies that accommodated workers who were injured on the job, had lost Department of Transportation certifications, or had disabilities covered by the Americans with Disabilities Act.

In vacating the judgment of the Fourth Circuit and remanding the case, the Supreme Court held as follows:

- A pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* burden-shifting framework, meaning that she must first establish a prima facie case of pregnancy discrimination, which requires her to show that she belongs to the protected class, she sought an accommodation, the employer did not accommodate her, and the employer did accommodate others who were "similar in their ability or inability to work."
- If the plaintiff establishes a prima facie case, then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for denying the plaintiff the accommodation, and the reasons cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates.
- If the employer articulates a legitimate, nondiscriminatory reason, then the burden shifts back to the plaintiff to show that the employer's reason is a pretext for unlawful discrimination.
- A plaintiff can show pretext by providing evidence that the employer's policies impose a "significant burden" on pregnant workers and the employer's legitimate, nondiscriminatory reasons are "not sufficiently strong" to justify the burden. A plaintiff may do so by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers.

Applying the above to the facts of this case, the Supreme Court held that Young had created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation could not reasonably be distinguished from hers, and the Fourth Circuit did not consider why, when UPS accommodated so many (those with on-the-job injuries, who had lost DOT certifications, and those with disabilities under the ADA), it could not accommodate pregnant women as well. The Court therefore remanded the case to the Fourth Circuit to determine whether Young had also created a genuine issue of material fact as to whether UPS's reasons for treating her less favorably than other non-pregnant employees was a pretext for discrimination.

The Supreme Court rejected Young's contention that as long as an employer provides one or two workers with an accommodation, then it must provide similar accommodations to pregnant workers with comparable physical limitations, irrespective of the nature of their jobs, the employer's need to keep them working, or any other criteria.

While the decision was split, the Supreme Court unanimously rejected the EEOC's position. As we have previously noted (here), the Commission issued updated pregnancy discrimination guidance on a partisan basis in July 2014 in a bald attempt to jump over a pending *Young* decision. The Supreme Court recognized as much, and disregarded the EEOC's guidance because of its timing, inconsistency with past positions, and the lack of a thorough consideration of the issue. In fact, the Supreme Court noted that the government had previously argued that a theory similar to the one set forth in *Young* was "simply incorrect." The Court determined that it could not "rely significantly on the EEOC's determination" contained in its guidance.

Regardless of the decision, both employers and employees will have difficulty making sense of the Court's new standard, which as Justice Scalia points out is "splendidly unconnected" to the text of Title VII. Without a doubt, given the broad expansion of covered disabilities under the ADAAA, many more pregnancy-related impairments now likely rise to the level of an ADA-covered disability (e.g., anemia, pregnancy-related sciatica, pre-eclampsia, gestational diabetes), something the majority alluded to in its opinion. In these instances, a pregnant employee would be afforded the same right to reasonable accommodation under the ADA as any other individual with a disability, regardless of whether the impairment was related to pregnancy.

While litigation will provide greater clarity in the coming years, employers should strongly consider adopting practices that consider accommodation of women with "normal" pregnancies, determine whether the individual can perform the essential functions of the job, and consider requests for accommodations accordingly.

Finally, regardless of these federal law developments, for those employers in states and municipalities that have passed pregnancy accommodation laws, they need to adopt policies and practices consistent with those laws in terms of providing accommodations to pregnant workers. The laws differ, some requiring a showing similar to the ADA for purposes of providing accommodations and others provide accommodations to pregnant workers, regardless of whether the pregnancy is normal or has complications.

If you have any questions, please contact your Seyfarth attorney or Camille Olson at *colson@seyfarth.com*, Tracy Billows at *tbillows@seyfarth.com*, Paul Kehoe at *phkehoe@seyfarth.com*, or Ashley Laken at *alaken@seyfarth.com*.

**www.seyfarth.com**

*U.S. Equal Employment Opportunity Commission*

# Preventing Discrimination is Good Business

OPEN for Business

***Preventing discrimination makes good business sense.*** Complying with the law may increase employee productivity, retention, and morale and limit legal expenses. You may even be entitled to tax benefits for hiring individuals with disabilities or making your business accessible to individuals with disabilities! See http://www.eeoc.gov/eeoc/publications/adahandbook.cfm#appendixa for more information.

***The EEOC can help small business owners!*** The EEOC is the federal government agency that enforces the federal laws against employment discrimination based on race, color, religion, sex, national origin, disability, age, and genetic information. These laws also prohibit retaliation (punishment) for opposing or reporting discrimination or participating in a discrimination investigation or lawsuit.

## Your Responsibilities

- **Ensure that employment decisions** are not based on race, color, religion, sex, national origin, disability, age, or genetic information.
- **Ensure that work policies and practices** are related to the job and do not disproportionately exclude people of a particular race, color, religion, sex, national origin, disability, or age.
- **Ensure that employees are not harassed** because of race, color, religion, sex, national origin, disability, age, or genetic information.
- **Provide equal pay to male and female employees who perform the same work,** unless you can justify a pay difference under the law.
- **Respond promptly and adequately to discrimination complaints.** Stop, address, and prevent harassment and discrimination. Ensure that employees are not punished for complaining.
- **Provide reasonable accommodations** (changes to the way things are normally done at work, such as permitting a schedule change so an employee can attend a doctor's appointment or can observe a religious holiday) **to applicants and employees who need them for medical or religious reasons,** if required by law.
- **Display a poster** that describes the federal employment discrimination laws. (Download one for free at http://www1.eeoc.gov/employers/poster.cfm).
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## How We Can Help

- **We can answer your questions** about the laws we enforce.
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## Contact Us!

**EEOC staff across the country are available to help you. Don't wait; contact us today!**
Free language assistance is available, if needed.

- ***Need EEOC information or training?***
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- ***Need information about the laws we enforce?***
Call us at (202) 663-4691 or e-mail us at olc@eeoc.gov.
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Contact the EEOC investigator assigned to your charge.

We look forward to hearing from you!

For additional information, contact your local EEOC Small Business Liaison (http://www.eeoc.gov/employers/contacts.cfm).

MEMORANDUM

To: Nassau Inn of Court

From: Allison Smalley

Date: February 9, 2016

Re: Research for Employment Law Presentation

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## TOPIC 1: RELIGIOUS ACCOMMODATION AND TATTOOS

***Lewis v. NYC Transit Authority,* 12 F.Supp.3d 418 (E.D.N.Y. 2014)**.

Stephanie Lewis (now deceased) was a Muslim-American woman who wore a khimar, a headscarf worn by some Muslim women, whenever she was in public and while working as bus driver for the defendant. She provided letters to the defendant requesting religious accommodation for her khimar, stating that all parts of her body except her hands and face must be covered due to her religious beliefs. Because Lewis refused to remove or cover her khimar with a baseball cap, or affix the defendant's logo to her forehead as part of their headgear policy, the defendant transferred Lewis to the Bus Depot. This transfer caused her to lose her seniority as a bus driver and take on a new position shifting and cleaning the defendant's buses. The District Court denied the defendant's summary judgment motion in its entirety because the religious accommodation the defendant offered was unreasonable. The Court relied on the standard announced in *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60 (1986) and *Baker v. The Home Depot*, 445 F.3d 541 (2d Cir. 2006), which is that "an offer of accommodation may be unreasonable if it causes [an employee] to suffer an inexplicable diminution in his employee status or benefits…In other words, an accommodation might be unreasonable if it imposes a significant work-related burden on the employee without justification, such as the neutral operation of a seniority system." Based on this standard, the Court found that the defendant's religious accommodation of transferring Lewis to the Bus Depot was unreasonable; and thus, denied the defendant's summary judgment motion.

***Hussein v. Waldorf Astoria,* 134 F.Supp.2d 591 (S.D.N.Y. 2001)**.

Religious Grooming case. Mamdouh Hussein was a "roll call" banquet waiter in the hotel industry, meaning that various hotels employed him when they required additional staff for special events. He has a history of "misconduct" within the hotel industry. On November 3, 1997, he showed up for work at the Waldorf Astoria with a long beard that was in violation of the hotel's dress code for waiters. The Waldorf Astoria refused to let him work while he had his beard. Hussein argues that his beard was a part of his religion and that he was entitled to a religious accommodation. Ultimately, the District Court granted the defendant's summary judgment motion and dismissed Hussein's complaint; holding, that because Hussein notified the defendant of his need for religious accommodation at the last moment and refused to cooperate

with or assist with the defendant accommodating him, the defendant was not obligated to grant Hussein a religious accommodation when he demanded one "on-the-spot." Furthermore, the Court concluded that the defendant's policy requiring its employees to be clean-shaven was not an unlawful discriminatory practice because it was not directed at a religion, but only due to the specific business the defendant practiced in.

Persuasive Authority:

***EEOC v. Red Robin Gourmet Burgers, Inc.*, No. C04–1291JLR, WL 2090677 (W.D. Wash. Aug. 29, 2005)**.

EEOC and Rangel brought this action because Red Robin terminated Rangel's employment as one of its severs after he continuously refused to cover his tattoos. Rangel obtained two tattoos on his wrists to represent his servitude to Ra, the Egyptian God, and his commitment to his Kemetecism faith. Rangel believes that intentionally covering his tattoos is a sin, so he refused to cover then when asked multiple times by his various managers at Red Robin. The District Court denied the defendant's summary judgment motion because it concluded that Rangel possessed a *bona fide* religious belief, established a *prima facie* case of religious discrimination, and demonstrated the defendant's failure to accommodate.

***Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126 (1st Cir. 2004)**.

Cloutier argues that her employer, Costco, failed to offer her a religious accommodation for her conflict between their dress code and her facial jewelry. After working as a cashier for the defendant, the position she was reassigned to, to allow her to continue wearing her ear piercings, Cloutier began wearing facial jewelry. When confronted with her violation of the defendant's dress code, Cloutier claimed that she belonged to the Church of Body Modification and that her facial piercings were part of her religion. After numerous confrontations, Cloutier was told to either take out her facial piercings or go home; she decided to go home instead and filed this action. The Court held that the defendant had no duty to accommodate Cloutier because requiring the defendant to allow Cloutier to wear facial jewelry would be undue hardship; and thus, the Court affirmed the District Court's decision to dismiss Cloutier's complaint and granting the defendant's summary judgment motion. The Court relied on the standard announced in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), stating that "an accommodation constitutes 'undue hardship' if it would impose more than a *de minimis* cost on the employer." As a result, the Court concluded that Cloutier's refusal to remove her facial jewelry would constitute an undue hardship because it causes the defendant to lose its ability to mandate compliance with its policies among its employers and lose control over its public image.

**TOPIC 2: VEGANISM A RELIGION?**

Unfortunately, I was unable to find any NY cases regarding veganism.

Most Recent:

***Chenzira v. Cincinnati Children's Hospital,* No. 1:11–CV–00917, 2012 WL 6721098 (S.D. Ohio Dec. 27, 2012)**.

Sakile Chenzira, an employee [customer service representative] at the Cincinnati Children's Hospital, was fired in 2010 when she refused to get a flu shot that is derived from eggs due to her veganism practices. Chenzira argues that her discharge violates her religious beliefs and that her veganism entitled her to a religious accommodation. The Hospital argued that veganism is not a religion, but merely "a dietary preference or religious philosophy" that is not entitled to a religious accommodation. The District Court denied the Hospital's motion to dismiss because Ms. Chenzira has alleged a plausible claim and it is possible that she "subscribe[s] to veganism with a sincerity equating that of traditional religious views," which may be entitled to protection under the Equal Employment Opportunity Commission. However, the Court narrowed its ruling by stating that it is merely ruling on the sufficiency of the complaint and found that the case could not be dismissed at this point.
Note: the parties have since reached a settlement, so there will be no further court proceedings.

Wage & Hour Litigation Blog

# District Court Turns the Other "Cheeks" on Parties' Proposed Stipulation of Dismissal

By **Seyfarth Shaw LLP** on July 11, 2016

POSTED IN SETTLEMENT


Co-authored by **Robert S. Whitman**, **Howard M. Wexler**, and **Meredith A. Berger**

*Seyfarth Synopsis: A district court judge within the Second Circuit held that, in light of Cheeks v. Freeport Pancake House, court or DOL approval is required for a valid dismissal of FLSA claims with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A).*

Settling FLSA cases in the Second Circuit is becoming more and more difficult. In ***Cheeks v. Freeport Pancake House***, the Second Circuit held that judicial or DOL approval is required for a valid dismissal of FLSA claims *with* prejudice. *Cheeks* is a controversial decision. The majority of courts have held that releases of FLSA rights have to be approved by a court or the DOL in order for the release to be valid, which often means that parties have to file otherwise confidential settlement agreements in publicly-available electronic court filing systems. A number of employer and plaintiffs' counsel in many circuits have managed to settle FLSA cases like they settle other cases—that is, without filing settlement agreements publicly—by agreeing to dismissal with prejudice, which results in later-filed claims being subject to dismissal by claim preclusion principles even if not by a release. *Cheeks* limited that practice in the Second Circuit.

But the *Cheeks* court left open two related questions: whether parties may settle without court or DOL approval by dismissing the case *without* prejudice, and whether approval is needed for a dismissal with prejudice before the opposing party serves either an answer or a motion for summary judgment.

In ***Martinez v. Ivy League School, Inc.***, Judge Denis Hurley of the Eastern District of New York answered the second question, holding that under *Cheeks*, court or DOL approval is required for a valid pre-answer dismissal with prejudice.

As is fairly common, the parties in *Martinez* reached an early settlement after engaging in limited discovery before the defendant filed an answer. The plaintiff informed the court of the parties' agreement and filed a notice of voluntary dismissal "with prejudice" pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(i), which states, "the plaintiff may dismiss an action without a court order by filing...a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment." The plaintiff did not submit a copy of the parties' agreement for the court's approval or even describe the terms of the resolution of the case. Judge Hurley thereafter requested a copy of the settlement agreement and, in the

alternative, issued an Order to Show Cause why court approval of the settlement is not required in light of *Cheeks*.

In response, the parties argued that court or DOL approval is not needed because *Cheeks* "is limited to cases where there has been a stipulated dismissal with prejudice...after the defendant has appeared in the case, thereby subjected itself to the jurisdiction of the court."

Judge Hurley disagreed and held "the reasoning in *Cheeks* applies with equal force to the dismissal of an FLSA action with prejudice pursuant to Rule 41(a)(1)(A)(i)." Citing *Cheeks*, he said the FLSA is a "uniquely protective statute," and as such, requiring judicial or DOL approval for a valid dismissal under Rule 41(a)(1)(A)(i) is consistent with its underlying purpose and helps eliminate potential abuse, such as exceedingly disproportionate attorneys' fees payments. Accordingly, Judge Hurley ordered the plaintiff to "provide this Court with the specifics of the settlement to enable the Court to determine whether it is fair and reasonable."

This decision, while not binding on any other court, underscores the need for litigants to give very careful consideration to the challenging issues raised by settlements in even the simplest of FLSA cases. As tempting as it may be for both sides to resolve cases with a handshake, basic settlement agreement, and one-line Stipulation of Dismissal with Prejudice, that practice is limited within the Second Circuit. Other circuits have not been as suspicious of the efforts of parties and their attorneys to amicably resolve cases.

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SEYFARTH SHAW

Wage & Hour Litigation Blog

# Show & Tell: Second Circuit Holds FLSA Bars Private Settlements

By **Seyfarth Shaw LLP** on August 10, 2015

POSTED IN SETTLEMENT


Co-authored by **Robert S. Whitman** and **Howard M. Wexler**

As we have noted in previous posts (most recently, **here**), courts have been paying increasingly close attention to the terms of FLSA settlements and, on occasion, refusing to approve agreements. Some parties have responded to this trend by entering into private settlements and filing a simple stipulation of dismissal with prejudice.

At least within the Second Circuit, this is no longer permitted. Court or DOL approval is now definitively required to obtain a dismissal with prejudice of FLSA claims.

***Cheeks v. Freeport Pancake House Inc.*** was an FLSA case not unlike many others. The claims appear to have been standard-issue, and the parties reached a settlement shortly after the Initial Conference. The parties then filed a joint Stipulation of Dismissal with Prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). However, the District Judge, Joanna Seybert, refused to honor the stipulation. She ordered the parties to "file a copy of the settlement agreement on the public docket" and "show cause why the proposed settlement reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching."

The parties instead asked the judge to certify the case for immediate review by the Second Circuit on the issue of whether FLSA actions are an exception to Rule 41(a)(1)(A)(ii)'s general rule that parties may stipulate to a dismissal with prejudice without the involvement of the court.

The Second Circuit heard oral argument on November 14, 2014, and because the two sides were in agreement that court approval should not be required, the court solicited the views of the DOL, which submitted a **letter brief** taking the position that the "FLSA falls within the 'applicable federal statute' exception to Rule 41(a)(1)(A), such that the parties may not stipulate to the dismissal of FLSA claims with prejudice without involvement of a court or the DOL."

The court agreed with the DOL. It started its analysis by noting that this issue is a "blank slate" as "neither the Supreme Court nor our sister Circuits have addressed the precise issue before us." It then explored the "differing results" reached by district courts within the Circuit, including Judge Brian Cogan's 2013 decision holding that court approval is not required (see our post on that decision **here**) and Judge Dora Irizarry's subsequent decision taking the opposite position.

Although the Second Circuit was "mindful of the concerns" articulated by Judge Cogan, it held that the FLSA is a "uniquely protective statute," and as such, requiring

judicial or DOL approval is consistent with its underlying purpose and helps eliminate potential abuse, such as exceedingly disproportionate attorney awards.

Given the importance of this issue to FLSA litigants, and the volume of FLSA lawsuits, *Cheeks* may not be the final word on this topic. Although there is no split among the Circuits (as the Second Circuit noted, it is the first to weigh in on this issue), the DOL's participation in the case and the unsettled nature of the question suggest that the case may be ripe for *en banc* or Supreme Court review. For now, however, it is clear that within the Second Circuit, the parties must submit their privately negotiated settlement agreements to the court in order for the case to be dismissed with prejudice. This means, of course, that the agreement will be a public document, and the *Cheeks* opinion suggests (but does not discuss) that strict confidentiality provisions in FLSA settlements may not survive court scrutiny either.

The court did leave open the question of "whether parties may settle such cases without court approval or DOL supervision by entering into a Rule 41(a)(1)(A) stipulation *without prejudice*." Since such a dismissal does not resolve claims or bar future lawsuits, there does not appear to be nearly the same (if any) judicial interest in monitoring them. But that is an issue the court may well take up sometime soon.

In the meantime, as we have advised before, litigants need to give very careful consideration to the challenging issues raised by settlements in even the simplest of FLSA cases. As tempting as it may be for both sides to resolve cases with a handshake, basic settlement agreement, and one-line Stipulation of Dismissal with Prejudice, the days of such an approach may be coming to an end.

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Workplace Class Action Blog

# The EEOC Issues New Enforcement Guidance On Retaliation

By **Seyfarth Shaw LLP** on September 1, 2016

POSTED IN EEOC LITIGATION

**By Gerald L. Maatman, Jr., Mark Casciari, and Christina M. Janice**

***Seyfarth Synopsis:*** *For the first time since 1998, the EEOC has updated its enforcement guidance on retaliation claims brought under the various anti-discrimination laws the Commission is charged with enforcing. Observing that retaliation is now the single largest category of claims presented in its charges, the EEOC's new enforcement guidance advocates expansive interpretations of law to broaden retaliation protections for federal and private sector applicants and*

*employees, creating new burdens on employers who decide to attempt to comply with this new EEOC directive.*

Making good on its stated objective to transform itself from a "nationwide law firm" to a "national law enforcement agency,"[1] the EEOC on August 29, 2016 issued its new **Enforcement Guidance on Retaliation and Related Issues** along with a **Small Business Fact Sheet.** After a period of public comment on its Proposed Enforcement Guidance on Retaliation, *see* **here,** the EEOC has now asserted even stronger, more expansive positions than it first proposed on defining actionable retaliation under Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), Title V of the Americans With Disabilities Act (ADA), Section 501 of the Rehabilitation Act (Section 501), the Equal Pay Act (EPA), and Title II of the Genetic Information Nondiscrimination Act (GINA). While the Guidance itself does not have the force of law, it provides employers with a valuable roadmap of the EEOC's agenda both in pursuing workplace retaliation claims and in attempting to make law in the courts.

The EEOC now clearly positions itself as interpreting anti-discrimination laws and federal decisions as it sees fit to serve its enforcement objectives: "This document sets for the Commission's interpretation of the law of retaliation and related issues. . . . Where the lower courts have not consistently applied the law *or the EEOC's interpretation of the law differs in some respect*, the guidance sets forth the EEOC's considered position and explains its analysis." (Emphasis added.) Rather than enforce existing law as interpreted by courts throughout the country, the EEOC supports its nationwide objective to expand employee protections by relying on court decisions favoring its approach, while at the same time rejecting court decisions that do not.

**What Is Retaliation?**

The Guidance says that the preconditions to a retaliation claim include: 1) *protected activity* being either "participation in an EEO process" or "opposition to

discrimination"; 2) *materially adverse action* taken by the employer; and 3) a requisite level of *causal connection* between the protected activity and materially adverse action. The EEOC considers these three elements to be fluid concepts, to be read and enforced expansively.

The Guidance also focuses on the concept of "anticipatory retaliation" or "pre-emptive retaliation" articulated by the Seventh and Tenth Circuits, that retaliation occurs "...when an employer takes a materially adverse action because an individual has engaged in, *or may engage in*, activity in furtherance of the EEO laws the Commission enforces" (emphasis added, citing *Beckel v. Wal-Mart Assocs., Inc.*, 301 F.3d 621, 624 (7th Cir. 2002); *Sauers v. Salt Lake Cty.*, 1 F.3d 1122, 1128 (10th Cir. 1993)). Employers concerned about the EEOC's scrutiny now must be vigilant to document or otherwise be able to prove that all aspects of performance management – including, but not limited to, evaluations, warnings, reprimands, hiring, promotions, compensation, terminations and references – is conducted without regard to whether an applicant or employee may be about to participate in an EEO process or oppose discrimination.

**What Is Protected Activity?**

*Participation In An EEO Process*. The Guidance restates the EEOC's longstanding position that participation in an EEO process is protected whether or not an individual has a reasonable, good faith belief that the allegations are or could become unlawful. Conceding that the Supreme Court has not addressed this question, the EEOC nonetheless rejects decisions by the Seventh and Eighth Circuits that hold that the anti-retaliation protections of Title VII do not extend to individuals making false claims to the EEOC. (See *Gilooly v. Mo. Dep't of Health & Senior Servs.*, 421 F.3d 734, 240 (8th Cir. 2005); *Mattson v. Caterpillar, Inc.*, 359 F.3d 885, 891 (7th Cir. 2004)).

*Opposition To Discrimination*. The Guidance provides that "opposition to discrimination" must be "reasonable" in manner to receive protection. The Guidance then qualifies this position by observing that that there is overlap between what

constitutes "participation in an EEO process" and "opposition to discrimination." Relying on Sixth Circuit case law the Guidance provides, self-servingly, that the EEOC is afforded great discretion to determine what constitutes protected activity. Employers should be on the lookout that the reasonableness of behaviors alleged to be in opposition to discrimination may be eroded as a defense to retaliation claims.

The Guidance also states that the EEOC rejects and will challenge what some courts have dubbed the "manager rule"; namely, that managers must step outside their management roles and take a position adverse to the employer in order to engage in the protected activity of opposition to discrimination.

**What Is A Materially Adverse Action?**

With respect to the requirement that an individual suffer a materially adverse action at the hands of an employer, the EEOC continues to broaden the actions that in its view constitute "materially adverse actions" as to include one-off incidents, warnings, dissuasive activities that do not directly affect employment, and activities outside of the workplace that may dissuade an applicant, employee or former employee from engaging in protected activity. Further, actions purportedly taken against close family members and fiancés on account of an applicant, employee or former employee engaging in protected activity also will be challenged as retaliatory.

**What Is Causation?**

While the Guidance acknowledges that the Supreme Court has held that the standard for proof of retaliation under Title VII is that "but for" the a retaliatory motive, the employer would not have taken the adverse action, the Guidance introduces the "motivating factor" standard for federal sector Title VII and ADEA retaliation cases, prohibiting retaliation if it is a mere motivating factor behind an adverse action. The Guidance provides that suspicious timing, incriminating oral or written statements, evidence of how comparable individuals were treated differently, and inconsistent or shifting explanations of the adverse action all can support a finding of retaliation, while the employer's ignorance of the protected activity or having a legitimate, non-

discriminatory reason for the adverse action may support a finding that no unlawful retaliation has occurred.

**Related Issues – Requests For Accommodation**

The Guidance discusses that, in addition to retaliation, the Americans With Disabilities Act prohibits interference with an applicant, employee or former employee's rights under the ADA, including assisting another in the exercise of their rights under the ADA. The Guidance suggests that the EEOC will aggressively challenge conduct allegedly interfering with requests for accommodation for disability under the ADA, as well as requests for religious accommodation under Title VII.

**Implications For Employers**

While the Guidance states that "[e]mployers remain free to discipline or terminate employees for legitimate, non-discriminatory, non-retaliatory reasons, notwithstanding any prior protected activity," employers have no cause for reassurance from the EEOC. The Guidance signals that the EEOC is broadening its interpretation of retaliation to include protection for activity that has not yet occurred, possible protection for "opposition" activities that may not be reasonable, and protection to the applicant and employee who may engage in protective activity in the future.

[1] We previously blogged about the EEOC's change in focus **here.**

Readers can also find this post on our EEOC Countdown blog **here**.

**Related Posts**

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SEYFARTH SHAW

# Complying with Wage Hour Laws

- Pay Regulations
    - Minimum Wage & Overtime Rates
    - Spread of Hours – New York
    - Notice of pay rates for new hires – NY Labor Law 195

- White Collar Exemptions
    - Executive
    - Administrative
    - Professional
    - Outside Sales
    - Conduct a Self Audit
        - Review salary information & exemptions

The FLSA requires employees to be paid overtime at one and one-half times their regular rate of pay for all hours worked beyond 40 in a workweek.

Some jobs are exempt from FLSA's overtime provision, however. The most common exemptions are for:

- ✓ Executive employees (mid-managers up to CEOs) who direct work and typically have authority to hire and fire others;
- ✓ Administrative employees (e.g. accountants, procurement officers and HR managers) who help keep a business running;
- ✓ Learned professional employees (e.g. doctors and lawyers) who perform work requiring advanced knowledge in a field that requires prolonged schooling;
- ✓ Outside sales employees, such as pharmaceutical sales representatives or door-to-door salespersons, who make sales away from their employer's place of business.

## EMPLOYEE CLASSIFICATION

Most state classification systems are similar to the FLSA's;
Even if an employee qualifies for an exemption under state law, he or she must be paid overtime unless also exempt under the FLSA.

To be exempt from overtime under FLSA, most employees must:

- Perform exempt job duties and
- Be paid at least $23,660 per year ($455 per week) on a salary basis.

## THE SALARY BASIS TEST

Under the FLSA, an employee is considered to be paid on a salary basis if the employee is guaranteed a minimum amount of income each workweek in which work is performed.

Note that:

- The amount of compensation may not be reduced because of quality or quantity of work performed;
- The salary does not need to be the only compensation the employee receives; and
- Pay may be expressed in hourly terms.

*Permissible Deductions*
A supervisor may dock an exempt employee's salary under the following circumstances without jeopardizing the salary requirements:

| Permissible Deductions | |
|---|---|
| Circumstance | Conditions |
| Personal absence | Employee must be absent for one or more *full* days for personal reasons. Deduction cannot be made for absence of less than full day. Employee's decision to take time off must be voluntary, not the result of a slowdown in work or for any other reason suggested by the employer. |
| Sickness or disability | Deductions may be made for absences of one or more full days for sickness or disability if the deduction is made according to a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the salary for full-day absences for which the employee receives compensation under the plan or for the initial waiting or qualification period. |
| Jury duty | An employer may offset amounts received for jury fees, witness fees or military pay for a particular week against the salary due for that week. |

| | |
|---|---|
| Penalties for major safety infractions | Deductions may be made for penalties imposed in good faith for major safety infractions, such as smoking in explosive plants. |
| Disciplinary suspensions for workplace conduct violations | Deductions may be made for unpaid disciplinary suspensions for one or more full days. Suspensions must be imposed pursuant to written policies applicable to all employees. |
| Initial and final workweeks | An employee is not required to pay the full salary in the initial or final week of employment. It may pay a proportionate part for the time actually worked in the first and last week of employment. |
| Family and Medical Leave Act (FMLA) | An employer is not required to pay an exempt employee's full salary for weeks taken as unpaid leave under the FMLA. A proportionate part for time worked may be paid. Deductions must be made in full-day increments only. |

*Impermissible deductions* from pay may change an employee's status from exempt to nonexempt (subject to overtime). Therefore the supervisor should become familiar with impermissible deductions to avoid reclassification.

| Impermissible Deductions | |
|---|---|
| Circumstance | Conditions |
| Deductions for quality or quantity | Poor performance may be reflected in a performance review, but cannot result in deductions from salary. |
| Partial-day absences | No deduction for a partial day's absence for an exempt employee. |
| Inclement weather | If the employer is closed because of bad weather, no deductions are allowed. However, if the employer remains open and an employee does not report to work for one or more full days, the absence is considered for personal reasons and deductions may be made on a full-day basis. |
| Loss or damage of employer property | Loss or damage of employer property cannot result in deductions. Such a deduction would violate the prohibition against reductions as a result of the quality of work performed. |
| Failure to provide work | If an employee is ready and willing to work but no work is available, the employer may not dock pay. However, the employer may require exempt employees to exhaust their PTO banks in such situations. |

| | |
|---|---|
| Disciplinary measures | Except for gross safety violations, no deductions for discipline are allowed. |
| Jury duty/witness leave/temporary military leave | The salary basis test precludes deductions from pay for these absences. An employer may take offsets for pay the employee receives for jury duty or military pay. |
| Catch-all | Any deductions not expressly permitted by regulations (as detailed here) are impermissible. |

If an impermissible deduction from an exempt employee's pay is made, it may be corrected under:

- The *window of correction* provision
  - An improper deduction is merely isolated or inadvertent;
  - The employer promptly repays the amount improperly deducted.
- The *safe harbor* provision.
  - The employer has a clearly communicated policy prohibiting improper pay deductions;
  - Policy provides for a complaint method;

Repayment is made promptly.

## EXEMPT JOB DUTIES

For an employee to be eligible for any of the FLSA's most commonly applied overtime exemptions, his or her *primary duty* must be performance of exempt work.
In general:

- Employees who spend the majority of their time performing exempt work qualify for an exemption from OT;
- Employees may still qualify even if they spend most of their time performing nonexempt work (e.g. stocking shelves) as long as exempt work is their main job duty.

In addition to the amount of time spent performing exempt work, courts also consider:

- ✓ The relative importance of the exempt duties compared to other duties;
- ✓ Relative freedom from direct supervision;
- ✓ The relationship between the employee's salary as compared to wages paid to other employees for the same type of nonexempt work.

Practice Tip: Under the FLSA, it's the employee's job duties, not title, that counts. An employee with the title of CEO who spends all day mopping floors does not qualify for exemption and must be paid overtime.

## THE EXECUTIVE EXEMPTION

In addition to being paid on a salary basis, an *exempt executive employee* must:

- Manage the business or a recognized department or subdivision of the business;
- Customarily and regularly direct the work of two or more employees; and
- Possess hiring and firing authority or have the power to affect the employment status of other employees through suggestion or recommendation.

Supervision alone is not sufficient to come within the executive exemption. The supervisory employee must also have management as the primary duty. Management responsibilities include:

- Interviewing, selecting, training;
- Planning work;
- Distributing assignments;
- Planning budgets;
- Reviewing productivity;
- Managing employee complaints;
- Disciplining employees;
- Monitoring work for compliance reasons; and
- Providing for safety and security in the workplace.

## THE ADMINISTRATIVE EXEMPTION

An employee with an *administrative exemption* must be paid on a salary basis plus:

- Have a primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or customers;
- Have a primary duty that includes the exercise of discretion and independent judgment with respect to matters of significance.

The following are examples of administrative functions:

- Payroll and finance;
- Accounting or Tax;
- Marketing and advertising;
- Quality control;
- Public relations;
- Legal and regulatory compliance;
- Some computer jobs including network, internet and database administration.

Administrative exempt work involves the exercise of discretion and judgment. These employees typically have the authority to make independent decisions on matters affecting the business as a whole.

To determine whether an employee should have an administrative exemption, the employer should consider:

- Whether the employee has the authority to formulate or interpret policy;
- How significant the employee's assignments are relative to the overall business operations;
- Whether the employee has the authority to commit the employer in matters having significant financial impact; and
- Whether the employee has the authority to deviate from workplace policy without prior approval.

## LEARNED PROFESSIONAL EXEMPTION

*The Learned Professional Exemption*

In addition to being paid on a salary basis, the *exempt learned professional employee* must perform work requiring advanced knowledge:

- In a field of science or learning, or
- Learning that is customarily acquired through a prolonged course of specialized intellectual instruction.

The employee's work should generally require the use of advanced knowledge to assess facts and circumstances.

Advanced knowledge cannot be attained in high school.

## THE OUTSIDE SALES EXEMPTION

*The Outside Sales Exemption*

Outside salesperson do not need to be paid on a salary basis. To be exempt from the minimum wage and overtime pay requirements of the FLSA, an outside sales employee must:

- Have a primary duty of making sales (as defined in the FLSA), obtaining orders or contracts for services or for the use of facilities for which consideration will be paid by the customer; and
- Customarily and regularly be working away from the employer's place or places of business.

## WAGE AND HOUR LAWS

- Potential Claims
  - United States Department of Labor Audit
  - New York State Department of Labor Audit
  - Private Action
  - Class or collective action
- Avoiding Claims
  - For Non-exempt employees
    - Record keeping is crucial
    - Avoiding collective actions
  - For Exempt employees
    - Avoid reducing pay for partial day absences
- Independent Contractors
- Hospitality Industry

## NEW YORK STATE WAGE THEFT PREVENTION ACT

- Employee Notice of Wages within ten business days of first date of employment to include basis for wage payment, and intent to claim allowances as part of minimum wage
- Written notice at least seven days prior to implementation of change
- Recordkeeping – 6 years
- Tougher civil penalties

## INTERNSHIP PROGRAMS UNDER THE FLSA

How to determine whether an intern must be paid under the FLSA for services they provide to "for-profit" private sector employers– Test for Unpaid Interns – the following 6 criteria must be met :

- The internship is similar to training which would be given in an educational environment
- The internship experience is for the benefit of the intern
- The intern does not displace regular employees, but works under close supervision of existing staff
- The employer derives no immediate advantage from the activities of the intern
- The intern is not necessarily entitled to a job at the conclusion of the internship

The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

## UPDATES IN THE LAW

- May 18, 2016, the Department of Labor (DOL) announced it will publish a Final Rule updating the overtime exemption regulations of the Fair Labor Standards Act (FLSA).
- The final rule doubles, from $455 to **$913** per week (or $23,660 to $47,476 annually), the minimum salary required for exemption of executive, administrative, and professional employees, as well as the minimum compensation level for the highly compensated employee exemption.
- The Final Rule is available at the Federal Register site and becomes effective December 1, 2016.

**** THIS WAS STAYED BY THE COURT ****

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# EMPLOYMENT DISCRIMINATION AND ARBITRATION CLAUSES IN COLLECTIVE BARGAINING AGREEMENTS

Collective Bargaining Agreements typically contain provisions which provide that disputes arising under the agreement are subject to arbitration and provide a procedure to be followed for addressing and resolving those disputes. Many CBAs also include clauses which prohibit an employer from discriminating against its employees in the terms and conditions of their employment. The question, therefore, arises whether an employee who is a member of a union covered by a CBA and who believes he has been discriminated against by his employer due to his race, age, religion, or some other prohibited characteristic may pursue his claims in a court of law or is required, instead, to proceed with arbitration of his claim in accordance with the CBA. The answer - - it depends.

The starting point in this inquiry is the Supreme Court's decision in Wright v. Universal Maritime Serv. Corp., 525 U.S. 70 (1998). The issue presented in Wright was whether a general arbitration clause in a collective bargaining agreement required an employee to utilize the arbitration procedure contained in the CBA for an alleged violation of the Americans with Disability Act.

The plaintiff in Wright, a Longshoreman, commenced an action against his employer alleging that he had been discriminated against because he was disabled. The employer moved for summary judgment on the grounds, *inter alia*, that the employee was required to submit his

claims to arbitration pursuant to the terms of his CBA. The Court found that the union had not waived the rights of its members to have statutory discrimination claims heard in a judicial forum despite the clause in the CBA which required arbitration of "matters under dispute". The Court reasoned that the waiver was not explicit enough, even though the CBA provided that it was "intended to cover all matters affecting wages, hours and other terms and conditions of employment" and further provided that no term in the agreement was intended to be "violative of any Federal or State law."

The Court in reaching its decision concluded that to be a valid waiver of a union member's right to bring statutory claims in court the waiver had to be "clear and unmistakable", and here the arbitration clause "could be understood to mean matters in dispute under the contract". Id. at 79-80. Although the employee argued that the agreement required the arbitrator to comply with the ADA in deciding the parties' dispute, the Court held that was "not the same as making compliance with the ADA a contractual commitment that would be subject to the arbitration clause." Id. at 81.

Two years after Wright, the Second Circuit in Rogers v. New York Univ., 220 F.3d 73 (2d Cir. 2000), considered the validity of a collectively bargained waiver of union members' rights to bring discrimination claims in court.

Rogers, a clerical employee of NYU, was terminated from her employment after taking an FMLA medical leave. After the EEOC issued her a "Right to Sue" letter she commenced an action in the Southern District of New York alleging that NYU had discriminated against her in violation of the Americans with Disabilities Act, FMLA, and the State and City Human Rights

laws. NYU moved to stay the action pending arbitration provided for in the CBA which governed the terms and conditions of Roger's employment. The CBA contained a "no discrimination clause which provided that "there shall be not discrimination as defined by the applicable Federal, New York State and New York City laws . . ." It also contained a separate grievance and arbitration clause which provided in substance that disputes arising under the agreement shall be arbitrated.

The Second Circuit, in affirming the lower court's denial of the stay, focused on the party who negotiated the waiver. If the arbitration provision was in a CBA negotiated by a union the Court concluded that the provision was not enforceable and the employee could bring his discrimination claim in court. Specifically it held that "[a] union-negotiated collective bargaining agreement, which contains provisions by which employees purport to waive their right to a federal forum with respect to statutory claims, are not enforceable." Id.at 75.

Although the Court reached its conclusion based on the fact that the union had negotiated the waiver, the Court addressed the Supreme Court's decision in Wright which, it acknowledged, could be taken to suggest that, under certain circumstances, a union-negotiated waiver of an employee's statutory right of a judicial forum might be enforceable. Id. The Court, concluded, however, that even if Wright allowed for a union negotiated waiver, the provision in the CBA at issue was not "clear and unmistakable" and, therefore, Rogers was free to pursue her claim in court.

The Second Circuit's holding in Rogers, that a union negotiated clause in a CBA could never waive an employee's right to bring his case in a court of law was effectively overturned by the Supreme Court in 14 Penn Plaza L.L.C. v. Pyett, 556 U.S. 247, 129 S. Ct. 1456 (2009).

In Pyett, the Supreme Court held, in accordance with its previous decision in Wright, that a collectively bargained waiver of the rights of union members to bring statutory discrimination claims in court is enforceable provided that the waiver it is "clear and unmistakable".[1] 556 U.S. at 274. The Court, however, did not define what makes a waiver "clear and unmistakable" because that issue was not preserved for appeal.[2] Id. at 273.

Although the Rogers holding was effectively overturned by Pyett, courts in this circuit nevertheless look to that portion of the decision which discussed the Wright case for guidance with regard to the enforceability of arbitration clauses in CBAs where the employee alleges discrimination. The Rogers Court pointed out that Wright did not establish a bright line test for determining whether a waiver is "clear and unmistakable", but noted that other courts had since held that there were generally two circumstances in which a waiver is sufficiently explicit to satisfy the "clear and unmistakable" standard. First, citing cases from the Fourth and Sixth Circuits, the Court posited that waivers have been held valid where a collective bargaining

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[1] The discrimination claim in Pyett was for alleged age discrimination under the ADEA. Since then, courts have universally concluded that discrimination claims brought under various state and federal statutes, are also arbitrable. See Borden v. Wavecrest Mgt. Team, Ltd., 572 Fed. Appx. 10, 10-11 (2d Cir. 2014).

[2] The parties in Pyett all acknowledged on appeal that the CBA provision requiring arbitration of their federal antidiscrimination statutory claims were sufficient explicit.

agreement provides that all federal causes of action arising out of union members' employment must be submitted to arbitration. Id. at 76 (citing Carson v. Giant Food, Inc., 175 F.3d 325, 331-32 (4th Cir. 1999); Bratten v. SSI Servs., Inc., 185 F.3d 625, 631 (6th Cir. 1999)). Second, the Court noted that a waiver is sufficiently clear and unmistakable when an arbitration clause identifies the statutes that it applies to by name or citation. Id.

The issue of the applicability of a CBA's arbitration clause to claims of discrimination was again presented to the Second Circuit in Lawrence v. Sol G. Atlas Realty Co., 841 F3d 81 (2d Cir. 2016). In that case an African-American union employee sued his employer alleging discrimination based on his race and national origin in violation of 42 U.S.C. §1981, Title VII, the New York Human Rights Law ("NYSHRL") and the Fair Labor Standards Act. ("FLSA"). The employer moved to dismiss the complaint arguing that the employee's claims were subject to arbitration under the applicable CBA. The CBA contained the following provision:

> NO DISCRIMINATION - There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability in accordance with applicable law, national origin, sex, sexual orientation, union membership or any characteristic protected by law. *Any disputes under this provision shall be subject to the grievance and arbitration procedure* (Article V)." (emphasis added)

The CBA also contained several provisions regarding the union members' terms and conditions of employment, and, in addition, provided that "no experienced employee shall be terminated or denied employment for the purpose of discrimination on the basis of his/her compensation and/or benefits" and that such discrimination will be "grieved in accordance with the grievance and arbitration provisions of the Agreement (Article V)".

Article V provided, in relevant part, that:

> *Any dispute or grievance* between the Union and the Employer shall be submitted to the Office of the Contract Arbitrator . . . The procedure herein with respect to matters over which a Contract Arbitrator has jurisdiction shall be the *sole and exclusive method* for the determination of all such issues, and the Arbitrator shall have the power to award appropriate remedies, the award being final and binding upon the parties and the employee(s) or Employer(s) involved. (emphasis added)

The District Court agreed with the employer that the employee was bound by the arbitration provision in the CBA and that he was required to proceed with his claim in accordance with that provision. As a result, the court dismissed the complaint. The employee appealed to the Second Circuit.

Despite what appeared to be a clear and unambiguous non-discrimination clause requiring arbitration of all disputes involving allegations of discrimination, the Second Circuit did not see it that way. The Court stated that in order to be "clear and unmistakable" the CBA had to make specific references to either the antidiscrimination statutes in question or to statutory causes of action. Id. at 84. Even though the CBA prohibited discrimination on the basis of "race, creed, color, age, disability in accordance with applicable law, national origin, sex, sexual orientation, union membership or any characteristic protected by law" the Court held that the provision did not satisfy the "exacting standard." Id. It concluded that the CBA's reference in the "No Discrimination" Clause to "any disputes under this provision" and the arbitration provisions reference to "[a]ny dispute or grievance between the Employer and the Union," could be interpreted to mean disputes under the CBA and not claims under the antidiscrimination

statutes. In other words, even though the CBA broadly prohibited the employer from engaging in unlawful discrimination and compelled arbitration of "any disputes" regarding this provision, it was not unmistakably clear that "any disputes" included statutory claims.

The Bottom Line - for a nondiscrimination clause requiring arbitration in a collective bargaining agreement to be effective the clause must either 1) specifically name or cite the particular statutes which are subject to the arbitration provision; or 2) specifically state that the arbitration provision is intended to cover *statutory causes of action* generally.

## IRS 20 Factor Test – Independent Contractor or Employee?

The IRS test often is termed the "right-to-control test" because each factor is designed to evaluate who controls how work is performed. Under IRS rules and common-law doctrine, independent contractors control the manner and means by which contracted services, products, or results are achieved. The more control a company exercises over how, when, where, and by whom work is performed, the more likely the workers are employees, not independent contractors.

A worker does not have to meet all 20 criteria to qualify as an employee or independent contractor, and no single factor is decisive in determining a worker's status. The individual circumstances of each case determine the weight IRS assigns different factors.

NOTE: Employers uncertain about how to classify a worker can request an IRS determination by filing Form SS-8, "Determination of Employee Work Status for Purposes of Federal Employment Taxes and Income Tax Withholding." However, some tax specialists caution that IRS usually classifies workers as employees whenever their status is not clear-cut. In addition, employers that request an IRS determination lose certain protections against liability for misclassification.

The 20 factors used to evaluate right to control and the validity of independent contractor classifications include:

• **Level of instruction**. If the company directs when, where, and how work is done, this control indicates a possible employment relationship.

• **Amount of training**. Requesting workers to undergo company-provided training suggests an employment relationship since the company is directing the methods by which work is accomplished.

• **Degree of business integration**. Workers whose services are integrated into business operations or significantly affect business success are likely to be considered employees.

• **Extent of personal services**. Companies that insist on a particular person performing the work assert a degree of control that suggests an employment relationship. In contrast, independent contractors typically are free to assign work to anyone.

• **Control of assistants**. If a company hires, supervises, and pays a worker's assistants, this control indicates a possible employment relationship. If the worker retains control over hiring, supervising, and paying helpers, this arrangement suggests an independent contractor relationship.

• **Continuity of relationship**. A continuous relationship between a company and a worker indicates a possible employment relationship. However, an independent

contractor arrangement can involve an ongoing relationship for multiple, sequential projects.

• **Flexibility of schedule**. People whose hours or days of work are dictated by a company are apt to qualify as its employees.

• **Demands for full-time work**. Full-time work gives a company control over most of a person's time, which supports a finding of an employment relationship.

• **Need for on-site services**. Requiring someone to work on company premises—particularly if the work can be performed elsewhere—indicates a possible employment relationship.

• **Sequence of work**. If a company requires work to be performed in specific order or sequence, this control suggests an employment relationship.

• **Requirements for reports**. If a worker regularly must provide written or oral reports on the status of a project, this arrangement indicates a possible employment relationship.

• **Method of payment**. Hourly, weekly, or monthly pay schedules are characteristic of employment relationships, unless the payments simply are a convenient way of distributing a lump-sum fee. Payment on commission or project completion is more characteristic of independent contractor relationships.

• **Payment of business or travel expenses**. Independent contractors typically bear the cost of travel or business expenses, and most contractors set their fees high enough to cover these costs. Direct reimbursement of travel and other business costs by a company suggests an employment relationship.

• **Provision of tools and materials**. Workers who perform most of their work using company-provided equipment, tools, and materials are more likely to be considered employees. Work largely done using independently obtained supplies or tools supports an independent contractor finding.

• **Investment in facilities**. Independent contractors typically invest in and maintain their own work facilities. In contrast, most employees rely on their employer to provide work facilities.

• **Realization of profit or loss**. Workers who receive predetermined earnings and have little chance to realize significant profit or loss through their work generally are employees.

• **Work for multiple companies**. People who simultaneously provide services for several unrelated companies are likely to qualify as independent contractors.

• **Availability to public**. If a worker regularly makes services available to the general public, this supports an independent contractor determination.

• **Control over discharge**. A company's unilateral right to discharge a worker suggests an employment relationship. In contrast, a company's ability to terminate independent contractor relationships generally depends on contract terms.

• **Right of termination**. Most employees unilaterally can terminate their work for a company without liability. Independent contractors cannot terminate services without liability, except as allowed under their contracts.

# Discrimination Under the NYSHRL and NYCHRL

In order to establish a prima facie case of discrimination under New York State's Human Rights Law, codified at Exec. Law § 296, the plaintiff bears the burden of showing that "(1) she is a member of a protected class; (2) she was qualified to hold the position; (3) she was terminated from employment or suffered another adverse employment action; and (4) the discharge or other adverse action occurred under circumstances giving rise to an inference of discrimination." *Forrest v. Jewish Guild for the Blind*, 3 N.Y.3d 295, 305 (App. Ct. 2004). As such, the burden then shifts to defendants to demonstrate "by clearly setting forth, through the introduction of admissible evidence, legitimate, independent, and nondiscriminatory reasons to support its employment decision." *Id*. Moreover, *Polidori v. Societe Generale Group*, 2006 N.Y. Misc. LEXIS 3787, at *13 (Sup. Ct. Nov. 27, 2006) has illustrated that "[t]he standards for recovery under New York State's and City's Human Rights Laws are in accord with federal standards under Title VII of the Civil Rights Act of 1964." Respectively, in order to state a prima facie case for retaliation, plaintiff must allege "(1) engagement in a protected activity; (2) the employer's awareness of such participation; (3) an adverse employment action against the plaintiff; and (4) a causal connection between the protected activity and the adverse action taken by the employer" Id. at *18.

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# Memorandum

**TO:** Inns of Court

**FROM:** Meredith-Anne Berger

**DATE:** March 13, 2017

**RE:** Employment Law
Pregnancy Discrimination Issues

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Federal Laws Relating to Pregnancy

FAMILY MEDICAL LEAVE ACT

- FMLA covers pregnancy & birth
- Prenatal care/incapacity due to pregnancy
- No health care provider treatment required
- Need not be absent more than three consecutive days
- Intermittent & reduced schedule leave available
- Consecutive leave if incapacitated
- Interference/Retaliation
    - AMERICANS WITH DISABILITIES ACT AMENDMENTS ACT OF 2008
- Pregnancy alone not covered disability under ADAAA
- Medical condition developed during pregnancy can be covered disability (*e.g.*, pregnancy-induced hypertension)
- ADAAA's rules of construction favor broad coverage
- EEOC regs = substantial limitation should not be primary object of attention - extensive analysis not needed
- Brief or infrequent nature of impairment not relevant in determining if substantially limits major life activity
    - PREGNANCY DISCRIMINATION ACT OF 1978

- "The terms "because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and
- women affected by pregnancy, childbirth, or related medical conditions **shall be treated the same for all employment-related purposes**, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."

- EEOC ENFORCEMENT OF PDA

- EEOC Regs address employment policies such as exclusion, disability coverage, termination, & fringe benefits as related to pregnancy & childbirth
- 1979 EEOC Enforcement Guidance no help in identifying "**other persons**" to whom pregnant woman must be compared
- July 2014 EEOC Enforcement Guidance & revisions to EEOC Compliance Manual "conveniently" addressed issue
- *Young v UPS* requires EEOC to re-work its 2014 Guidance
- State and Local Law Overview
- Pregnancy leave laws (*e.g.*, CA, CT, NJ)
- Anti-discrimination laws
- Disability accommodation and anti-discrimination acts
- STD & LTD coverage
- Pregnancy accommodation laws
- State and Local Law Overview
- Pregnancy accommodation laws governing private employers:
    - California, Connecticut, Delaware, District of Columbia, Hawaii, Illinois Louisiana, Maryland, Minnesota, New Jersey, Texas & West Virginia
- Municipalities with pregnancy accommodation laws governing private employers:
    - Central Falls, Rhode Island, Providence, Rhode Island, New York City & Philadelphia
- State and Local Law Overview
- Generally, what do these laws require?

    - Reasonable accommodation for conditions related to pregnancy, childbirth, or a related medical condition
- Who is covered?
    - State by state
- When do you need to provide accommodations?
    - Upon request or if otherwise aware of the pregnancy
- What is sufficient notice?
    - Verbal vs. written request
- State and Local Law Overview
- Does state law require an interactive process?
    - Required in District of Columbia and Minnesota
    - Best practice → engage in interactive process
- What constitutes a reasonable accommodation?
    - Temporary transfer
    - Breaks, seating, rest
    - Light duty assignment
    - Leave
    - Job restructuring
- State and Local Law Overview
- Undue Hardship Exception
- What does not qualify?
    - MN Example: No undue hardship for restroom, food or water breaks, seating, or limits on lifting over 20 pounds
- How far does an employer have to go to accommodate?
    - Not obligated to create a new position
    - Not obligated to discharge another employee, transfer more senior employee, or promote an unqualified employee
- State and Local Law Overview
- Additional protections
    - Example Delaware and District of Columbia

- Cannot deny employment opportunities to pregnant applicant or employee based on need to make reasonable accommodations;
- Cannot require applicant or pregnant employee to accept accommodation she chooses not to accept;
- Cannot require leave of absence if reasonable accommodation exists;
- Cannot take adverse action against employee for requesting or using a reasonable accommodation for pregnancy

- State and Local Law Overview
- NYCHRL requires reasonable accommodations for pregnant women & those who suffer conditions related to pregnancy & childbirth
    - Law applies even to independent contractors
- Undue hardship defense
- Notice requirements
    - Must provide notice of the law to new employees upon hire
    - Posting in the workplace
- Civil cause of action through the City Commission or Court
- EEOC Strategic Focus

**Strategic Enforcement Plan FY 2013-2016 identified three "emerging and developing issues"**

**Accommodating pregnancy-related limitations under ADAAA and PDA was one**

- EEOC Pregnancy-Related Filings
- EEOC's Touted Pregnancy Successes
- Increased case filings & press attention
- Targeted "all segments & sectors of workforce"
- Litigation victories across breadth of fact patterns
    - refusing to hire, failing to promote, demoting, firing, & retaliating
    - involuntary leaves, hours reductions, & other opportunity limits
    - interfering with lactation
- Supreme Court decided in *Young* that PDA requires pregnancy accommodation under certain circumstances
- Spurred state & local developments

- Spurred employer changes in policies & practices
- EEOC's Pregnancy Failures
- Supreme Court's stinging disregard in *Young* of EEOC's 2014 Enforcement Guidance
- Supreme Court's rejection in *Young* of "most favored nation status" for pregnant employees
- Lack of complex-litigation victories
    - Adverse *Bloomberg* rulings clearest example
- EEOC's *Bloomberg* Blemish
- 9/7 Complaint alleged demotions & decreases in pay, duties, & other opportunities when became pregnant
    - Press release asserted women "forced to choose between motherhood and livelihood"
    - Numerous district-court losses, incl. exclusions of experts & dismissals of pattern & practice, class (for failure to conciliate), time-barred, & ultimately all claims
    - Insufficient evidence even to meet individual *prima facie* burden
    - EEOC's & other experts agreed Class Members treated more favorably than other employees with leaves of similar duration
- 2/15 EEOC withdrew 2nd Cir. appeal in exchange for Bloomberg dropping bid for fees & costs
- *Young v. UPS* Splits the Baby
- On March 25, 2015, Supreme Court (6-3) reversed 4th Circuit decision affirming summary judgment for UPS
- Justice Breyer's opinion rejects parties' polar arguments
    - Rejects UPS's arguments that:
        - PDA simply clarified that sex discrimination includes pregnancy discrimination
        - Lawful to deny accommodations on basis of evenhanded policy
    - Rejects Young's / EEOC's arguments that:
        - Pregnant employees have affirmative right to accommodation regardless of whether others provided it

        - Pregnant employees have "most-favored-nation" status entitling them to accommodation simply because provided to one or more other employees similar in ability or inability to work
- *Young v. UPS* Births New Standard

*McDonnell Douglas* for disparate-treatment-pregnancy-accommodation claim supported by indirect evidence

- *Prima facie* disparate treatment elements for pregnancy claim:
    - (1) protected class; (2) sought accommodation; (3) denied; & (4) employer accommodated others similar in ability or inability to work
- Legitimate Nondiscriminatory Reason
    - Cannot be more expensive or less convenient
- Pretext if policies impose "significant burden" on pregnant workers for which reasons "not sufficiently strong" to justify
    - Plaintiff can create genuine issue of material fact re: significant burden with evidence employer accommodates large % of non-pregnant workers while failing to accommodate large % of pregnant workers
    - Then evaluate strength of employer's justifications
        - "That is, why, when the employer accommodated so many, could it not accommodate pregnant women as well?"
- *E.E.O.C. v. CFS Health Mgmt. Inc* (N. Dist. Ga. Mar. 25, 2015)
    - Employer sued for removing employee from work schedule 2 days after she told him about pregnancy, allegedly because he felt deceived she had not disclosed during the interview process
- *E.E.O.C. v. Savi Technology, Inc.* (E.D.Va. 2014)
    - Employer sued for rescinding offer for Director of HR position after learning applicant had recently given birth/had related surgery
    - Settled March 2, 2015 for $20,000
- *E.E.O.C. v. Benhar Office Interiors LLC* (S.D.N.Y. Apr. 15, 2014)
    - Employer sued for rescinding offer after applicant informed company of pregnancy

- Settled April 15, 2014 for $90,000

- *E.E.O.C. v. The WW Group, Inc. d/b/a Weight Watchers*, Civ. No. 12-cv-11124 (E.D. Mich. Apr. 1, 2014)
    - Weight Watchers sued under Title VII for allegedly refusing to hire applicant because she was pregnant
    - WW allegedly discriminated against applicant based on pregnancy-related weight by disqualifying her under its "goal weight" requirement
    - $45,000 settlement included revision to "goal weight" policy to comply with the PDA
- *E.E.O.C. v. Receivable Mgmt. Inc. d/b/a Kramer and Assocs.*, Case No. 15-cv-01997 (D.N.J. Mar. 23, 2015)
    - Debt collection company sued under Title VII for rescinding offer to promote employee to management position after she told her supervisor she was pregnant
    - Complaint alleges company told her to focus on her health and that her maternity leave would coincide with tax season, the busiest time of the year
- Compensation
    - *Barrett v. Forest Laboratories, Inc.*, 39 F. Supp. 3d 407 (S.D.N.Y. Aug. 14, 2014)
    - Group of female pharmaceutical sales representatives survived motion to dismiss on claims including:
        - Pattern and practice of lowering performance reviews of pregnant women & women who return from maternity leave, leading to reduced base salaries and bonuses
        - Disparate impact from policy of “refusing to pay earned bonuses to employees on leave for six weeks or more”
        - Individual claims for five women on compensation claims
- Lactation Rooms

*E.E.O.C. v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013)

- Adverse action against female employee because she was lactating or expressing milk constituted sex discrimination in violation of Title VII

Patient Protection and Affordable Care Act (2010)

- Amended Section 7 of the FLSA to require reasonable break time for employee to express breast milk for 1 year after birth as needed
- Requirement to provide a private space, not a bathroom

New York Breastfeeding Mothers Bill of Rights

- Right to express breast milk for up to 3 years;
- Reasonable unpaid breaks;
- Reasonable efforts to provide private room (not a bathroom)

- Child Care Accommodations
    - Considerations
    - Is it an FMLA-covered absence?
    - Associational discrimination?
- *Manon v. 878 Educ., LLC*, Civ. No. 13-cv-3476 (RJS) (S.D.N.Y. Mar. 4, 2015)
    - Receptionist's claims to proceed to jury under NYCHRL and ADA where she was terminated after missing work for her daughter's respiratory illness
- Discipline and Termination
- *Obi v. Vantage House*, 2014 WL 5587028 (Dist. Md. Oct. 31, 2014)
    - Granting summary judgment for employer on PDA claim where plaintiff refused to come to work 2 days in violation of no call/no show policy, even though employer knew she was pregnant
- *Lamar v. Procter & Gamble Distributing LLC*, 2015 WL 1530669 (E.D. Mich. Apr. 6, 2015)
    - Granting summary judgment for employer on *inter alia* pregnancy discrimination claim finding poor performance (including PIP) was legitimate reason for termination and plaintiff failed to show pretext
- *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003)
    - 1990 BLS survey: 37% private sector employees covered by maternity leave policies, only 18% by paternity leave policies
    - On FMLA:
        - "By creating an across-the-board, routine employment benefit for all eligible employees, Congress sought to ensure that family-care leave

would no longer be stigmatized as an inordinate drain on the workplace caused by female employees, and that employers could not evade leave obligations simply by hiring men…the FMLA attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers' incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes." *Id.* at 737.

- EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014)
    - "Employers should carefully distinguish between leave related to any physical limitations imposed by pregnancy or childbirth… and leave for purposes of bonding with a child and/or providing care for a child"
        - Leave related to pregnancy, childbirth or related medical conditions can be limited to women affected by those conditions
        - Parental leave provided to similarly situated men and women on the same terms
        - Any leave provided to mothers beyond recuperation from childbirth should be equivalently provided to new fathers
- *Govori v. Goat Fifty, L.L.C.*, 519 Fed. Appx. 732 (2d Cir. 2013)
        - Affirms summary judgment for employer where plaintiff alleged gender discrimination under PDA for termination shortly after announcing infertility treatment; declines to address whether IVF treatment is protected under the PDA
- *E.E.O.C. v. Platinum P.T.S. Inc. d/b/a Platinum Production Testing Servs.*, Civ. No. 12-cv-00139 (S.D.Tex. Aug. 8, 2013)
        - Title VII suit for employee who requested time off for medical treatment to address a miscarriage, and was terminated after missing several days of work. Settled for $100,000.

NEW YORK STATE OF OPPORTUNITY.

# 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

☐ 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.

_____

Print Employee Name

_____

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.**

**Please note:** It is unlawful for an employee to be paid less than an employee of the opposite sex for equal work. Employers also may not prohibit employees from discussing wages with their co-workers.

# Labor Law Section 195(1)
# Notice and Acknowledgement of Wage Rate and Designated Payday
# Hourly Rate Plus Overtime

| **Employer** | **Employee** |
|---|---|
| Company Name _____ | Name _____ |
| FEIN _____ | Street address _____ |
| Street address _____ | Apt. _____ City _____ |
| City _____ State _____ | State _____ Zip: _____ |
| Zip _____ | Phone (_____) _____ - _____ |
| Phone (_____) _____ - _____ | |
| Preparer's Name _____ | |
| Preparer's Title _____ | |

Your rate of pay: _____ per hour.

Your overtime rate of pay: _____ per hour.

Designated pay day: _____

I hereby certify that I have read the above and the information contained in this form is true and accurate to the best of my knowledge and belief. Any false statements knowingly made are punishable as a class A misdemeanor (Section 210.45 of the New York State Penal Law).

Date: _____ _____
**[Preparer's Signature]**

**General Statement Regarding Overtime Pay in New York:**
Almost all employees in New York must be paid overtime wages of 1½ times their regular rate of pay for all hours worked over 40 per workweek. A very limited number of specific categories of employees are covered by overtime at a lower overtime rate or not at all.

I hereby acknowledge that I have been notified of my wage rate, overtime rate, and designated pay day on the date set forth below.

Date: _____ _____
**[Employee's Signature]**

*A duplicate signed copy of this form is to be provided to the employee. Original must be kept by the employer.*

LS 52 (10/09)

# NY DOL Approves Regulations to Increase Salary Threshold for Exempt Employees

Large Employers (11 or more employees) in New York City

- $825.00 per week on and after December 31, 2016;
- $975.00 per week on and after December 31, 2017; and
- $1,125.00 per week on and after December 31, 2018.

Small Employers (10 or fewer employees) in New York City

- $787.50 per week on and after December 31, 2016;
- $900.00 per week on and after December 31, 2017;
- $1,012.50 per week on and after December 31, 2018; and
- $1,125.00 per week on and after December 31, 2019.

Employers in Nassau, Suffolk, and Westchester Counties

- $750.00 per week on and after December 31, 2016;
- $825.00 per week on and after December 31, 2017;
- $900.00 per week on and after December 31, 2018;
- $975.00 per week on and after December 31, 2019;
- $1,050.00 per week on and after December 31, 2020; and
- $1,125.00 per week on and after December 31, 2021.

Employers Outside of New York City, Nassau, Suffolk, and Westchester Counties

- $727.50 per week on and after December 31, 2016;
- $780.00 per week on and after December 31, 2017;
- $832.00 per week on and after December 31, 2018;
- $885.00 per week on and after December 31, 2019; and
- $937.50 per week on and after December 31, 2020.

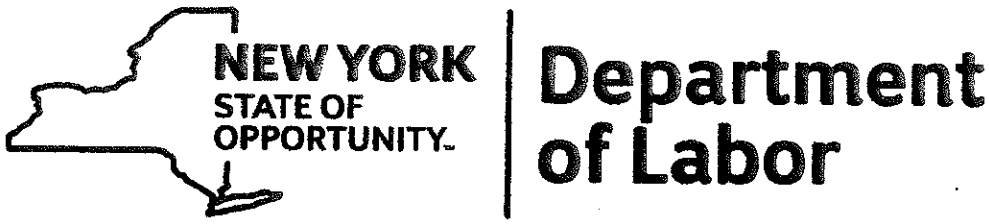
In addition to the increased salary levels, the new regulations adjust the amount employers can deduct for employees' uniforms and claim as a meal and tip credit in line with the gradual increase of the minimum wage toward $15. There is a tiered system for these changes as well depending on the employer's location.

# Hospitality Industry Wage Order

Part 146 of Title 12 of the Official Compilation of Codes, Rules, and Regulations of the State of New York (Cited as NYCRR 146)

Promulgated by the Commissioner of Labor Pursuant to the Minimum Wage Act (Article 19 of the New York State Labor Law)

Statutory authority: Labor Law Section 21(11), Labor Law Section 199 and Labor Law Section 652




As Amended
Effective December 31, 2016

# PART 146
# HOSPITALITY INDUSTRY

**Subpart 146-1 Minimum Wage Rates**
**Subpart 146-2 Regulations**
**Subpart 146-3 Definitions**

## SUBPART 146-1
## MINIMUM WAGE RATES

Sec.



### § 146-1.1. Application.

(a) Every employer in the hospitality industry must pay to each employee, as defined in this Part, at least the minimum wage rates provided in this Part.

(b) The rates provided herein shall apply, unless otherwise stated, on and after January 1, 2011.

### § 146-1.2. Basic minimum hourly rate.

(a) The basic minimum hourly rate shall be, for each hour worked by:

(1) *Employees, other than fast food employees*, in

(i) *New York City* for

(*a*) *Large employers* of eleven or more employees

$11.00 per hour on and after December 31, 2016;
$13.00 per hour on and after December 31, 2017;
$15.00 per hour on and after December 31, 2018;

(*b*) *Small employers* of ten or fewer employees

$10.50 per hour on and after December 31, 2016;
$12.00 per hour on and after December 31, 2017;
$13.50 per hour on and after December 31, 2018;
$15.00 per hour on and after December 31, 2019;

(ii) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$10.00 per hour on and after December 31, 2016;
$11.00 per hour on and after December 31, 2017;
$12.00 per hour on and after December 31, 2018;
$13.00 per hour on and after December 31, 2019;
$14.00 per hour on and after December 31, 2020;
$15.00 per hour on and after December 31, 2021,

(iii) *Remainder of state* (outside of New York City and Nassau, Suffolk and Westchester counties)

$9.70 per hour on and after December 31, 2016;
$10.40 per hour on and after December 31, 2017;
$11.10 per hour on and after December 31, 2018;
$11.80 per hour on and after December 31, 2019;
$12.50 per hour on and after December 31, 2020.

(2) *Fast food employees* in

(i) *New York City*

$12.00 per hour on and after December 31, 2016;
$13.50 per hour on and after December 31, 2017;
$15.00 per hour on and after December 31, 2018.

(ii) *Outside of New York City*

$10.75 per hour on and after December 31, 2016;
$11.75 per hour on and after December 31, 2017;
$12.75 per hour on and after December 31, 2018;
$13.75 per hour on and after December 31, 2019;
$14.50 per hour on and after December 31, 2020;
$15.00 per hour on and after July 1, 2021.

(b) If a higher wage is established by federal law pursuant to 29 U.S.C. section 206 or any successor provisions, such wage shall apply.

**§ 146-1.3. Tip credits.**

An employer may take a credit towards the basic minimum hourly rate if a service employee or food service worker receives enough tips and if the employee has been notified of the tip credit as required in section 146-2.2 of this Part. Such employees shall be considered "tipped employees."

(a) *Tip credits for service employees.* A service employee shall receive a wage of at least the hourly Cash Wage rate listed below, and credit for tips shall not exceed the hourly Credit rate listed below, provided that the weekly average of tips is at least the hourly Tip Threshold rate listed below and the total of tips received plus wages equals or exceeds the basic minimum hourly rate pursuant to section 146-1.2 of this Subpart.

(1) *General.* For service employees (other than at resort hotels) employed in

(i) *New York City* by

(*a*) *Large Employers* of eleven or more employees

$9.15 Cash Wage, $1.85 Credit, $2.40 Tip Threshold on and after December 31, 2016;
$10.85 Cash Wage, $2.15 Credit, $2.80 Tip Threshold on and after December 31, 2017;
$12.50 Cash Wage, $2.50 Credit, $3.25 Tip Threshold on and after December 31, 2018;

(*b*) *Small Employer* of ten or fewer employees

$8.75 Cash Wage, $1.75 Credit, $2.30 Tip Threshold on and after December 31, 2016;
$10.00 Cash Wage, $2.00 Credit, $2.60 Tip Threshold on and after December 31, 2017;
$11.25 Cash Wage, $2.25 Credit, $2.95 Tip Threshold on and after December 31, 2018;
$12.50 Cash Wage, $2.50 Credit, $3.25 Tip Threshold on and after December 31, 2019;

(ii) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$8.35 Cash Wage, $1.65 Credit, $2.15 Tip Threshold on and after December 31, 2016;
$9.15 Cash Wage, $1.85 Credit, $2.40 Tip Threshold on and after December 31, 2017;
$10.00 Cash Wage, $2.00 Credit, $2.60 Tip Threshold on and after December 31, 2018;
$10.85 Cash Wage, $2.15 Credit, $2.80 Tip Threshold on and after December 31, 2019;
$11.65 Cash Wage, $2.35 Credit, $3.05 Tip Threshold on and after December 31, 2020;
$12.50 Cash Wage, $2.50 Credit, $3.25 Tip Threshold on and after December 31, 2021;

(iii) *Remainder of state* (outside of New York City and Nassau, Suffolk and Westchester counties)

$8.10 Cash Wage, $1.60 Credit, $2.10 Tip Threshold on and after December 31, 2016;
$8.65 Cash Wage, $1.75 Credit, $2.25 Tip Threshold on and after December 31, 2017;
$9.25 Cash Wage, $1.85 Credit, $2.40 Tip Threshold on and after December 31, 2018;
$9.85 Cash Wage, $1.95 Credit, $2.55 Tip Threshold on and after December 31, 2019;
$10.40 Cash Wage, $2.10 Credit, $2.70 Tip Threshold on and after December 31, 2020.

(2) *Resorts*. For service employees at resort hotels only, employed in

(i) *New York City* by

(*a*) *Large employers* of eleven or more employees

$9.15 Cash Wage, $1.85 Credit, $6.15 Tip Threshold on and after December 31, 2016;
$10.85 Cash Wage, $2.15 Credit, $7.30 Tip Threshold on and after December 31, 2017;
$12.50 Cash Wage, $2.50 Credit, $8.40 Tip Threshold on and after December 31, 2018;

(*b*) *Small Employer* of ten or fewer employees

$8.75 Cash Wage, $1.75 Credit, $5.90 Tip Threshold on and after December 31, 2016;
$10.00 Cash Wage, $2.00 Credit, $6.75 Tip Threshold on and after December 31, 2017;
$11.25 Cash Wage, $2.25 Credit, $7.60 Tip Threshold on and after December 31, 2018;
$12.50 Cash Wage, $2.50 Credit, $8.40 Tip Threshold on and after December 31, 2019;

(ii) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$8.35 Cash Wage, $1.65 Credit, $5.60 Tip Threshold on and after December 31, 2016;
$9.15 Cash Wage, $1.85 Credit, $6.15 Tip Threshold on and after December 31, 2017;
$10.00 Cash Wage, $2.00 Credit, $6.75 Tip Threshold on and after December 31, 2018;

$10.85 Cash Wage, $2.15 Credit, $7.30 Tip Threshold on and after December 31, 2019;
$11.65 Cash Wage, $2.35 Credit, $7.85 Tip Threshold on and after December 31, 2020;
$12.50 Cash Wage, $2.50 Credit, $8.40 Tip Threshold on and after December 31, 2021.

(iii) *Remainder of state* (outside of New York City and Nassau, Suffolk and Westchester counties)

$8.10 Cash Wage, $1.60 Credit, $5.45 Tip Threshold on and after December 31, 2016;
$8.65 Cash Wage, $1.75 Credit, $5.85 Tip Threshold on and after December 31, 2017;
$9.25 Cash Wage, $1.85 Credit, $6.25 Tip Threshold on and after December 31, 2018;
$9.85 Cash Wage, $1.95 Credit, $6.60 Tip Threshold on and after December 31, 2019;
$10.40 Cash Wage, $2.10 Credit, $7.00 Tip Threshold on and after December 31, 2020.

(b) *Tip credits for food service workers.* A food service worker shall receive a wage of at least the hourly Cash Wage rate listed below, and credit for tips shall not exceed the hourly Credit rate listed below, provided that the total of tips received plus the wages equals or exceeds the hourly Total rate listed below when working in:

(1) *New York City* for

(i) *Large Employers* of eleven or more employees

$7.50 Cash Wage, $3.50 Credit, $11.00 Total on and after December 31, 2016;
$8.65 Cash Wage, $4.35 Credit, $13.00 Total on and after December 31, 2017;
$10.00 Cash Wage, $5.00 Credit, $15.00 Total on and after December 31, 2018;

(ii) *Small Employers* of ten or fewer employees

$7.50 Cash Wage, $3.00 Credit, $10.50 Total on and after December 31, 2016;
$8.00 Cash Wage, $4.00 Credit, $12.00 Total on and after December 31, 2017;
$9.00 Cash Wage, $4.50 Credit, $13.50 Total on and after December 31, 2018;
$10.00 Cash Wage, $5.00 Credit, $15.00 Total on and after December 31, 2019;

(2) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$7.50 Cash Wage, $2.50 Credit, $10.00 Total on and after December 31, 2016;
$7.50 Cash Wage, $3.50 Credit, $11.00 Total on and after December 31, 2017;
$8.00 Cash Wage, $4.00 Credit, $12.00 Total on and after December 31, 2018;
$8.65 Cash Wage, $4.35 Credit, $13.00 Total on and after December 31, 2019;
$9.35 Cash Wage, $4.65 Credit, $14.00 Total on and after December 31, 2020;
$10.00 Cash Wage, $5.00 Credit, $15.00 Total on and after December 31, 2021;

(3) *Remainder of state* (outside of New York City and Nassau, Suffolk and Westchester counties)

$7.50 Cash Wage, $2.20 Credit, $9.70 Total on and after December 31, 2016;
$7.50 Cash Wage, $2.90 Credit, $10.40 Total on and after December 31, 2017;
$7.50 Cash Wage, $3.60 Credit, $11.10 Total on and after December 31, 2018;
$7.85 Cash Wage, $3.95 Credit, $11.80 Total on and after December 31, 2019;
$8.35 Cash Wage, $4.15 Credit, $12.50 Total on and after December 31, 2020.

(c) *Tip credit for fast food employees.* No tip credit is permitted for fast food employees.

**§ 146-1.4. Overtime hourly rates.**

An employer shall pay an employee for overtime at a wage rate of 1½ times the employee's regular rate for hours worked in excess of 40 hours in one workweek. When an employer is taking a credit toward the basic minimum hourly rate pursuant to section 146-1.3 of this Subpart, the overtime rate shall be the employee's regular rate of pay before subtracting any tip credit, multiplied by 1½, minus the tip credit. It is a violation of the overtime requirement for an employer to subtract the tip credit first and then multiply the reduced rate by one and one half.

*Example 1*: Non-tipped employee (when the basic minimum hourly rate is less than or equal to $10.00). An employee regularly paid $10 per hour who works 50 hours in a workweek:

| | |
|---|---|
| Regular rate: | $10.00 per hour |
| Overtime rate: | $10.00 x 1.5 = $15.00 per hour |
| Wage for 40 hours: | $10.00 x 40 = $400.00 |
| Wage for 10 hours: | $15.00 x 10 = $150 |
| | Total $550.00 |

*Example 2*: Tipped employee (when the basic minimum wage was $5.00, and the maximum tip credit was $2.25, for food service workers). A food service worker regularly paid $7.25 per hour minus a tip credit of $2.25 per hour, for a wage rate of $5.00 per hour, who works 50 hours in a workweek:

| | |
|---|---|
| Regular rate: | $7.25 per hour |
| Overtime rate: | $7.25 x 1.5 = $10.875 per hour |
| Wage rate for 40 hours: | $7.25 - $2.25 = $5.00 per hour |
| Wage rate for 10 hours: | $10.875 - $2.25 = $8.625 per hour |
| Wages for the workweek: | $5.00 x 40 hours = $200.00 |
| | $8.625 x 10 hours = $ 86.25 |
| | Total $286.25 |

*Alternative calculation:*

| | |
|---|---|
| Wages for the work week: | $7.25 x 40 hours = $290.00 |
| | $10.875 x 10 hours = $108.75 |
| | Subtotal $398.75 |
| Minus tip credit | $2.25 x 50 hours = - 112.50 |
| | Total $286.25 |

**§ 146-1.5. Call-in pay.**

(a) An employee who by request or permission of the employer reports for duty on any day, whether or not assigned to actual work, shall be paid at the applicable wage rate:

(1) for at least three hours for one shift, or the number of hours in the regularly scheduled shift, whichever is less;

(2) for at least six hours for two shifts totaling six hours or less, or the number of hours in the regularly scheduled shift, whichever is less; and

(3) for at least eight hours for three shifts totaling eight hours or less, or the number of hours in the regularly scheduled shift, whichever is less.

(b) For purposes of this section, *applicable wage rate* shall mean:

(1) Payment for time of actual attendance calculated at the employee's regular or overtime rate of pay, whichever is applicable, minus any customary and usual tip credit;

(2) Payment for the balance of the period calculated at the basic minimum hourly rate with no tip credit subtracted. Payment for the balance of the period is not payment for time worked or work performed and need not be included in the regular rate for the purpose of calculating overtime pay.

(c) Call-in pay shall not be offset by any credits for meals or lodging provided to the employee.

(d) A *regularly scheduled shift* is a fixed, repeating shift that an employee normally works on the same day of each week. If an employee's total hours worked or scheduled to work on a given day of the week change from week to week, there is no regularly scheduled shift.

(e) This section shall apply to all employees, regardless of a given employee's regular rate of pay.

**§ 146-1.6. Spread of hours greater than 10 in restaurants and all-year hotels.**

The *spread of hours* is the length of the interval between the beginning and end of an employee's workday. The spread of hours for any day includes working time plus time off for meals plus intervals off duty. Examples of a spread of hours greater than 10 are: 7 a.m. – 10 a.m., 7 p.m. – 10 p.m. = 6 hours worked but a 15 hour spread; 11:30 a.m. – 3 p.m., 4 p.m. – 10:00 p.m. = 9½ hours worked but a 10½ hour spread.

(a) On each day on which the spread of hours exceeds 10, an employee shall receive one additional hour of pay at the basic minimum hourly rate.

(b) The additional hour of pay shall not be offset by any credits for meals or lodging provided to the employee.

(c) The additional hour of pay is not a payment for time worked or work performed and need not be included in the regular rate for the purpose of calculating overtime pay.

(d) This section shall apply to all employees in restaurants and all-year hotels, regardless of a given employee's regular rate of pay.

**§ 146-1.7. Uniform maintenance pay.**

Maintaining required uniforms includes washing, ironing, dry cleaning, alterations, repair, or any other maintenance necessary.

(a) Where an employer does not maintain required uniforms for any employee, the employer shall pay the employee, in addition to the employee's agreed rate of pay, uniform maintenance pay at the weekly rate set forth below, based on the number of hours worked, where employees who work over 30 hours per week shall be paid the High rate, employees who work more than 20 hours but fewer than 30 hours shall be paid the Medium rate and employees who work 20 hours or fewer shall be paid the Low rate for work performed in:

(1) *New York City* for

(i) *Large employers* of eleven or more employees

$13.70 High, $10.80 Medium, $6.55 Low on and after December 31, 2016;
$16.20 High, $12.80 Medium, $7.75 Low on and after December 31, 2017;
$18.65 High, $14.75 Medium, $8.90 Low on and after December 31, 2018;

(ii) *Small employers* of ten or fewer employees

$13.05 High, $10.35 Medium, $6.25 Low on and after December 31, 2016;
$14.95 High, $11.80 Medium, $7.15 Low on and after December 31, 2017;
$16.80 High, $13.30 Medium, $8.05 Low on and after December 31, 2018;
$18.65 High, $14.75 Medium, $8.90 Low on and after December 31, 2019;

(2) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$12.45 High, $9.85 Medium, $5.95 Low on and after December 31, 2016;
$13.70 High, $10.80 Medium, $6.55 Low on and after December 31, 2017;
$14.95 High, $11.80 Medium, $7.15 Low on and after December 31, 2018;
$16.20 High, $12.80 Medium, $7.75 Low on and after December 31, 2019;
$17.40 High, $13.75 Medium, $8.30 Low on and after December 31, 2020;
$18.65 High, $14.75 Medium, $8.90 Low on and after December 31, 2021;

(3) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$12.05 High, $9.55 Medium, $5.75 Low on and after December 31, 2016;
$12.95 High, $10.25 Medium, $6.20 Low on and after December 31, 2017;
$13.80 High, $10.90 Medium, $6.60 Low on and after December 31, 2018;
$14.70 High, $11.60 Medium, $7.00 Low on and after December 31, 2019;
$15.55 High, $12.30 Medium, $7.45 Low on and after December 31, 2020.

(b) *Wash and wear exception to uniform maintenance pay.* An employer will not be required to pay the uniform maintenance pay, where required uniforms

(1) are made of "wash and wear" materials;

(2) may be routinely washed and dried with other personal garments;

(3) do not require ironing, dry cleaning, daily washing, commercial laundering, or other special treatment; and

(4) are furnished to the employee in sufficient number, or the employee is reimbursed by the employer for the purchase of a sufficient number of uniforms, consistent with the average number of days per week worked by the employee.

(c) *Employee chooses not to use employer-provided laundry service.* The employer will not be required to pay uniform maintenance pay to any employee who chooses not to use the employer's service, where an employer:

(1) launders required uniforms free of charge and with reasonable frequency;

(2) ensures the availability of an adequate supply of clean, properly-fitting uniforms; and

(3) informs employees individually in writing of such service.

(d) Uniform maintenance pay shall not be offset by any credits for meals or lodging provided to the employee.

(e) This section shall apply to all employees, regardless of a given employee's regular rate of pay.

**§ 146-1.8. Costs of purchasing required uniforms.**

(a) When an employee purchases a required uniform, he or she shall be reimbursed by the employer for the total cost of the uniform no later than the next payday. Employers may not avoid such costs by requiring employees to obtain uniforms before starting the job.

(b) Where the employer furnishes to the employees free of charge, or reimburses the employees for purchasing, enough uniforms for an average workweek, and an employee chooses to purchase additional uniforms in excess of the number needed, the employer will not be required to reimburse the employee for the cost of purchasing the additional uniforms.

(c) This section shall apply to all employees, regardless of a given employee's regular rate of pay.

**§ 146-1.9. Credits for meals and lodging.**

Meals and/or lodging provided by an employer to an employee may be considered part of the wages paid to the employee but shall be valued at no more than the amounts given below.

(a) *Meal credits in restaurants and all-year hotels.* (1) Meals furnished by an employer to an employee may be considered part of the wages but shall be valued at no more than the per meal amounts listed below at the Food Service rate for food service workers, the Service rate for service employees, and the Other rate for non-service employees for work performed in:

(i) *New York City* for

(*a*) *Large employers* of eleven or more employees

$2.85 Food Service, $3.05 Service, $3.80 Other per meal on and after December 31, 2016;
$3.25 Food Service, $3.60 Service, $4.50 Other per meal on and after December 31, 2017;
$3.60 Food Service, $4.15 Service, $5.15 Other per meal on and after December 31, 2018;

(*b*) *Small employers* of ten or fewer employees

$2.80 Food Service, $2.90 Service, $3.60 Other per meal on and after December 31, 2016;
$3.05 Food Service, $3.35 Service, $4.15 Other per meal on and after December 31, 2017;
$3.35 Food Service, $3.75 Service, $4.65 Other per meal on and after December 31, 2018;
$3.60 Food Service, $4.15 Service, $5.15 Other per meal on and after December 31, 2019;

(ii) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$2.70 Food Service, $2.80 Service, $3.45 Other per meal on and after December 31, 2016;
$2.85 Food Service, $3.05 Service, $3.80 Other per meal on and after December 31, 2017;
$3.05 Food Service, $3.35 Service, $4.15 Other per meal on and after December 31, 2018;
$3.25 Food Service, $3.60 Service, $4.50 Other per meal on and after December 31, 2019;
$3.45 Food Service, $3.90 Service, $4.80 Other per meal on and after December 31, 2020;
$3.60 Food Service, $4.15 Service, $5.15 Other per meal on and after December 31, 2021;

(iii) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$2.65 Food Service, $2.70 Service, $3.35 Other per meal on and after December 31, 2016;
$2.75 Food Service, $2.90 Service, $3.60 Other per meal on and after December 31, 2017;
$2.90 Food Service, $3.10 Service, $3.80 Other per meal on and after December 31, 2018;
$3.00 Food Service, $3.30 Service, $4.05 Other per meal on and after December 31, 2019;
$3.15 Food Service, $3.45 Service, $4.30 Other per meal on and after December 31, 2020.

(2) A credit for more than one meal shall not be permitted for any employee working less than 5 hours on any day.

(3) A credit for more than two meals shall not be permitted for any other employee on any day, except that a credit of one meal per shift may be permitted for an employee working on a split shift.

(b) *Lodging credits in restaurants.* Lodging furnished by an employer to an employee may be considered part of wages but shall be valued at no more than the daily or weekly amounts listed below at the Food Service rate for food service workers, the Service rate for service employees, and the Other rate for non-service employees:

(1) *Daily*, for work performed in

(i) *New York City* for

(*a*) *Large employers* of eleven or more employees

$1.70 Food Service, $2.15 Service, $2.70 Other on and after December 31, 2016;
$1.95 Food Service, $2.55 Service, $3.20 Other on and after December 31, 2017;
$2.15 Food Service, $2.90 Service, $3.65 Other on and after December 31, 2018;

(*b*) *Small employers* of ten or fewer employees

$1.65 Food Service, $2.05 Service, $2.55 Other on and after December 31, 2016;
$1.85 Food Service, $2.35 Service, $2.95 Other on and after December 31, 2017;
$2.00 Food Service, $2.65 Service, $3.30 Other on and after December 31, 2018;
$2.15 Food Service, $2.90 Service, $3.65 Other on and after December 31, 2019;

(ii) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$1.60 Food Service, $1.95 Service, $2.45 Other on and after December 31, 2016;
$1.70 Food Service, $2.15 Service, $2.70 Other on and after December 31, 2017;
$1.85 Food Service, $2.35 Service, $2.95 Other on and after December 31, 2018;
$1.95 Food Service, $2.55 Service, $3.20 Other on and after December 31, 2019;
$2.05 Food Service, $2.70 Service, $3.40 Other on and after December 31, 2020;
$2.15 Food Service, $2.90 Service, $3.65 Other on and after December 31, 2021;

(iii) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$1.60 Food Service, $1.90 Service, $2.35 Other on and after December 31, 2016;
$1.65 Food Service, $2.00 Service, $2.55 Other on and after December 31, 2017;
$1.75 Food Service, $2.15 Service, $2.70 Other on and after December 31, 2018;
$1.80 Food Service, $2.30 Service, $2.90 Other on and after December 31, 2019;

$1.90 Food Service, $2.45 Service, $3.05 Other on and after December 31, 2020.

(2) *Weekly*, for work performed in

(i) *New York City*

(*a*) *Large employers* of eleven or more employees

$11.00 Food Service, $13.80 Service, $17.10 Other on and after December 31, 2016;
$12.45 Food Service, $16.30 Service, $20.20 Other on and after December 31, 2017;
$13.85 Food Service, $18.85 Service, $23.35 Other on and after December 31, 2018;

(*b*) *Small employers* of ten or fewer employees

$10.65 Food Service, $13.20 Service, $16.35 Other on and after December 31, 2016;
$11.75 Food Service, $15.05 Service, $18.65 Other on and after December 31, 2017;
$12.80 Food Service, $16.95 Service, $21.00 Other on and after December 31, 2018;
$13.85 Food Service, $18.85 Service, $23.35 Other on and after December 31, 2019;

(ii) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$10.30 Food Service, $12.55 Service, $15.55 Other on and after December 31, 2016;
$11.00 Food Service, $13.80 Service, $17.10 Other on and after December 31, 2017;
$11.75 Food Service, $15.05 Service, $18.65 Other on and after December 31, 2018;
$12.45 Food Service, $16.30 Service, $20.20 Other on and after December 31, 2019;
$13.15 Food Service, $17.60 Service, $21.80 Other on and after December 31, 2020;
$13.85 Food Service, $18.85 Service, $23.35 Other on and after December 31, 2021;

(iii) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$10.10 Food Service, $12.20 Service, $15.10 Other on and after December 31, 2016;
$10.60 Food Service, $13.05 Service, $16.20 Other on and after December 31, 2017;
$11.10 Food Service, $13.95 Service, $17.25 Other on and after December 31, 2018;
$11.60 Food Service, $14.80 Service, $18.35 Other on and after December 31, 2019;
$12.10 Food Service, $15.70 Service, $19.45 Other on and after December 31, 2020.

(c) *Lodging credits in all-year hotels.* Lodging furnished by an employer to an employee in an all-year hotel may be considered part of wages but shall be valued at no more than the hourly amounts listed below at the Food Service rate for food service workers, the Service rate for service employees, and the Other rate for non-service employees for work performed in:

(1) *New York City* for

(i) *Large employers* of eleven or more employees

$0.40 Food Service, $0.45 Service, $0.55 Other per hour on and after December 31, 2016;
$0.45 Food Service, $0.50 Service, $0.65 Other per hour on and after December 31, 2017;
$0.50 Food Service, $0.60 Service, $0.75 Other per hour on and after December 31, 2018;

(ii) *Small employers* of ten or fewer employees

$0.40 Food Service, $0.40 Service, $0.55 Other per hour on and after December 31, 2016;
$0.45 Food Service, $0.45 Service, $0.60 Other per hour on and after December 31, 2017;
$0.45 Food Service, $0.55 Service, $0.70 Other per hour on and after December 31, 2018;
$0.50 Food Service, $0.60 Service, $0.75 Other per hour on and after December 31, 2019;

(2) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$0.40 Food Service, $0.40 Service, $0.50 Other per hour on and after December 31, 2016;
$0.40 Food Service, $0.45 Service, $0.55 Other per hour on and after December 31, 2017;
$0.45 Food Service, $0.45 Service, $0.60 Other per hour on and after December 31, 2018;
$0.45 Food Service, $0.50 Service, $0.65 Other per hour on and after December 31, 2019;
$0.50 Food Service, $0.55 Service, $0.70 Other per hour on and after December 31, 2020;
$0.50 Food Service, $0.60 Service, $0.75 Other per hour on and after December 31, 2021;

(3) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$0.35 Food Service, $0.40 Service, $0.50 Other per hour on and after December 31, 2016;
$0.40 Food Service, $0.40 Service, $0.50 Other per hour on and after December 31, 2017;
$0.40 Food Service, $0.45 Service, $0.55 Other per hour on and after December 31, 2018;
$0.40 Food Service, $0.45 Service, $0.60 Other per hour on and after December 31, 2019;
$0.45 Food Service, $0.50 Service, $0.65 Other per hour on and after December 31, 2020.

(d) *Meal and lodging credits in resort hotels.* Meals and lodging furnished by an employer to an employee in a resort hotel may be considered part of wages but shall be valued at no more than the amounts listed below at the Tipped rates for food service workers and service employees, the Untipped rates for non-service employees other than fast food employees, and the Fast Food rates for fast food employees for:

(1) Lodging and three meals per day furnished to a residential employee in

(i) *New York City* for

(*a*) *Large employers* of eleven or more employees

$15.80 Food Service, $19.85 Service, $24.70 Other per day on and after December 31, 2016;
$17.80 Food Service, $23.45 Service, $29.20 Other per day on and after December 31, 2017;
$19.85 Food Service, $27.10 Service, $33.65 Other per day on and after December 31, 2018;

(*b*) *Small employers* of ten or fewer employees

$15.30 Food Service, $18.95 Service, $23.55 Other per day on and after December 31, 2016;
$16.80 Food Service, $21.65 Service, $26.95 Other per day on and after December 31, 2017;
$18.35 Food Service, $24.40 Service, $30.30 Other per day on and after December 31, 2018;
$19.85 Food Service, $27.10 Service, $33.65 Other per day on and after December 31, 2019;

(ii) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$14.75 Food Service, $18.05 Service, $22.45 Other per day on and after December 31, 2016;
$15.80 Food Service, $19.85 Service, $24.70 Other per day on and after December 31, 2017;
$16.80 Food Service, $21.65 Service, $26.95 Other per day on and after December 31, 2018;

$17.80 Food Service, $23.45 Service, $29.20 Other per day on and after December 31, 2019;
$18.85 Food Service, $25.30 Service, $31.40 Other per day on and after December 31, 2020;
$19.85 Food Service, $27.10 Service, $33.65 Other per day on and after December 31, 2021;

(iii) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$14.45 Food Service, $17.50 Service, $21.75 Other per day on and after December 31, 2016;
$15.20 Food Service, $18.80 Service, $23.35 Other per day on and after December 31, 2017;
$15.90 Food Service, $20.05 Service, $24.90 Other per day on and after December 31, 2018;
$16.60 Food Service, $21.30 Service, $26.50 Other per day on and after December 31, 2019;
$17.30 Food Service, $22.55 Service, $28.05 Other per day on and after December 31, 2020.

(2) Meals furnished to a non-residential employee in

(i) *New York City* for

(*a*) *Large employers* of eleven or more employees

$3.15 Food Service, $3.95 Service, $4.95 Other per meal on and after December 31, 2016;
$3.55 Food Service, $4.70 Service, $5.85 Other per meal on and after December 31, 2017;
$3.95 Food Service, $5.40 Service, $6.75 Other per meal on and after December 31, 2018;

(*b*) *Small employers* of ten or fewer employees

$3.05 Food Service, $3.80 Service, $4.75 Other per meal on and after December 31, 2016;
$3.35 Food Service, $4.35 Service, $5.40 Other per meal on and after December 31, 2017;
$3.65 Food Service, $4.90 Service, $6.10 Other per meal on and after December 31, 2018;
$3.95 Food Service, $5.40 Service, $6.75 Other per meal on and after December 31, 2019;

(ii) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$2.95 Food Service, $3.60 Service, $4.50 Other per meal on and after December 31, 2016;
$3.15 Food Service, $3.95 Service, $4.95 Other per meal on and after December 31, 2017;
$3.35 Food Service, $4.35 Service, $5.40 Other per meal on and after December 31, 2018;
$3.55 Food Service, $4.70 Service, $5.85 Other per meal on and after December 31, 2019;
$3.75 Food Service, $5.05 Service, $6.30 Other per meal on and after December 31, 2020;
$3.95 Food Service, $5.40 Service, $6.75 Other per meal on and after December 31, 2021;

(iii) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$2.90 Food Service, $3.50 Service, $4.35 Other per meal on and after December 31, 2016;
$3.05 Food Service, $3.75 Service, $4.70 Other per meal on and after December 31, 2017;
$3.20 Food Service, $4.00 Service, $5.00 Other per meal on and after December 31, 2018;
$3.30 Food Service, $4.25 Service, $5.30 Other per meal on and after December 31, 2019;
$3.45 Food Service, $4.50 Service, $5.65 Other per meal on and after December 31, 2020;

(3) Lodging furnished without meals in

(i) *New York City* for

(*a*) *Large employers* of eleven or more employees

$0.40 Food Service, $0.45 Service, $0.55 Other per hour on and after December 31, 2016;
$0.45 Food Service, $0.50 Service, $0.65 Other per hour on and after December 31, 2017;
$0.50 Food Service, $0.60 Service, $0.75 Other per hour on and after December 31, 2018;

(*b*) *Small employers* of ten or fewer employees

$0.40 Food Service, $0.40 Service, $0.55 Other per hour on and after December 31, 2016;
$0.45 Food Service, $0.45 Service, $0.60 Other per hour on and after December 31, 2017;
$0.45 Food Service, $0.55 Service, $0.70 Other per hour on and after December 31, 2018;
$0.50 Food Service, $0.60 Service, $0.75 Other per hour on and after December 31, 2019;

(ii) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$0.40 Food Service, $0.40 Service, $0.50 Other per hour on and after December 31, 2016;
$0.40 Food Service, $0.45 Service, $0.55 Other per hour on and after December 31, 2017;
$0.45 Food Service, $0.45 Service, $0.60 Other per hour on and after December 31, 2018;
$0.45 Food Service, $0.50 Service, $0.65 Other per hour on and after December 31, 2019;
$0.50 Food Service, $0.55 Service, $0.70 Other per hour on and after December 31, 2020;
$0.50 Food Service, $0.60 Service, $0.75 Other per hour on and after December 31, 2021;

(iii) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$0.35 Food Service, $0.40 Service, $0.50 Other per hour on and after December 31, 2016;
$0.40 Food Service, $0.40 Service, $0.50 Other per hour on and after December 31, 2017;
$0.40 Food Service, $0.45 Service, $0.55 Other per hour on and after December 31, 2018;
$0.40 Food Service, $0.45 Service, $0.60 Other per hour on and after December 31, 2019;
$0.45 Food Service, $0.50 Service, $0.65 Other per hour on and after December 31, 2020.

## SUBPART 146-2
## REGULATIONS

Sec.

**§ 146-2.1. Employer records.**

(a) Every employer shall establish, maintain and preserve for at least six years weekly payroll records which shall show for each employee:

(1) name and address;

(2) social security number or other employee identification number;

(3) occupational classification;

(4) the number of hours worked daily and weekly, including the time of arrival and departure for each employee working a split shift or spread of hours exceeding 10;

(5) regular and overtime hourly wage rates;

(6) the amount of gross wages;

(7) deductions from gross wages;

(8) the amount of net wages;

(9) tip credits, if any, claimed as part of the minimum wage;

(10) meal and lodging credits, if any, claimed as part of wages;

(11) money paid in cash; and

(12) student classification.

(b) The records should also indicate whether the employee has uniforms maintained by the employer.

(c) In addition, for each individual working in an executive, administrative or professional capacity, or as a staff counselor in a children's camp, an employer's records shall also show:

(1) name and address;

(2) social security number or other employee identification number;

(3) description of occupation; and

(4) for individuals permitted or suffered to work in an executive or administrative capacity, total wages, and the value of meal and lodging credits, if any, for each payroll period.

(d) For each individual for whom student status is claimed, a statement from the school which such individual attends indicating whether or not such individual:

(1) is a student whose course of instruction is one leading to a degree, diploma or certificate; or

(2) is completing residence requirements for a degree; and

(3) is required to obtain supervised and directed vocational experience to fulfill curriculum requirements.

(e) Employers, including those who maintain their records containing the information required by this section, section 146-2.2, section 146-2.17 and section 146-2.18 of this Subpart at a place outside of New York State, shall make such records or sworn certified copies thereof available at the place of employment upon request of the commissioner.

**§ 146-2.2. Written notice of pay rates, tip credit and pay day.**

(a) Prior to the start of employment, an employer shall give each employee written notice of the employee's regular hourly pay rate, overtime hourly pay rate, the amount of tip credit, if any, to be taken from the basic minimum hourly rate, and the regular payday. The notice shall also state that extra pay is required if tips are insufficient to bring the employee up to the basic minimum hourly rate. The employer must provide notice in:

(1) English; and

(2) any other language spoken by the new employee as his/her primary language, so long as the Commissioner has made such notice available to employers in such language on the Department's website.

(b) Such notice shall also be required prior to any change in the employee's hourly rates of pay.

(c) An acknowledgment of receipt signed by the employee shall be kept on file for six years.

(d) The employer has the burden of proving compliance with the notification provisions of this section. As an example, the employer will have met this burden by providing the employee with the following notice, filled out and subject to revisions in the minimum rates, subject to the language requirements set forth in subdivision (a) of this section, and the employee signs a statement acknowledging that he or she received the notice.

Notice of Pay Rates and Pay Day

Company name and address _____

Preparer's name and title _____

Employee's name and address _____

Your regular rate of pay will be $_____ per hour for the first 40 hours in a week.

Your overtime rate of pay will be $_____ per hour for hours over 40.

Your designated pay day will be: _____

FOR TIPPED EMPLOYEES ONLY:

The tip credit taken will be $_____ per hour.

If you do not receive enough tips over the course of a week to bring you up to the minimum hourly rates of $____ per hour for the first 40 hours and $____ per hour for hours over 40, you will be paid additional wages that week to make up the difference.

FOR SERVICE EMPLOYEES IN RESORT HOTELS ONLY (if different from rates given above): If your weekly average of tips received is at least $____ per hour, your regular rate of pay will be $_____ per hour and your overtime rate of pay will be $_____ per hour. The tip credit taken will be $_____ per hour.

Preparer's signature and date _____

I have been notified of my pay rate, overtime rate, tip credit if applicable, and designated pay day on the date given below.

Employee's signature and date _____

**§ 146-2.3. Statement to employee.**

Every employer shall provide to each employee a statement, commonly referred to as a pay stub, with every payment of wages. The pay stub must list hours worked, rates paid, gross wages, credits claimed (for tips, meals and lodging) if any, deductions and net wages.

**§ 146-2.4. Posting requirements.**

Every employer shall post, in a conspicuous place in his or her establishment, notices issued by the Department of Labor about wage and hour laws, tip appropriations, illegal deduction provisions and any other labor laws that the Commissioner shall deem appropriate.

**§ 146-2.5. Hourly rates are required.**

Employees as defined in section 146-3.2 of this Title, other than commissioned salespersons, shall be paid hourly rates of pay. Employers may not pay employees on a daily, weekly, salary, piece rate or other non-hourly rate basis.

**§ 146-2.6. Weekly basis of minimum wage.**

The minimum wage provided by this Part shall be required for each week of work, regardless of the frequency of payment.

**§ 146-2.7. Deductions and expenses.**

(a) Employers may not make any deductions from wages, except for credits authorized in this Part and deductions authorized or required by law, such as for social security and income taxes. Some examples of prohibited deductions are:

(1) deductions for spoilage or breakage;

(2) deductions because of non-payment by a customer;

(3) deductions for cash shortages or losses; and

(4) fines or penalties for lateness, misconduct, or quitting by an employee without notice.

(b) Employers may not charge employees separately from wages for items prohibited as deductions from wages, except for optional meal purchases allowed by section 146-2.8(d) of this Part.

(c) If an employee must spend money to carry out duties assigned by his or her employer, those expenses must not bring the employee's wage below the required minimum wage.

**§ 146-2.8. Meals and lodging.**

(a) When an employer takes a meal and/or lodging credit toward the pay of an employee, the employer may not charge the employee any additional money for the meal(s) and/or lodging.

(b) A residential employee in a resort hotel whose compensation is based on the inclusion of meals shall be provided with three meals per day.

(c) An employee who works a shift requiring a meal period under Section 162 of the New York State Labor Law must either:

(1) receive a meal furnished by the employer as part of his or her compensation, at no more than the meal credit allowed in this Part; or

(2) be permitted to bring his or her own food and consume it on premises.

(d) Nothing in this Part shall prevent an employee from purchasing from the employer:

(1) in a restaurant or an all-year hotel, meals at other times or places than those provided as part of his or her compensation;

(2) in a resort hotel, food in addition to meals provided as part of his or her compensation.

Such purchases may not be paid for through deductions from the employee's wages.

**§ 146-2.9. Working at tipped and non-tipped occupations on the same day.**

On any day that a service employee or food service worker works at a non-tipped occupation

(a) for two hours or more, or

(b) for more than 20 percent of his or her shift, whichever is less, the wages of the employee shall be subject to no tip credit for that day.

*Example*: An employee has a daily schedule as follows: 8 a.m. to 9:45 a.m., food preparation; 9:45 a.m. to 1:30 p.m., serving food in the restaurant; takes ½ hour meal period; 2:00 p.m. to 4:30 p.m. serving food in the restaurant. That employee has worked 8 hours total, consisting of 6 hours, 15 minutes as a food service worker and 1 hour, 45 minutes in a non-tipped occupation. Twenty percent of an 8 hour shift is 1 hour, 36 minutes. Although the employee worked for less than two hours at the non-tipped occupation, he/she has worked for more than 20 percent of his/her shift at the non-tipped occupation. Therefore, the employee is subject to no tip credit for that day.

**§ 146-2.10. Employment covered by more than one wage order.**

An employee in the hospitality industry who works for the same employer at an occupation governed by another New York State minimum wage order

(a) for two hours or more during any one day; or

(b) for 12 hours or more in any week shall be paid for all hours of working time for that day or week in accordance with the minimum wage standards contained in the minimum wage order for such other industry or the hospitality industry, whichever is higher.

**§ 146-2.11. Learner, trainee, or apprentice rates.**

Any employees whom an employer designates learners, trainees, or apprentices must nonetheless be paid at least the minimum rates prescribed in this Part.

**§ 146-2.12. Rehabilitation programs.**

For an individual employed as part of a rehabilitation program approved by the commissioner, the payment of compensation under such program shall be deemed to meet the requirements of this Part.

**§ 146-2.13. Student obtaining vocational experience.**

A student is not deemed to be permitted or suffered to work if, in order to fulfill the curriculum requirements of the educational institution which the student attends, the student is required to obtain supervised and directed vocational experience in another establishment.

**§ 146-2.14. Tip sharing and tip pooling.**

(a) *Tip sharing* is the practice by which a directly tipped employee gives a portion of his or her tips to another service employee or food service worker who participated in providing service to customers and keeps the balance.

(b) *Tip pooling* is the practice by which the tip earnings of directly tipped employees are intermingled in a common pool and then redistributed among directly and indirectly tipped employees.

(c) *Directly tipped employees* are those who receive tips from patrons or customers without any intermediary between the patron or customer and the employee.

(d) *Indirectly tipped employees* are those employees who, without receiving direct tips, are eligible to receive shared tips or to receive distributions from a tip pool.

(e) Eligibility of employees to receive shared tips, or to receive distributions from a tip pool, shall be based upon duties and not titles. Eligible employees must perform, or assist in performing, personal service to patrons at a level that is a principal and regular part of their duties and is not merely occasional or incidental. Examples of eligible occupations include:

(1) wait staff;

(2) counter personnel who serve food or beverages to customers;

(3) bus persons;

(4) bartenders;

(5) service bartenders;

(6) barbacks;

(7) food runners;

(8) captains who provide direct food service to customers; and

(9) hosts who greet and seat guests.

(f) Employers may not require directly tipped employees to contribute a greater percentage of their tips to indirectly tipped employees through tip sharing or tip pooling than is customary and reasonable.

**§ 146-2.15. Tip sharing.**

(a) Directly tipped employees may share their tips on a voluntary basis with other service employees or food service workers who participated in providing service to customers.

(b) An employer may require directly tipped food service workers to share their tips with other food service workers who participated in providing service to customers and may set the percentage to be given to each occupation. However, employees must handle the transactions themselves.

(c) Nothing in this section shall be interpreted as requiring an employer to compensate participants in tip sharing for tips wrongfully withheld from the tip sharing by any participant.

**§ 146-2.16. Tip pooling.**

(a) Directly tipped employees may mutually agree to pool their tips on a voluntary basis and to redistribute the tips among directly tipped employees and indirectly tipped employees who participated in providing the service.

(b) An employer may require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool. Only food service workers may receive distributions from the tip pool.

(c) Nothing in this section shall be interpreted as requiring an employer to compensate participants in tip pooling for tips wrongfully withheld from the tip pool by any participant.

**§ 146-2.17. Records of tip sharing or tip pooling.**

(a) Employers who operate a tip sharing or tip pooling system must establish, maintain, and preserve for at least six years records which include:

(1) A daily log of the tips collected by each employee on each shift, whether in cash or by credit card;

(2) A list of occupations that the employer deems eligible to receive tips through a tip sharing or tip pool system;

(3) The shares of tips that each occupation is scheduled to receive from tip sharing or tip pooling; and

(4) The amount in tips that each employee receives from the tip share or tip pool, by date.

(b) Such records must be regularly made available for participants in the tip sharing or tip pooling systems to review. Nothing in this section shall be interpreted as granting any employee the right to review the payroll records of any other employee.

**§ 146-2.18. Charge purported to be a gratuity or tip.**

Section 196-d of the New York State Labor Law prohibits employers from demanding, accepting, or retaining, directly or indirectly, any part of an employee's gratuity or any charge purported to be a gratuity.

(a) A charge purported to be a gratuity must be distributed in full as gratuities to the service employees or food service workers who provided the service.

(b) There shall be a rebuttable presumption that any charge in addition to charges for food, beverage, lodging, and other specified materials or services, including but not limited to any charge for "service" or "food service," is a charge purported to be a gratuity.

(c) Employers who make charges purported to be gratuities must establish, maintain and preserve for at least six years records of such charges and their dispositions.

(d) Such records must be regularly made available for participants in the tip sharing or tip pooling systems to review.

**§ 146-2.19 Administrative charge not purported to be a gratuity or tip.**

(a) A charge for the administration of a banquet, special function, or package deal shall be clearly identified as such and customers shall be notified that the charge is not a gratuity or tip.

(b) The employer has the burden of demonstrating, by clear and convincing evidence, that the notification was sufficient to ensure that a reasonable customer would understand that such charge was not purported to be a gratuity.

(c) *Adequate notification* shall include a statement in the contract or agreement with the customer, and on any menu and bill listing prices, that the administrative charge is for administration of the banquet, special function, or package deal, is not purported to be a gratuity, and will not be distributed as gratuities to the employees who provided service to the guests. The statements shall use ordinary language readily understood and shall appear in a font size similar to surrounding text, but no smaller than a 12-point font.

(d) A combination charge, part of which is for the administration of a banquet, special function or package deal and part of which is to be distributed as gratuities to the employees who provided service to the guests, must be broken down into specific percentages or portions, in writing to the customer, in accordance with the standards for adequate notification in subdivision (c) of this section. The portion of the combination charge which will not be distributed as gratuities to the employees who provided service to the guests shall be covered by subdivisions (a), (b) and (c) of this section.

**§ 146-2.20. Tips charged on credit cards.**

When tips are charged on credit cards, an employer is not required to pay the employee's pro-rated share of the service charge taken by the credit card company for the processing of the tip. The employer must return to the employee the full amount of the tip charged on the credit card, minus the pro-rated portion of the tip taken by the credit card company.

*Example:* The bill totals $100 exactly. The customer leaves, on their credit card, the $100 payment of the bill, as well as a $20 tip. Both the tip and the bill must be processed through a credit card company which charges a 5 percent fee on all transactions. The total charge levied by the credit card company on the $120 charge is $6. Of that $6, $5 is for the bill (5 percent of $100) and $1 is for the tip (5 percent of $20). The employer must provide the employee $19, which represents the $20 tip minus $1 pro-rated employee's portion of the surcharge).

## SUBPART 146-3
## DEFINITIONS

Sec.



### § 146-3.1. Hospitality industry.

(a) The term *hospitality industry* includes any restaurant or hotel, as defined herein.

(b) The term *restaurant* includes any eating or drinking place that prepares and offers food or beverage for human consumption either on any of its premises or by such service as catering, banquet, box lunch, curb service or counter service to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto. The term *restaurant* includes but is not limited to restaurant operations of other types of establishments, restaurant concessions in any establishment and concessions in restaurants.

(c) The term *hotel* includes:

(1) any establishment which as a whole or part of its business activities offers lodging accommodations for hire to the public, to employees, or to members or guests of members, and services in connection therewith or incidental thereto. The industry includes but is not limited to commercial hotels, apartment hotels, resort hotels, lodging houses, boarding houses, all-year hotels, furnished room houses, children's camps, adult camps, tourist camps, tourist homes, auto camps, motels, residence clubs, membership clubs, dude ranches, and spas and baths that provide lodging.

(2) An *all-year hotel* is one that does not qualify as a resort hotel under the definition below. Motor courts, motels, cabins, tourist homes, and other establishments serving similar purposes shall be classified as all-year hotels unless they specifically qualify as resort hotels in accordance with the definition below.

(3) A *resort hotel* is one which offers lodging accommodations of a vacational nature to the public or to members or guests of members, and which:

(i) operates for not more than seven months in any calendar year; or

(ii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of employee workdays during any consecutive four-week period by at least 100 percent over the number of employee workdays in any other consecutive four-week period within the preceding calendar year; or

(iii) being located in a rural community or in a city or village of less than 15,000 population, increased its number of guest days during any consecutive four-week period by at least 100 percent over the number of guest days in any other consecutive four-week period within the preceding calendar year.

(d) The *hospitality industry* excludes:

(1) establishments where the service of food or beverage or the provision of lodging is not available to the public or to members or guests of members, but is incidental to instruction, medical care, religious observance, or the care of persons with disabilities or those who are impoverished or other public charges; and

(2) establishments where the service of food or beverage or the provision of lodging is offered by any corporation, unincorporated association, community chest, fund or foundation organized exclusively for religious, charitable or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

The exclusions set forth in paragraphs (1) and (2) of this subdivision shall not be deemed to exempt such establishments from coverage under another minimum wage order which covers them.

**§ 146-3.2. Employee.**

(a) *Employee* means any individual suffered or permitted to work in the hospitality industry by the operator of the establishment or by any other employer, except as provided below.

(b) *Employee* does not include any individual employed by a Federal, State or municipal government or political subdivision thereof.

(c) *Employee* also does not include any individual permitted to work in, or as:

(1) an executive, administrative or professional capacity.

(i) executive. *Work in a bona fide executive capacity* means work by an individual:

(*a*) whose primary duty consists of the management of the enterprise in which such individual is employed or of a customarily recognized department or subdivision thereof;

(*b*) who customarily and regularly directs the work of two or more other employees therein;

(*c*) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight;

(*d*) who customarily and regularly exercises discretionary powers; and

(*e*) who is paid for his services a salary, inclusive of board, lodging or other allowances and facilities, of at least the amounts listed below when working in:

(*1*) *New York City* for

(*i*) *Large employers* of eleven or more employees

$825.00 per week on and after December 31, 2016;
$975.00 per week on and after December 31, 2017;
$1,125.00 per week on and after December 31, 2018;

(*ii*) *Small employers* of ten or fewer employees

$787.50 per week on and after December 31, 2016;
$900.00 per week on and after December 31, 2017;
$1,012.50 per week on and after December 31, 2018;
$1,125.00 per week on and after December 31, 2019;

(*2*) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$750.00 per week on and after December 31, 2016;
$825.00 per week on and after December 31, 2017;
$900.00 per week on and after December 31, 2018;
$975.00 per week on and after December 31, 2019;
$1,050.00 per week on and after December 31, 2020;
$1,125.00 per week on and after December 31, 2021;

(*3*) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$727.50 per week on and after December 31, 2016;
$780.00 per week on and after December 31, 2017;
$832.00 per week on and after December 31, 2018;
$885.00 per week on and after December 31, 2019;
$937.50 per week on and after December 31, 2020.

(ii) Administrative. Work in a *bona fide administrative capacity* means work by an individual:

(*a*) whose primary duty consists of the performance of office or non-manual field work directly related to management policies or general operations of such individual's employer;

(*b*) who customarily and regularly exercises discretion and independent judgment;

(*c*) who regularly and directly assists an employer, or an employee employed in a bona fide executive or administrative capacity (*e.g.*, employment as an administrative assistant); or who performs under only general supervision work along specialized or technical lines requiring special training, experience or knowledge; and

(*d*) who is paid for his services a salary, inclusive of board, lodging or other allowances and facilities, of at least the amounts listed below when working in:

(*1*) *New York City* for

(*i*) *Large employers* of eleven or more employees

$825.00 per week on and after December 31, 2016;
$975.00 per week on and after December 31, 2017;
$1,125.00 per week on and after December 31, 2018;

(*ii*) *Small employers* of ten or fewer employees

$787.50 per week on and after December 31, 2016;
$900.00 per week on and after December 31, 2017;
$1,012.50 per week on and after December 31, 2018;
$1,125.00 per week on and after December 31, 2019;

(*2*) *Remainder of downstate* (Nassau, Suffolk and Westchester counties)

$750.00 per week on and after December 31, 2016;
$825.00 per week on and after December 31, 2017;
$900.00 per week on and after December 31, 2018;
$975.00 per week on and after December 31, 2019;
$1,050.00 per week on and after December 31, 2020;
$1,125.00 per week on and after December 31, 2021;

(*3*) *Remainder of state* (outside of New York City, Nassau, Suffolk and Westchester counties)

$727.50 per week on and after December 31, 2016;
$780.00 per week on and after December 31, 2017;
$832.00 per week on and after December 31, 2018;
$885.00 per week on and after December 31, 2019;
$937.50 per week on and after December 31, 2020.

(iii) professional. Work in a *bona fide professional capacity* means work by an individual:

(*a*) whose primary duty consists of the performance of work:

(*1*) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, as distinguished from a general academic education and from an apprenticeship, and from training in the performance of routine mental, manual or physical processes, or

(*2*) original and creative in character in a recognized field of artistic endeavor (as opposed to work which can be produced by a person endowed with general manual or intellectual ability and training), and the result of which depends primarily on the invention, imagination or talent of the employee; and

(*b*) whose work requires the consistent exercise of discretion and judgment in its performance; or

(*c*) whose work is predominantly intellectual and varied in character (as opposed to routine mental, manual, mechanical or physical work), and is of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time.

(2) an outside salesperson. The term *outside salesperson* means an individual who is customarily and predominantly engaged away from the premises of the employer and not at any fixed site and location for the purpose of:

(i) making sales; or

(ii) selling and delivering articles or goods; or

(iii) obtaining orders or contracts for service or for the use of facilities.

(3) a golf caddy. This exclusion shall not be deemed to exclude caddies from another minimum wage order which covers such employees.

(4) a camper worker. A camper who works no more than four hours a day for a children's camp and at all other times enjoys the same privileges, facilities and accommodations as a regular camper in such camp shall be known as a *camper worker* and shall not be an employee within the meaning of this Part.

(5) spa and bath workers employed by concessionaires in hotels or by spas and baths operated independently of hotels, who shall be covered under another minimum wage order. Spa and bath workers employed by hotels are employees under this Part.

(6) staff counselors in children's camps.

(i) a *staff counselor* is a person whose duties primarily relate to the guidance, instruction, supervision and care of campers in children's camps, whether such work involves direct charge of, or responsibility for, such activities, or merely assistance to persons in charge. The term *staff counselor* includes, but is not limited to: head counselor, assistant head counselor, specialist counselor or instructor (such as swimming counselor, arts and crafts counselor, etc.), group or division leader, camp mother or father, supervising counselor, senior counselor, counselor, general counselor, bunk counselor, assistant counselor, co-counselor, junior counselor, and counselor aide.

(ii) *children's camp* means any establishment which, as a whole or part of its business activities, is engaged in offering for children, on a resident or nonresident basis, recreational programs of supervised play or organized activity in such fields as sports, nature lore, and arts and crafts, whether known as camps, play groups, play schools, or by any other name. The term *children's camp* does not include an establishment which is open for a period of more than 17 consecutive weeks during the year.

**§ 146-3.3. Service employee and non-service employee.**

(a) A *service employee* is an employee, other than a food service worker or fast food employee, who customarily receives tips at or above the Tip Threshold rate listed at subdivision (a) of section 146-1.3 of this Subpart.

(b) A *non-service employee* is any employee other than a service employee or a food service worker.

(c) Classification as a service employee or as a non-service employee shall be on a weekly basis except that an employee may not be classified as a service employee on any day in which she or he has been assigned to

work at an occupation in which tips are not customarily received for 2 hours or more or for more than 20 percent of her or his shift, whichever is less.

(d) The employer shall have the burden of proof that an employee receives sufficient tips to be classified as a service employee.

**§ 146-3.4. Food service worker.**

(a) A *food service worker* is any employee who is primarily engaged in the serving of food or beverages to guests, patrons or customers in the hospitality industry, including, but not limited to, wait staff, bartenders, captains and bussing personnel; and who regularly receives tips from such guests, patrons or customers. The term *food service worker* shall not include delivery workers.

(b) Classification as a food service worker shall be on a weekly basis except that an employee may not be classified as a food service worker on any day in such week in which she or he has been assigned to work in an occupation in which tips are not customarily received for 2 hours or more or for more than 20 percent of her or his shift, whichever is less.

**§ 146-3.5. Regular rate of pay.**

(a) The term *regular rate* shall mean the amount that the employee is regularly paid for each hour of work, before subtracting a tip credit, if any.

(b) If an employer fails to pay an employee an hourly rate of pay, the employee's regular hourly rate of pay shall be calculated by dividing the employee's total weekly earnings, not including exclusions from the regular rate, by the lesser of 40 hours or the actual number of hours worked by that employee during the work week.

*Exclusions from the regular rate* are gifts and discretionary bonuses, fringe benefits pay, expense reimbursement, profit-sharing and savings-plan payments, employer contributions to benefit plans, premium pay for hours worked above 8 hours a day or 40 hours a week or above normal daily or weekly standards, premium pay for time and one half (or greater) rates paid for Saturday, Sunday, holiday, day of rest, sixth or seventh day worked, and premium pay for work outside of a contractual daily period not exceeding 8 hours or a contractual weekly period not exceeding 40 hours. The premium pay mentioned above shall be credited towards overtime pay due.

**§ 146-3.6. Working time.**

*Working time* means time worked or time of permitted attendance, including waiting time, whether or not work duties are assigned, or time an employee is required to be available for work at a place or within a geographical area prescribed by the employer such that the employee is unable to use the time productively for his or her own purposes, and time spent in traveling as part of the duties of the employee.

**§ 146-3.7. Meal.**

(a) A *meal* shall provide adequate portions of a variety of wholesome, nutritious foods and shall include at least one of the types of food from all four of the following groups:

(1) fruits or vegetables;

(2) grains or potatoes;

(3) eggs, meat, fish, poultry, dairy, or legumes; and

(4) tea, coffee, milk or juice.

(b) *Meals* shall be deemed to be furnished by an employer to an employee when made available to that employee during reasonable meal periods and customarily eaten by that employee.

**§ 146-3.8. Lodging.**

*Lodging* means living accommodations used by the employee which meet generally accepted standards of adequacy and sanitation. All lodging provided by an employer to an employee must comply with all community standards for housing. For purposes of this Part, *community standards* shall mean all applicable state, county and local health or housing codes. The employer shall have the burden of proof that provided lodging complies with community standards.

**§ 146-3.9. Split shift.**

A *split shift* is a schedule of daily hours in which the working hours required or permitted are not consecutive. Interruption of working hours for a meal period of one hour or less does not constitute a split shift.

**§ 146-3.10. Required uniform.**

(a) A *required uniform* is that clothing required to be worn while working at the request of an employer, or to comply with any federal, state, city or local law, rule, or regulation, *except* clothing that may be worn as part of an employee's ordinary wardrobe.

(b) *Ordinary wardrobe* shall mean ordinary basic street clothing selected by the employee where the employer permits variations in details of dress.

**§ 146-3.11. Week of work.**

A *week of work* is a fixed and regularly recurring period of 168 hours–7 consecutive 24 hour periods. It need not coincide with the calendar week but may begin on any day and at any hour of the day. For purposes of computing pay due under this Part, a single workweek may be established for an establishment as a whole or different workweeks may be established for different employees or groups of employees. Once the beginning time of an employee's workweek is established, it remains fixed regardless of the schedule of hours worked by him or her. The beginning of the workweek may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements of this Part.

**§ 146-3.12. Hourly tip rates.**

The term *tips received*, as used in section 146-1.3 of this Part, and the term *receives tips*, as used in sections 146-3.3 and 146-3.4 of this Part, shall mean the hourly rate that results when the total amount of tips received by a tipped employee during a week of work are divided by the total working time of such worker during that week of work. The total amount of tips received shall be the net amount of tips received after adjustments for tip pooling, tip sharing, and credit card charges pursuant to sections 146-2.14, 146-2.15, 146-2.16 and 146-2.20.

**§ 146-3.13 Fast Food Employee**

(a) "Fast Food Employee" shall mean any person employed or permitted to work at or for a Fast Food Establishment by any employer where such person's job duties include at least one of the following: customer service, cooking, food or drink preparation, delivery, security, stocking supplies or equipment, cleaning, or routine maintenance.

(b) "Fast Food Establishment" shall mean any establishment in the state of New York: (a) which has as its primary purpose serving food or drink items; (b) where patrons order or select items and pay before eating and such items may be consumed on the premises, taken out, or delivered to the customer's location; (c) which offers limited service; (d) which is part of a chain; and (e) which is one of thirty (30) or more establishments nationally, including: (i) an integrated enterprise which owns or operates thirty (30) or more such establishments in the aggregate nationally; or (ii) an establishment operated pursuant to a Franchise where the Franchisor and the Franchisee(s) of such Franchisor owns or operate thirty (30) or more such establishments in the aggregate nationally. "Fast Food Establishment" shall include such establishments located within non-Fast Food Establishments.

(c) "Chain" shall mean a set of establishments which share a common brand, or which are characterized by standardized options for décor, marketing, packaging, products, and services.

(d) "Franchisee" shall mean a person or entity to whom a franchise is granted.

(e) "Franchisor" shall mean a person or entity who grants a franchise to another person or entity.

(f) "Franchise" shall have the same definition as set forth in General Business Law Section 681.

(g)"Integrated enterprise" shall mean two or more entities sufficiently integrated so as to be considered a single employer as determined by application of the following factors: (i) degree of interrelation between the operations of multiple entities; (ii) degree to which the entities share common management; (iii) centralized control of labor relations; and (iv) degree of common ownership or financial control.

Federal Register

Friday,
April 23, 2004

Part II

# Department of Labor

Wage and Hour Division

29 CFR Part 541

Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees; Final Rule

Regulations

■ For the reasons set forth above, 29 CFR part 541 is revised to read as follows:

# PART 541—DEFINING AND DELIMITING THE EXEMPTIONS FOR EXECUTIVE, ADMINISTRATIVE, PROFESSIONAL, COMPUTER AND OUTSIDE SALES EMPLOYEES



**Authority:** 29 U.S.C. 213; Public Law 101–583, 104 Stat. 2871; Reorganization Plan No. 6 of 1950 (3 CFR 1945–53 Comp. p. 1004); Secretary's Order No. 4–2001 (66 FR 29656).

## Subpart A—General Regulations

### § 541.0 Introductory statement.

(a) Section 13(a)(1) of the Fair Labor Standards Act, as amended, provides an exemption from the Act's minimum wage and overtime requirements for any employee employed in a bona fide executive, administrative, or professional capacity (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of an outside sales employee, as such terms are defined and delimited from time to time by regulations of the Secretary, subject to the provisions of the Administrative Procedure Act. Section 13(a)(17) of the Act provides an exemption from the minimum wage and overtime requirements for computer systems analysts, computer programmers, software engineers, and other similarly skilled computer employees.

(b) The requirements for these exemptions are contained in this part as follows: executive employees, subpart B; administrative employees, subpart C; professional employees, subpart D; computer employees, subpart E; outside sales employees, subpart F. Subpart G contains regulations regarding salary requirements applicable to most of the exemptions, including salary levels and the salary basis test. Subpart G also contains a provision for exempting certain highly compensated employees. Subpart H contains definitions and other miscellaneous provisions applicable to all or several of the exemptions.

(c) Effective July 1, 1972, the Fair Labor Standards Act was amended to include within the protection of the equal pay provisions those employees exempt from the minimum wage and overtime pay provisions as bona fide executive, administrative, and professional employees (including any employee employed in the capacity of academic administrative personnel or teacher in elementary or secondary schools), or in the capacity of an outside sales employee under section 13(a)(1) of the Act. The equal pay provisions in section 6(d) of the Fair Labor Standards Act are administered and enforced by the United States Equal Employment Opportunity Commission.

### § 541.1 Terms used in regulations.

*Act* means the Fair Labor Standards Act of 1938, as amended.

*Administrator* means the Administrator of the Wage and Hour Division, United States Department of Labor. The Secretary of Labor has delegated to the Administrator the functions vested in the Secretary under sections 13(a)(1) and 13(a)(17) of the Fair Labor Standards Act.

### § 541.2 Job titles insufficient.

A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee's salary and duties meet the requirements of the regulations in this part.

### § 541.3 Scope of the section 13(a)(1) exemptions.

(a) The section 13(a)(1) exemptions and the regulations in this part do not apply to manual laborers or other "blue collar" workers who perform work involving repetitive operations with their hands, physical skill and energy. Such nonexempt "blue collar" employees gain the skills and knowledge required for performance of their routine manual and physical work through apprenticeships and on-the-job training, not through the prolonged

course of specialized intellectual instruction required for exempt learned professional employees such as medical doctors, architects and archeologists. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers and laborers are entitled to minimum wage and overtime premium pay under the Fair Labor Standards Act, and are not exempt under the regulations in this part no matter how highly paid they might be.

(b)(1) The section 13(a)(1) exemptions and the regulations in this part also do not apply to police officers, detectives, deputy sheriffs, state troopers, highway patrol officers, investigators, inspectors, correctional officers, parole or probation officers, park rangers, fire fighters, paramedics, emergency medical technicians, ambulance personnel, rescue workers, hazardous materials workers and similar employees, regardless of rank or pay level, who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; pursuing, restraining and apprehending suspects; detaining or supervising suspected and convicted criminals, including those on probation or parole; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; or other similar work.

(2) Such employees do not qualify as exempt executive employees because their primary duty is not management of the enterprise in which the employee is employed or a customarily recognized department or subdivision thereof as required under § 541.100. Thus, for example, a police officer or fire fighter whose primary duty is to investigate crimes or fight fires is not exempt under section 13(a)(1) of the Act merely because the police officer or fire fighter also directs the work of other employees in the conduct of an investigation or fighting a fire.

(3) Such employees do not qualify as exempt administrative employees because their primary duty is not the performance of work directly related to the management or general business operations of the employer or the employer's customers as required under § 541.200.

(4) Such employees do not qualify as exempt professionals because their primary duty is not the performance of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as required under § 541.300. Although some police officers, fire fighters, paramedics, emergency medical technicians and similar employees have college degrees, a specialized academic degree is not a standard prerequisite for employment in such occupations.

### § 541.4 Other laws and collective bargaining agreements.

The Fair Labor Standards Act provides minimum standards that may be exceeded, but cannot be waived or reduced. Employers must comply, for example, with any Federal, State or municipal laws, regulations or ordinances establishing a higher minimum wage or lower maximum workweek than those established under the Act. Similarly, employers, on their own initiative or under a collective bargaining agreement with a labor union, are not precluded by the Act from providing a wage higher than the statutory minimum, a shorter workweek than the statutory maximum, or a higher overtime premium (double time, for example) than provided by the Act. While collective bargaining agreements cannot waive or reduce the Act's protections, nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements.

## Subpart B—Executive Employees

### § 541.100 General rule for executive employees.

(a) The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;

(3) Who customarily and regularly directs the work of two or more other employees; and

(4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

(b) The phrase "salary basis" is defined at § 541.602; "board, lodging or other facilities" is defined at § 541.606; "primary duty" is defined at § 541.700; and "customarily and regularly" is defined at § 541.701.

### § 541.101 Business owner.

The term "employee employed in a bona fide executive capacity" in section 13(a)(1) of the Act also includes any employee who owns at least a bona fide 20-percent equity interest in the enterprise in which the employee is employed, regardless of whether the business is a corporate or other type of organization, and who is actively engaged in its management. The term "management" is defined in § 541.102. The requirements of Subpart G (salary requirements) of this part do not apply to the business owners described in this section.

### § 541.102 Management.

Generally, "management" includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures.

### § 541.103 Department or subdivision.

(a) The phrase "a customarily recognized department or subdivision" is intended to distinguish between a mere collection of employees assigned from time to time to a specific job or series of jobs and a unit with permanent status and function. A customarily recognized department or subdivision must have a permanent status and a continuing function. For example, a

large employer's human resources department might have subdivisions for labor relations, pensions and other benefits, equal employment opportunity, and personnel management, each of which has a permanent status and function.

(b) When an enterprise has more than one establishment, the employee in charge of each establishment may be considered in charge of a recognized subdivision of the enterprise.

(c) A recognized department or subdivision need not be physically within the employer's establishment and may move from place to place. The mere fact that the employee works in more than one location does not invalidate the exemption if other factors show that the employee is actually in charge of a recognized unit with a continuing function in the organization.

(d) Continuity of the same subordinate personnel is not essential to the existence of a recognized unit with a continuing function. An otherwise exempt employee will not lose the exemption merely because the employee draws and supervises workers from a pool or supervises a team of workers drawn from other recognized units, if other factors are present that indicate that the employee is in charge of a recognized unit with a continuing function.

**§ 541.104 Two or more other employees.**

(a) To qualify as an exempt executive under § 541.100, the employee must customarily and regularly direct the work of two or more other employees. The phrase "two or more other employees" means two full-time employees or their equivalent. One full-time and two half-time employees, for example, are equivalent to two full-time employees. Four half-time employees are also equivalent.

(b) The supervision can be distributed among two, three or more employees, but each such employee must customarily and regularly direct the work of two or more other full-time employees or the equivalent. Thus, for example, a department with five full-time nonexempt workers may have up to two exempt supervisors if each such supervisor customarily and regularly directs the work of two of those workers.

(c) An employee who merely assists the manager of a particular department and supervises two or more employees only in the actual manager's absence does not meet this requirement.

(d) Hours worked by an employee cannot be credited more than once for different executives. Thus, a shared responsibility for the supervision of the same two employees in the same department does not satisfy this requirement. However, a full-time employee who works four hours for one supervisor and four hours for a different supervisor, for example, can be credited as a half-time employee for both supervisors.

**§ 541.105 Particular weight.**

To determine whether an employee's suggestions and recommendations are given "particular weight," factors to be considered include, but are not limited to, whether it is part of the employee's job duties to make such suggestions and recommendations; the frequency with which such suggestions and recommendations are made or requested; and the frequency with which the employee's suggestions and recommendations are relied upon. Generally, an executive's suggestions and recommendations must pertain to employees whom the executive customarily and regularly directs. It does not include an occasional suggestion with regard to the change in status of a co-worker. An employee's suggestions and recommendations may still be deemed to have "particular weight" even if a higher level manager's recommendation has more importance and even if the employee does not have authority to make the ultimate decision as to the employee's change in status.

**§ 541.106 Concurrent duties.**

(a) Concurrent performance of exempt and nonexempt work does not disqualify an employee from the executive exemption if the requirements of § 541.100 are otherwise met. Whether an employee meets the requirements of § 541.100 when the employee performs concurrent duties is determined on a case-by-case basis and based on the factors set forth in § 541.700. Generally, exempt executives make the decision regarding when to perform nonexempt duties and remain responsible for the success or failure of business operations under their management while performing the nonexempt work. In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods. An employee whose primary duty is ordinary production work or routine, recurrent or repetitive tasks cannot qualify for exemption as an executive.

(b) For example, an assistant manager in a retail establishment may perform work such as serving customers, cooking food, stocking shelves and cleaning the establishment, but performance of such nonexempt work does not preclude the exemption if the assistant manager's primary duty is management. An assistant manager can supervise employees and serve customers at the same time without losing the exemption. An exempt employee can also simultaneously direct the work of other employees and stock shelves.

(c) In contrast, a relief supervisor or working supervisor whose primary duty is performing nonexempt work on the production line in a manufacturing plant does not become exempt merely because the nonexempt production line employee occasionally has some responsibility for directing the work of other nonexempt production line employees when, for example, the exempt supervisor is unavailable. Similarly, an employee whose primary duty is to work as an electrician is not an exempt executive even if the employee also directs the work of other employees on the job site, orders parts and materials for the job, and handles requests from the prime contractor.

## Subpart C—Administrative Employees

**§ 541.200 General rule for administrative employees.**

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities;

(2) Whose primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) Whose primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

**§ 541.201 Directly related to management or general business operations.**

(a) To qualify for the administrative exemption, an employee's primary duty must be the performance of work directly related to the management or general business operations of the employer or the employer's customers. The phrase "directly related to the management or general business operations" refers to the type of work

performed by the employee. To meet this requirement, an employee must perform work directly related to assisting with the running or servicing of the business, as distinguished, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.

(b) Work directly related to management or general business operations includes, but is not limited to, work in functional areas such as tax; finance; accounting; budgeting; auditing; insurance; quality control; purchasing; procurement; advertising; marketing; research; safety and health; personnel management; human resources; employee benefits; labor relations; public relations, government relations; computer network, internet and database administration; legal and regulatory compliance; and similar activities. Some of these activities may be performed by employees who also would qualify for another exemption.

(c) An employee may qualify for the administrative exemption if the employee's primary duty is the performance of work directly related to the management or general business operations of the employer's customers. Thus, for example, employees acting as advisers or consultants to their employer's clients or customers (as tax experts or financial consultants, for example) may be exempt.

**§ 541.202 Discretion and independent judgment.**

(a) To qualify for the administrative exemption, an employee's primary duty must include the exercise of discretion and independent judgment with respect to matters of significance. In general, the exercise of discretion and independent judgment involves the comparison and the evaluation of possible courses of conduct, and acting or making a decision after the various possibilities have been considered. The term "matters of significance" refers to the level of importance or consequence of the work performed.

(b) The phrase "discretion and independent judgment" must be applied in the light of all the facts involved in the particular employment situation in which the question arises. Factors to consider when determining whether an employee exercises discretion and independent judgment with respect to matters of significance include, but are not limited to: whether the employee has authority to formulate, affect, interpret, or implement management policies or operating practices; whether the employee carries out major assignments in conducting the operations of the business; whether the employee performs work that affects business operations to a substantial degree, even if the employee's assignments are related to operation of a particular segment of the business; whether the employee has authority to commit the employer in matters that have significant financial impact; whether the employee has authority to waive or deviate from established policies and procedures without prior approval; whether the employee has authority to negotiate and bind the company on significant matters; whether the employee provides consultation or expert advice to management; whether the employee is involved in planning long- or short-term business objectives; whether the employee investigates and resolves matters of significance on behalf of management; and whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

(c) The exercise of discretion and independent judgment implies that the employee has authority to make an independent choice, free from immediate direction or supervision. However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed at a higher level. Thus, the term "discretion and independent judgment" does not require that the decisions made by an employee have a finality that goes with unlimited authority and a complete absence of review. The decisions made as a result of the exercise of discretion and independent judgment may consist of recommendations for action rather than the actual taking of action. The fact that an employee's decision may be subject to review and that upon occasion the decisions are revised or reversed after review does not mean that the employee is not exercising discretion and independent judgment. For example, the policies formulated by the credit manager of a large corporation may be subject to review by higher company officials who may approve or disapprove these policies. The management consultant who has made a study of the operations of a business and who has drawn a proposed change in organization may have the plan reviewed or revised by superiors before it is submitted to the client.

(d) An employer's volume of business may make it necessary to employ a number of employees to perform the same or similar work. The fact that many employees perform identical work or work of the same relative importance does not mean that the work of each such employee does not involve the exercise of discretion and independent judgment with respect to matters of significance.

(e) The exercise of discretion and independent judgment must be more than the use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources. *See also* § 541.704 regarding use of manuals. The exercise of discretion and independent judgment also does not include clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work. An employee who simply tabulates data is not exempt, even if labeled as a "statistician."

(f) An employee does not exercise discretion and independent judgment with respect to matters of significance merely because the employer will experience financial losses if the employee fails to perform the job properly. For example, a messenger who is entrusted with carrying large sums of money does not exercise discretion and independent judgment with respect to matters of significance even though serious consequences may flow from the employee's neglect. Similarly, an employee who operates very expensive equipment does not exercise discretion and independent judgment with respect to matters of significance merely because improper performance of the employee's duties may cause serious financial loss to the employer.

**§ 541.203 Administrative exemption examples.**

(a) Insurance claims adjusters generally meet the duties requirements for the administrative exemption, whether they work for an insurance company or other type of company, if their duties include activities such as interviewing insureds, witnesses and physicians; inspecting property damage; reviewing factual information to prepare damage estimates; evaluating and making recommendations regarding coverage of claims; determining liability and total value of a claim; negotiating settlements; and making recommendations regarding litigation.

(b) Employees in the financial services industry generally meet the duties requirements for the administrative exemption if their duties include work such as collecting and analyzing information regarding the customer's income, assets, investments or debts; determining which financial products best meet the customer's needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial

products; and marketing, servicing or promoting the employer's financial products. However, an employee whose primary duty is selling financial products does not qualify for the administrative exemption.

(c) An employee who leads a team of other employees assigned to complete major projects for the employer (such as purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements) generally meets the duties requirements for the administrative exemption, even if the employee does not have direct supervisory responsibility over the other employees on the team.

(d) An executive assistant or administrative assistant to a business owner or senior executive of a large business generally meets the duties requirements for the administrative exemption if such employee, without specific instructions or prescribed procedures, has been delegated authority regarding matters of significance.

(e) Human resources managers who formulate, interpret or implement employment policies and management consultants who study the operations of a business and propose changes in organization generally meet the duties requirements for the administrative exemption. However, personnel clerks who "screen" applicants to obtain data regarding their minimum qualifications and fitness for employment generally do not meet the duties requirements for the administrative exemption. Such personnel clerks typically will reject all applicants who do not meet minimum standards for the particular job or for employment by the company. The minimum standards are usually set by the exempt human resources manager or other company officials, and the decision to hire from the group of qualified applicants who do meet the minimum standards is similarly made by the exempt human resources manager or other company officials. Thus, when the interviewing and screening functions are performed by the human resources manager or personnel manager who makes the hiring decision or makes recommendations for hiring from the pool of qualified applicants, such duties constitute exempt work, even though routine, because this work is directly and closely related to the employee's exempt functions.

(f) Purchasing agents with authority to bind the company on significant purchases generally meet the duties requirements for the administrative exemption even if they must consult with top management officials when making a purchase commitment for raw materials in excess of the contemplated plant needs.

(g) Ordinary inspection work generally does not meet the duties requirements for the administrative exemption. Inspectors normally perform specialized work along standardized lines involving well-established techniques and procedures which may have been catalogued and described in manuals or other sources. Such inspectors rely on techniques and skills acquired by special training or experience. They have some leeway in the performance of their work but only within closely prescribed limits.

(h) Employees usually called examiners or graders, such as employees that grade lumber, generally do not meet the duties requirements for the administrative exemption. Such employees usually perform work involving the comparison of products with established standards which are frequently catalogued. Often, after continued reference to the written standards, or through experience, the employee acquires sufficient knowledge so that reference to written standards is unnecessary. The substitution of the employee's memory for a manual of standards does not convert the character of the work performed to exempt work requiring the exercise of discretion and independent judgment.

(i) Comparison shopping performed by an employee of a retail store who merely reports to the buyer the prices at a competitor's store does not qualify for the administrative exemption. However, the buyer who evaluates such reports on competitor prices to set the employer's prices generally meets the duties requirements for the administrative exemption.

(j) Public sector inspectors or investigators of various types, such as fire prevention or safety, building or construction, health or sanitation, environmental or soils specialists and similar employees, generally do not meet the duties requirements for the administrative exemption because their work typically does not involve work directly related to the management or general business operations of the employer. Such employees also do not qualify for the administrative exemption because their work involves the use of skills and technical abilities in gathering factual information, applying known standards or prescribed procedures, determining which procedure to follow, or determining whether prescribed standards or criteria are met.

### § 541.204 Educational establishments.

(a) The term "employee employed in a bona fide administrative capacity" in section 13(a)(1) of the Act also includes employees:

(1) Compensated for services on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government) exclusive of board, lodging or other facilities, or on a salary basis which is at least equal to the entrance salary for teachers in the educational establishment by which employed; and

(2) Whose primary duty is performing administrative functions directly related to academic instruction or training in an educational establishment or department or subdivision thereof.

(b) The term "educational establishment" means an elementary or secondary school system, an institution of higher education or other educational institution. Sections 3(v) and 3(w) of the Act define elementary and secondary schools as those day or residential schools that provide elementary or secondary education, as determined under State law. Under the laws of most States, such education includes the curriculums in grades 1 through 12; under many it includes also the introductory programs in kindergarten. Such education in some States may also include nursery school programs in elementary education and junior college curriculums in secondary education. The term "other educational establishment" includes special schools for mentally or physically disabled or gifted children, regardless of any classification of such schools as elementary, secondary or higher. Factors relevant in determining whether post-secondary career programs are educational institutions include whether the school is licensed by a state agency responsible for the state's educational system or accredited by a nationally recognized accrediting organization for career schools. Also, for purposes of the exemption, no distinction is drawn between public and private schools, or between those operated for profit and those that are not for profit.

(c) The phrase "performing administrative functions directly related to academic instruction or training" means work related to the academic operations and functions in a school rather than to administration along the lines of general business operations. Such academic administrative functions include operations directly in the field of education. Jobs relating to areas outside the educational field are not

within the definition of academic administration.

(1) Employees engaged in academic administrative functions include: the superintendent or other head of an elementary or secondary school system, and any assistants, responsible for administration of such matters as curriculum, quality and methods of instructing, measuring and testing the learning potential and achievement of students, establishing and maintaining academic and grading standards, and other aspects of the teaching program; the principal and any vice-principals responsible for the operation of an elementary or secondary school; department heads in institutions of higher education responsible for the administration of the mathematics department, the English department, the foreign language department, *etc.*; academic counselors who perform work such as administering school testing programs, assisting students with academic problems and advising students concerning degree requirements; and other employees with similar responsibilities.

(2) Jobs relating to building management and maintenance, jobs relating to the health of the students, and academic staff such as social workers, psychologists, lunch room managers or dietitians do not perform academic administrative functions. Although such work is not considered academic administration, such employees may qualify for exemption under § 541.200 or under other sections of this part, provided the requirements for such exemptions are met.

## Subpart D—Professional Employees

### § 541.300 General rule for professional employees.

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act shall mean any employee:

(1) Compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging, or other facilities; and

(2) Whose primary duty is the performance of work:

(i) Requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction; or

(ii) Requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

(b) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

### § 541.301 Learned professionals.

(a) To qualify for the learned professional exemption, an employee's primary duty must be the performance of work requiring advanced knowledge in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction. This primary duty test includes three elements:

(1) The employee must perform work requiring advanced knowledge;

(2) The advanced knowledge must be in a field of science or learning; and

(3) The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

(b) The phrase "work requiring advanced knowledge" means work which is predominantly intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment, as distinguished from performance of routine mental, manual, mechanical or physical work. An employee who performs work requiring advanced knowledge generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances. Advanced knowledge cannot be attained at the high school level.

(c) The phrase "field of science or learning" includes the traditional professions of law, medicine, theology, accounting, actuarial computation, engineering, architecture, teaching, various types of physical, chemical and biological sciences, pharmacy and other similar occupations that have a recognized professional status as distinguished from the mechanical arts or skilled trades where in some instances the knowledge is of a fairly advanced type, but is not in a field of science or learning.

(d) The phrase "customarily acquired by a prolonged course of specialized intellectual instruction" restricts the exemption to professions where specialized academic training is a standard prerequisite for entrance into the profession. The best prima facie evidence that an employee meets this requirement is possession of the appropriate academic degree. However, the word "customarily" means that the exemption is also available to employees in such professions who have substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attained the advanced knowledge through a combination of work experience and intellectual instruction. Thus, for example, the learned professional exemption is available to the occasional lawyer who has not gone to law school, or the occasional chemist who is not the possessor of a degree in chemistry. However, the learned professional exemption is not available for occupations that customarily may be performed with only the general knowledge acquired by an academic degree in any field, with knowledge acquired through an apprenticeship, or with training in the performance of routine mental, manual, mechanical or physical processes. The learned professional exemption also does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction.

(e) (1) *Registered or certified medical technologists.* Registered or certified medical technologists who have successfully completed three academic years of pre-professional study in an accredited college or university plus a fourth year of professional course work in a school of medical technology approved by the Council of Medical Education of the American Medical Association generally meet the duties requirements for the learned professional exemption.

(2) *Nurses.* Registered nurses who are registered by the appropriate State examining board generally meet the duties requirements for the learned professional exemption. Licensed practical nurses and other similar health care employees, however, generally do not qualify as exempt learned professionals because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

(3) *Dental hygienists.* Dental hygienists who have successfully completed four academic years of pre-professional and professional study in an accredited college or university approved by the Commission on Accreditation of Dental and Dental Auxiliary Educational Programs of the American Dental Association generally meet the duties requirements for the learned professional exemption.

(4) *Physician assistants.* Physician assistants who have successfully completed four academic years of pre-professional and professional study, including graduation from a physician assistant program accredited by the Accreditation Review Commission on Education for the Physician Assistant, and who are certified by the National Commission on Certification of Physician Assistants generally meet the

duties requirements for the learned professional exemption.

(5) *Accountants.* Certified public accountants generally meet the duties requirements for the learned professional exemption. In addition, many other accountants who are not certified public accountants but perform similar job duties may qualify as exempt learned professionals. However, accounting clerks, bookkeepers and other employees who normally perform a great deal of routine work generally will not qualify as exempt professionals.

(6) *Chefs.* Chefs, such as executive chefs and sous chefs, who have attained a four-year specialized academic degree in a culinary arts program, generally meet the duties requirements for the learned professional exemption. The learned professional exemption is not available to cooks who perform predominantly routine mental, manual, mechanical or physical work.

(7) *Paralegals.* Paralegals and legal assistants generally do not qualify as exempt learned professionals because an advanced specialized academic degree is not a standard prerequisite for entry into the field. Although many paralegals possess general four-year advanced degrees, most specialized paralegal programs are two-year associate degree programs from a community college or equivalent institution. However, the learned professional exemption is available for paralegals who possess advanced specialized degrees in other professional fields and apply advanced knowledge in that field in the performance of their duties. For example, if a law firm hires an engineer as a paralegal to provide expert advice on product liability cases or to assist on patent matters, that engineer would qualify for exemption.

(8) *Athletic trainers.* Athletic trainers who have successfully completed four academic years of pre-professional and professional study in a specialized curriculum accredited by the Commission on Accreditation of Allied Health Education Programs and who are certified by the Board of Certification of the National Athletic Trainers Association Board of Certification generally meet the duties requirements for the learned professional exemption.

(9) *Funeral directors or embalmers.* Licensed funeral directors and embalmers who are licensed by and working in a state that requires successful completion of four academic years of pre-professional and professional study, including graduation from a college of mortuary science accredited by the American Board of Funeral Service Education, generally meet the duties requirements for the learned professional exemption.

(f) The areas in which the professional exemption may be available are expanding. As knowledge is developed, academic training is broadened and specialized degrees are offered in new and diverse fields, thus creating new specialists in particular fields of science or learning. When an advanced specialized degree has become a standard requirement for a particular occupation, that occupation may have acquired the characteristics of a learned profession. Accrediting and certifying organizations similar to those listed in paragraphs (e)(1), (e)(3), (e)(4), (e)(8) and (e)(9) of this section also may be created in the future. Such organizations may develop similar specialized curriculums and certification programs which, if a standard requirement for a particular occupation, may indicate that the occupation has acquired the characteristics of a learned profession.

### § 541.302 Creative professionals.

(a) To qualify for the creative professional exemption, an employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work. The exemption does not apply to work which can be produced by a person with general manual or intellectual ability and training.

(b) To qualify for exemption as a creative professional, the work performed must be "in a recognized field of artistic or creative endeavor." This includes such fields as music, writing, acting and the graphic arts.

(c) The requirement of "invention, imagination, originality or talent" distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy. The duties of employees vary widely, and exemption as a creative professional depends on the extent of the invention, imagination, originality or talent exercised by the employee. Determination of exempt creative professional status, therefore, must be made on a case-by-case basis. This requirement generally is met by actors, musicians, composers, conductors, and soloists; painters who at most are given the subject matter of their painting; cartoonists who are merely told the title or underlying concept of a cartoon and must rely on their own creative ability to express the concept; essayists, novelists, short-story writers and screen-play writers who choose their own subjects and hand in a finished piece of work to their employers (the majority of such persons are, of course, not employees but self-employed); and persons holding the more responsible writing positions in advertising agencies. This requirement generally is not met by a person who is employed as a copyist, as an "animator" of motion-picture cartoons, or as a retoucher of photographs, since such work is not properly described as creative in character.

(d) Journalists may satisfy the duties requirements for the creative professional exemption if their primary duty is work requiring invention, imagination, originality or talent, as opposed to work which depends primarily on intelligence, diligence and accuracy. Employees of newspapers, magazines, television and other media are not exempt creative professionals if they only collect, organize and record information that is routine or already public, or if they do not contribute a unique interpretation or analysis to a news product. Thus, for example, newspaper reporters who merely rewrite press releases or who write standard recounts of public information by gathering facts on routine community events are not exempt creative professionals. Reporters also do not qualify as exempt creative professionals if their work product is subject to substantial control by the employer. However, journalists may qualify as exempt creative professionals if their primary duty is performing on the air in radio, television or other electronic media; conducting investigative interviews; analyzing or interpreting public events; writing editorials, opinion columns or other commentary; or acting as a narrator or commentator.

### § 541.303 Teachers.

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act also means any employee with a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge and who is employed and engaged in this activity as a teacher in an educational establishment by which the employee is employed. The term "educational establishment" is defined in § 541.204(b).

(b) Exempt teachers include, but are not limited to: Regular academic teachers; teachers of kindergarten or nursery school pupils; teachers of gifted or disabled children; teachers of skilled and semi-skilled trades and occupations; teachers engaged in automobile driving instruction; aircraft flight instructors; home economics teachers; and vocal or instrumental

music instructors. Those faculty members who are engaged as teachers but also spend a considerable amount of their time in extracurricular activities such as coaching athletic teams or acting as moderators or advisors in such areas as drama, speech, debate or journalism are engaged in teaching. Such activities are a recognized part of the schools' responsibility in contributing to the educational development of the student.

(c) The possession of an elementary or secondary teacher's certificate provides a clear means of identifying the individuals contemplated as being within the scope of the exemption for teaching professionals. Teachers who possess a teaching certificate qualify for the exemption regardless of the terminology (*e.g.*, permanent, conditional, standard, provisional, temporary, emergency, or unlimited) used by the State to refer to different kinds of certificates. However, private schools and public schools are not uniform in requiring a certificate for employment as an elementary or secondary school teacher, and a teacher's certificate is not generally necessary for employment in institutions of higher education or other educational establishments. Therefore, a teacher who is not certified may be considered for exemption, provided that such individual is employed as a teacher by the employing school or school system.

(d) The requirements of § 541.300 and Subpart G (salary requirements) of this part do not apply to the teaching professionals described in this section.

**§ 541.304 Practice of law or medicine.**

(a) The term "employee employed in a bona fide professional capacity" in section 13(a)(1) of the Act also shall mean:

(1) Any employee who is the holder of a valid license or certificate permitting the practice of law or medicine or any of their branches and is actually engaged in the practice thereof; and

(2) Any employee who is the holder of the requisite academic degree for the general practice of medicine and is engaged in an internship or resident program pursuant to the practice of the profession.

(b) In the case of medicine, the exemption applies to physicians and other practitioners licensed and practicing in the field of medical science and healing or any of the medical specialties practiced by physicians or practitioners. The term "physicians" includes medical doctors including general practitioners and specialists, osteopathic physicians (doctors of osteopathy), podiatrists, dentists (doctors of dental medicine), and optometrists (doctors of optometry or bachelors of science in optometry).

(c) Employees engaged in internship or resident programs, whether or not licensed to practice prior to commencement of the program, qualify as exempt professionals if they enter such internship or resident programs after the earning of the appropriate degree required for the general practice of their profession.

(d) The requirements of § 541.300 and subpart G (salary requirements) of this part do not apply to the employees described in this section.

## Subpart E—Computer Employees

**§ 541.400 General rule for computer employees.**

(a) Computer systems analysts, computer programmers, software engineers or other similarly skilled workers in the computer field are eligible for exemption as professionals under section 13(a)(1) of the Act and under section 13(a)(17) of the Act. Because job titles vary widely and change quickly in the computer industry, job titles are not determinative of the applicability of this exemption.

(b) The section 13(a)(1) exemption applies to any computer employee compensated on a salary or fee basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities, and the section 13(a)(17) exemption applies to any computer employee compensated on an hourly basis at a rate not less than $27.63 an hour. In addition, under either section 13(a)(1) or section 13(a)(17) of the Act, the exemptions apply only to computer employees whose primary duty consists of:

(1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

(2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

(3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

(4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

(c) The term "salary basis" is defined at § 541.602; "fee basis" is defined at § 541.605; "board, lodging or other facilities" is defined at § 541.606; and "primary duty" is defined at § 541.700.

**§ 541.401 Computer manufacture and repair.**

The exemption for employees in computer occupations does not include employees engaged in the manufacture or repair of computer hardware and related equipment. Employees whose work is highly dependent upon, or facilitated by, the use of computers and computer software programs (*e.g.*, engineers, drafters and others skilled in computer-aided design software), but who are not primarily engaged in computer systems analysis and programming or other similarly skilled computer-related occupations identified in § 541.400(b), are also not exempt computer professionals.

**§ 541.402 Executive and administrative computer employees.**

Computer employees within the scope of this exemption, as well as those employees not within its scope, may also have executive and administrative duties which qualify the employees for exemption under subpart B or subpart C of this part. For example, systems analysts and computer programmers generally meet the duties requirements for the administrative exemption if their primary duty includes work such as planning, scheduling, and coordinating activities required to develop systems to solve complex business, scientific or engineering problems of the employer or the employer's customers. Similarly, a senior or lead computer programmer who manages the work of two or more other programmers in a customarily recognized department or subdivision of the employer, and whose recommendations as to the hiring, firing, advancement, promotion or other change of status of the other programmers are given particular weight, generally meets the duties requirements for the executive exemption.

## Subpart F—Outside Sales Employees

**§ 541.500 General rule for outside sales employees.**

(a) The term "employee employed in the capacity of outside salesman" in section 13(a)(1) of the Act shall mean any employee:

(1) Whose primary duty is:

(i) making sales within the meaning of section 3(k) of the Act, or

(ii) obtaining orders or contracts for services or for the use of facilities for

which a consideration will be paid by the client or customer; and

(2) Who is customarily and regularly engaged away from the employer's place or places of business in performing such primary duty.

(b) The term "primary duty" is defined at § 541.700. In determining the primary duty of an outside sales employee, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including incidental deliveries and collections, shall be regarded as exempt outside sales work. Other work that furthers the employee's sales efforts also shall be regarded as exempt work including, for example, writing sales reports, updating or revising the employee's sales or display catalogue, planning itineraries and attending sales conferences.

(c) The requirements of subpart G (salary requirements) of this part do not apply to the outside sales employees described in this section.

**§ 541.501 Making sales or obtaining orders.**

(a) Section 541.500 requires that the employee be engaged in:

(1) Making sales within the meaning of section 3(k) of the Act, or

(2) Obtaining orders or contracts for services or for the use of facilities.

(b) Sales within the meaning of section 3(k) of the Act include the transfer of title to tangible property, and in certain cases, of tangible and valuable evidences of intangible property. Section 3(k) of the Act states that "sale" or "sell" includes any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition.

(c) Exempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.

(d) The word "services" extends the outside sales exemption to employees who sell or take orders for a service, which may be performed for the customer by someone other than the person taking the order.

**§ 541.502 Away from employer's place of business.**

An outside sales employee must be customarily and regularly engaged "away from the employer's place or places of business." The outside sales employee is an employee who makes sales at the customer's place of business or, if selling door-to-door, at the customer's home. Outside sales does not include sales made by mail, telephone or the Internet unless such contact is used merely as an adjunct to personal calls. Thus, any fixed site, whether home or office, used by a salesperson as a headquarters or for telephonic solicitation of sales is considered one of the employer's places of business, even though the employer is not in any formal sense the owner or tenant of the property. However, an outside sales employee does not lose the exemption by displaying samples in hotel sample rooms during trips from city to city; these sample rooms should not be considered as the employer's places of business. Similarly, an outside sales employee does not lose the exemption by displaying the employer's products at a trade show. If selling actually occurs, rather than just sales promotion, trade shows of short duration (*i.e.*, one or two weeks) should not be considered as the employer's place of business.

**§ 541.503 Promotion work.**

(a) Promotion work is one type of activity often performed by persons who make sales, which may or may not be exempt outside sales work, depending upon the circumstances under which it is performed. Promotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work. On the other hand, promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work. An employee who does not satisfy the requirements of this subpart may still qualify as an exempt employee under other subparts of this rule.

(b) A manufacturer's representative, for example, may perform various types of promotional activities such as putting up displays and posters, removing damaged or spoiled stock from the merchant's shelves or rearranging the merchandise. Such an employee can be considered an exempt outside sales employee if the employee's primary duty is making sales or contracts. Promotion activities directed toward consummation of the employee's own sales are exempt. Promotional activities designed to stimulate sales that will be made by someone else are not exempt outside sales work.

(c) Another example is a company representative who visits chain stores, arranges the merchandise on shelves, replenishes stock by replacing old with new merchandise, sets up displays and consults with the store manager when inventory runs low, but does not obtain a commitment for additional purchases. The arrangement of merchandise on the shelves or the replenishing of stock is not exempt work unless it is incidental to and in conjunction with the employee's own outside sales. Because the employee in this instance does not consummate the sale nor direct efforts toward the consummation of a sale, the work is not exempt outside sales work.

**§ 541.504 Drivers who sell.**

(a) Drivers who deliver products and also sell such products may qualify as exempt outside sales employees only if the employee has a primary duty of making sales. In determining the primary duty of drivers who sell, work performed incidental to and in conjunction with the employee's own outside sales or solicitations, including loading, driving or delivering products, shall be regarded as exempt outside sales work.

(b) Several factors should be considered in determining if a driver has a primary duty of making sales, including, but not limited to: a comparison of the driver's duties with those of other employees engaged as truck drivers and as salespersons; possession of a selling or solicitor's license when such license is required by law or ordinances; presence or absence of customary or contractual arrangements concerning amounts of products to be delivered; description of the employee's occupation in collective bargaining agreements; the employer's specifications as to qualifications for hiring; sales training; attendance at sales conferences; method of payment; and proportion of earnings directly attributable to sales.

(c) Drivers who may qualify as exempt outside sales employees include:

(1) A driver who provides the only sales contact between the employer and the customers visited, who calls on customers and takes orders for products, who delivers products from stock in the employee's vehicle or procures and delivers the product to the customer on a later trip, and who receives compensation commensurate with the volume of products sold.

(2) A driver who obtains or solicits orders for the employer's products from persons who have authority to commit the customer for purchases.

(3) A driver who calls on new prospects for customers along the employee's route and attempts to convince them of the desirability of accepting regular delivery of goods.

(4) A driver who calls on established customers along the route and

persuades regular customers to accept delivery of increased amounts of goods or of new products, even though the initial sale or agreement for delivery was made by someone else.

(d) Drivers who generally would not qualify as exempt outside sales employees include:

(1) A route driver whose primary duty is to transport products sold by the employer through vending machines and to keep such machines stocked, in good operating condition, and in good locations.

(2) A driver who often calls on established customers day after day or week after week, delivering a quantity of the employer's products at each call when the sale was not significantly affected by solicitations of the customer by the delivering driver or the amount of the sale is determined by the volume of the customer's sales since the previous delivery.

(3) A driver primarily engaged in making deliveries to customers and performing activities intended to promote sales by customers (including placing point-of-sale and other advertising materials, price stamping commodities, arranging merchandise on shelves, in coolers or in cabinets, rotating stock according to date, and cleaning and otherwise servicing display cases), unless such work is in furtherance of the driver's own sales efforts.

## Subpart G—Salary Requirements

### § 541.600 Amount of salary required.

(a) To qualify as an exempt executive, administrative or professional employee under section 13(a)(1) of the Act, an employee must be compensated on a salary basis at a rate of not less than $455 per week (or $380 per week, if employed in American Samoa by employers other than the Federal Government), exclusive of board, lodging or other facilities. Administrative and professional employees may also be paid on a fee basis, as defined in § 541.605.

(b) The $455 a week may be translated into equivalent amounts for periods longer than one week. The requirement will be met if the employee is compensated biweekly on a salary basis of $910, semimonthly on a salary basis of $985.83, or monthly on a salary basis of $1,971.66. However, the shortest period of payment that will meet this compensation requirement is one week.

(c) In the case of academic administrative employees, the compensation requirement also may be met by compensation on a salary basis at a rate at least equal to the entrance salary for teachers in the educational establishment by which the employee is employed, as provided in § 541.204(a)(1).

(d) In the case of computer employees, the compensation requirement also may be met by compensation on an hourly basis at a rate not less than $27.63 an hour, as provided in § 541.400(b).

(e) In the case of professional employees, the compensation requirements in this section shall not apply to employees engaged as teachers (*see* § 541.303); employees who hold a valid license or certificate permitting the practice of law or medicine or any of their branches and are actually engaged in the practice thereof (*see* § 541.304); or to employees who hold the requisite academic degree for the general practice of medicine and are engaged in an internship or resident program pursuant to the practice of the profession (*see* § 541.304). In the case of medical occupations, the exception from the salary or fee requirement does not apply to pharmacists, nurses, therapists, technologists, sanitarians, dietitians, social workers, psychologists, psychometrists, or other professions which service the medical profession.

### § 541.601 Highly compensated employees.

(a) An employee with total annual compensation of at least $100,000 is deemed exempt under section 13(a)(1) of the Act if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part.

(b) (1) "Total annual compensation" must include at least $455 per week paid on a salary or fee basis. Total annual compensation may also include commissions, nondiscretionary bonuses and other nondiscretionary compensation earned during a 52-week period. Total annual compensation does not include board, lodging and other facilities as defined in § 541.606, and does not include payments for medical insurance, payments for life insurance, contributions to retirement plans and the cost of other fringe benefits.

(2) If an employee's total annual compensation does not total at least the minimum amount established in paragraph (a) of this section by the last pay period of the 52-week period, the employer may, during the last pay period or within one month after the end of the 52-week period, make one final payment sufficient to achieve the required level. For example, an employee may earn $80,000 in base salary, and the employer may anticipate based upon past sales that the employee also will earn $20,000 in commissions. However, due to poor sales in the final quarter of the year, the employee actually only earns $10,000 in commissions. In this situation, the employer may within one month after the end of the year make a payment of at least $10,000 to the employee. Any such final payment made after the end of the 52-week period may count only toward the prior year's total annual compensation and not toward the total annual compensation in the year it was paid. If the employer fails to make such a payment, the employee does not qualify as a highly compensated employee, but may still qualify as exempt under subparts B, C or D of this part.

(3) An employee who does not work a full year for the employer, either because the employee is newly hired after the beginning of the year or ends the employment before the end of the year, may qualify for exemption under this section if the employee receives a *pro rata* portion of the minimum amount established in paragraph (a) of this section, based upon the number of weeks that the employee will be or has been employed. An employer may make one final payment as under paragraph (b)(2) of this section within one month after the end of employment.

(4) The employer may utilize any 52-week period as the year, such as a calendar year, a fiscal year, or an anniversary of hire year. If the employer does not identify some other year period in advance, the calendar year will apply.

(c) A high level of compensation is a strong indicator of an employee's exempt status, thus eliminating the need for a detailed analysis of the employee's job duties. Thus, a highly compensated employee will qualify for exemption if the employee customarily and regularly performs any one or more of the exempt duties or responsibilities of an executive, administrative or professional employee identified in subparts B, C or D of this part. An employee may qualify as a highly compensated executive employee, for example, if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements for the executive exemption under § 541.100.

(d) This section applies only to employees whose primary duty includes performing office or non-manual work. Thus, for example, non-management production-line workers and non-management employees in maintenance, construction and similar occupations

such as carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and other employees who perform work involving repetitive operations with their hands, physical skill and energy are not exempt under this section no matter how highly paid they might be.

**§ 541.602 Salary basis.**

(a) *General rule.* An employee will be considered to be paid on a "salary basis" within the meaning of these regulations if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in paragraph (b) of this section, an exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work. An employee is not paid on a salary basis if deductions from the employee's predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.

(b) *Exceptions.* The prohibition against deductions from pay in the salary basis requirement is subject to the following exceptions:

(1) Deductions from pay may be made when an exempt employee is absent from work for one or more full days for personal reasons, other than sickness or disability. Thus, if an employee is absent for two full days to handle personal affairs, the employee's salaried status will not be affected if deductions are made from the salary for two full-day absences. However, if an exempt employee is absent for one and a half days for personal reasons, the employer can deduct only for the one full-day absence.

(2) Deductions from pay may be made for absences of one or more full days occasioned by sickness or disability (including work-related accidents) if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for loss of salary occasioned by such sickness or disability. The employer is not required to pay any portion of the employee's salary for full-day absences for which the employee receives compensation under the plan, policy or practice. Deductions for such full-day absences also may be made before the employee has qualified under the plan, policy or practice, and after the employee has exhausted the leave allowance thereunder. Thus, for example, if an employer maintains a short-term disability insurance plan providing salary replacement for 12 weeks starting on the fourth day of absence, the employer may make deductions from pay for the three days of absence before the employee qualifies for benefits under the plan; for the twelve weeks in which the employee receives salary replacement benefits under the plan; and for absences after the employee has exhausted the 12 weeks of salary replacement benefits. Similarly, an employer may make deductions from pay for absences of one or more full days if salary replacement benefits are provided under a State disability insurance law or under a State workers' compensation law.

(3) While an employer cannot make deductions from pay for absences of an exempt employee occasioned by jury duty, attendance as a witness or temporary military leave, the employer can offset any amounts received by an employee as jury fees, witness fees or military pay for a particular week against the salary due for that particular week without loss of the exemption.

(4) Deductions from pay of exempt employees may be made for penalties imposed in good faith for infractions of safety rules of major significance. Safety rules of major significance include those relating to the prevention of serious danger in the workplace or to other employees, such as rules prohibiting smoking in explosive plants, oil refineries and coal mines.

(5) Deductions from pay of exempt employees may be made for unpaid disciplinary suspensions of one or more full days imposed in good faith for infractions of workplace conduct rules. Such suspensions must be imposed pursuant to a written policy applicable to all employees. Thus, for example, an employer may suspend an exempt employee without pay for three days for violating a generally applicable written policy prohibiting sexual harassment. Similarly, an employer may suspend an exempt employee without pay for twelve days for violating a generally applicable written policy prohibiting workplace violence.

(6) An employer is not required to pay the full salary in the initial or terminal week of employment. Rather, an employer may pay a proportionate part of an employee's full salary for the time actually worked in the first and last week of employment. In such weeks, the payment of an hourly or daily equivalent of the employee's full salary for the time actually worked will meet the requirement. However, employees are not paid on a salary basis within the meaning of these regulations if they are employed occasionally for a few days, and the employer pays them a proportionate part of the weekly salary when so employed.

(7) An employer is not required to pay the full salary for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. Rather, when an exempt employee takes unpaid leave under the Family and Medical Leave Act, an employer may pay a proportionate part of the full salary for time actually worked. For example, if an employee who normally works 40 hours per week uses four hours of unpaid leave under the Family and Medical Leave Act, the employer could deduct 10 percent of the employee's normal salary that week.

(c) When calculating the amount of a deduction from pay allowed under paragraph (b) of this section, the employer may use the hourly or daily equivalent of the employee's full weekly salary or any other amount proportional to the time actually missed by the employee. A deduction from pay as a penalty for violations of major safety rules under paragraph (b)(4) of this section may be made in any amount.

**§ 541.603 Effect of improper deductions from salary.**

(a) An employer who makes improper deductions from salary shall lose the exemption if the facts demonstrate that the employer did not intend to pay employees on a salary basis. An actual practice of making improper deductions demonstrates that the employer did not intend to pay employees on a salary basis. The factors to consider when determining whether an employer has an actual practice of making improper deductions include, but are not limited to: the number of improper deductions, particularly as compared to the number of employee infractions warranting discipline; the time period during which the employer made improper deductions; the number and geographic location of employees whose salary was improperly reduced; the number and geographic location of managers responsible for taking the improper deductions; and whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.

(b) If the facts demonstrate that the employer has an actual practice of

making improper deductions, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. Employees in different job classifications or who work for different managers do not lose their status as exempt employees. Thus, for example, if a manager at a company facility routinely docks the pay of engineers at that facility for partial-day personal absences, then all engineers at that facility whose pay could have been improperly docked by the manager would lose the exemption; engineers at other facilities or working for other managers, however, would remain exempt.

(c) Improper deductions that are either isolated or inadvertent will not result in loss of the exemption for any employees subject to such improper deductions, if the employer reimburses the employees for such improper deductions.

(d) If an employer has a clearly communicated policy that prohibits the improper pay deductions specified in § 541.602(a) and includes a complaint mechanism, reimburses employees for any improper deductions and makes a good faith commitment to comply in the future, such employer will not lose the exemption for any employees unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints. If an employer fails to reimburse employees for any improper deductions or continues to make improper deductions after receiving employee complaints, the exemption is lost during the time period in which the improper deductions were made for employees in the same job classification working for the same managers responsible for the actual improper deductions. The best evidence of a clearly communicated policy is a written policy that was distributed to employees prior to the improper pay deductions by, for example, providing a copy of the policy to employees at the time of hire, publishing the policy in an employee handbook or publishing the policy on the employer's Intranet.

(e) This section shall not be construed in an unduly technical manner so as to defeat the exemption.

**§ 541.604 Minimum guarantee plus extras.**

(a) An employer may provide an exempt employee with additional compensation without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly-required amount paid on a salary basis. Thus, for example, an exempt employee guaranteed at least $455 each week paid on a salary basis may also receive additional compensation of a one percent commission on sales. An exempt employee also may receive a percentage of the sales or profits of the employer if the employment arrangement also includes a guarantee of at least $455 each week paid on a salary basis. Similarly, the exemption is not lost if an exempt employee who is guaranteed at least $455 each week paid on a salary basis also receives additional compensation based on hours worked for work beyond the normal workweek. Such additional compensation may be paid on any basis (*e.g.*, flat sum, bonus payment, straight-time hourly amount, time and one-half or any other basis), and may include paid time off.

(b) An exempt employee's earnings may be computed on an hourly, a daily or a shift basis, without losing the exemption or violating the salary basis requirement, if the employment arrangement also includes a guarantee of at least the minimum weekly required amount paid on a salary basis regardless of the number of hours, days or shifts worked, and a reasonable relationship exists between the guaranteed amount and the amount actually earned. The reasonable relationship test will be met if the weekly guarantee is roughly equivalent to the employee's usual earnings at the assigned hourly, daily or shift rate for the employee's normal scheduled workweek. Thus, for example, an exempt employee guaranteed compensation of at least $500 for any week in which the employee performs any work, and who normally works four or five shifts each week, may be paid $150 per shift without violating the salary basis requirement. The reasonable relationship requirement applies only if the employee's pay is computed on an hourly, daily or shift basis. It does not apply, for example, to an exempt store manager paid a guaranteed salary of $650 per week who also receives a commission of one-half percent of all sales in the store or five percent of the store's profits, which in some weeks may total as much as, or even more than, the guaranteed salary.

**§ 541.605 Fee basis.**

(a) Administrative and professional employees may be paid on a fee basis, rather than on a salary basis. An employee will be considered to be paid on a "fee basis" within the meaning of these regulations if the employee is paid an agreed sum for a single job regardless of the time required for its completion. These payments resemble piecework payments with the important distinction that generally a "fee" is paid for the kind of job that is unique rather than for a series of jobs repeated an indefinite number of times and for which payment on an identical basis is made over and over again. Payments based on the number of hours or days worked and not on the accomplishment of a given single task are not considered payments on a fee basis.

(b) To determine whether the fee payment meets the minimum amount of salary required for exemption under these regulations, the amount paid to the employee will be tested by determining the time worked on the job and whether the fee payment is at a rate that would amount to at least $455 per week if the employee worked 40 hours. Thus, an artist paid $250 for a picture that took 20 hours to complete meets the minimum salary requirement for exemption since earnings at this rate would yield the artist $500 if 40 hours were worked.

**§ 541.606 Board, lodging or other facilities.**

(a) To qualify for exemption under section 13(a)(1) of the Act, an employee must earn the minimum salary amount set forth in § 541.600, "exclusive of board, lodging or other facilities." The phrase "exclusive of board, lodging or other facilities" means "free and clear" or independent of any claimed credit for non-cash items of value that an employer may provide to an employee. Thus, the costs incurred by an employer to provide an employee with board, lodging or other facilities may not count towards the minimum salary amount required for exemption under this part 541. Such separate transactions are not prohibited between employers and their exempt employees, but the costs to employers associated with such transactions may not be considered when determining if an employee has received the full required minimum salary payment.

(b) Regulations defining what constitutes "board, lodging, or other facilities" are contained in 29 CFR part 531. As described in 29 CFR 531.32, the term "other facilities" refers to items similar to board and lodging, such as meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; merchandise furnished at company stores or commissaries, including articles of food, clothing, and household effects; housing furnished for dwelling purposes; and transportation furnished

to employees for ordinary commuting between their homes and work.

## Subpart H—Definitions and Miscellaneous Provisions

### § 541.700 Primary duty.

(a) To qualify for exemption under this part, an employee's "primary duty" must be the performance of exempt work. The term "primary duty" means the principal, main, major or most important duty that the employee performs. Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

(b) The amount of time spent performing exempt work can be a useful guide in determining whether exempt work is the primary duty of an employee. Thus, employees who spend more than 50 percent of their time performing exempt work will generally satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in this section requires that exempt employees spend more than 50 percent of their time performing exempt work. Employees who do not spend more than 50 percent of their time performing exempt duties may nonetheless meet the primary duty requirement if the other factors support such a conclusion.

(c) Thus, for example, assistant managers in a retail establishment who perform exempt executive work such as supervising and directing the work of other employees, ordering merchandise, managing the budget and authorizing payment of bills may have management as their primary duty even if the assistant managers spend more than 50 percent of the time performing nonexempt work such as running the cash register. However, if such assistant managers are closely supervised and earn little more than the nonexempt employees, the assistant managers generally would not satisfy the primary duty requirement.

### § 541.701 Customarily and regularly.

The phrase "customarily and regularly" means a frequency that must be greater than occasional but which, of course, may be less than constant. Tasks or work performed "customarily and regularly" includes work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.

### § 541.702 Exempt and nonexempt work.

The term "exempt work" means all work described in §§ 541.100, 541.101, 541.200, 541.300, 541.301, 541.302, 541.303, 541.304, 541.400 and 541.500, and the activities directly and closely related to such work. All other work is considered "nonexempt."

### § 541.703 Directly and closely related.

(a) Work that is "directly and closely related" to the performance of exempt work is also considered exempt work. The phrase "directly and closely related" means tasks that are related to exempt duties and that contribute to or facilitate performance of exempt work. Thus, "directly and closely related" work may include physical tasks and menial tasks that arise out of exempt duties, and the routine work without which the exempt employee's exempt work cannot be performed properly. Work "directly and closely related" to the performance of exempt duties may also include recordkeeping; monitoring and adjusting machinery; taking notes; using the computer to create documents or presentations; opening the mail for the purpose of reading it and making decisions; and using a photocopier or fax machine. Work is not "directly and closely related" if the work is remotely related or completely unrelated to exempt duties.

(b) The following examples further illustrate the type of work that is and is not normally considered as directly and closely related to exempt work:

(1) Keeping time, production or sales records for subordinates is work directly and closely related to an exempt executive's function of managing a department and supervising employees.

(2) The distribution of materials, merchandise or supplies to maintain control of the flow of and expenditures for such items is directly and closely related to the performance of exempt duties.

(3) A supervisor who spot checks and examines the work of subordinates to determine whether they are performing their duties properly, and whether the product is satisfactory, is performing work which is directly and closely related to managerial and supervisory functions, so long as the checking is distinguishable from the work ordinarily performed by a nonexempt inspector.

(4) A supervisor who sets up a machine may be engaged in exempt work, depending upon the nature of the industry and the operation. In some cases the setup work, or adjustment of the machine for a particular job, is typically performed by the same employees who operate the machine. Such setup work is part of the production operation and is not exempt. In other cases, the setting up of the work is a highly skilled operation which the ordinary production worker or machine tender typically does not perform. In large plants, non-supervisors may perform such work. However, particularly in small plants, such work may be a regular duty of the executive and is directly and closely related to the executive's responsibility for the work performance of subordinates and for the adequacy of the final product. Under such circumstances, it is exempt work.

(5) A department manager in a retail or service establishment who walks about the sales floor observing the work of sales personnel under the employee's supervision to determine the effectiveness of their sales techniques, checks on the quality of customer service being given, or observes customer preferences is performing work which is directly and closely related to managerial and supervisory functions.

(6) A business consultant may take extensive notes recording the flow of work and materials through the office or plant of the client; after returning to the office of the employer, the consultant may personally use the computer to type a report and create a proposed table of organization. Standing alone, or separated from the primary duty, such note-taking and typing would be routine in nature. However, because this work is necessary for analyzing the data and making recommendations, the work is directly and closely related to exempt work. While it is possible to assign note-taking and typing to nonexempt employees, and in fact it is frequently the practice to do so, delegating such routine tasks is not required as a condition of exemption.

(7) A credit manager who makes and administers the credit policy of the employer, establishes credit limits for customers, authorizes the shipment of orders on credit, and makes decisions on whether to exceed credit limits would be performing work exempt under § 541.200. Work that is directly and closely related to these exempt duties may include checking the status of accounts to determine whether the credit limit would be exceeded by the shipment of a new order, removing credit reports from the files for analysis,

and writing letters giving credit data and experience to other employers or credit agencies.

(8) A traffic manager in charge of planning a company's transportation, including the most economical and quickest routes for shipping merchandise to and from the plant, contracting for common-carrier and other transportation facilities, negotiating with carriers for adjustments for damages to merchandise, and making the necessary rearrangements resulting from delays, damages or irregularities in transit, is performing exempt work. If the employee also spends part of the day taking telephone orders for local deliveries, such order-taking is a routine function and is not directly and closely related to the exempt work.

(9) An example of work directly and closely related to exempt professional duties is a chemist performing menial tasks such as cleaning a test tube in the middle of an original experiment, even though such menial tasks can be assigned to laboratory assistants.

(10) A teacher performs work directly and closely related to exempt duties when, while taking students on a field trip, the teacher drives a school van or monitors the students' behavior in a restaurant.

### § 541.704 Use of manuals.

The use of manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills does not preclude exemption under section 13(a)(1) of the Act or the regulations in this part. Such manuals and procedures provide guidance in addressing difficult or novel circumstances and thus use of such reference material would not affect an employee's exempt status. The section 13(a)(1) exemptions are not available, however, for employees who simply apply well-established techniques or procedures described in manuals or other sources within closely prescribed limits to determine the correct response to an inquiry or set of circumstances.

### § 541.705 Trainees.

The executive, administrative, professional, outside sales and computer employee exemptions do not apply to employees training for employment in an executive, administrative, professional, outside sales or computer employee capacity who are not actually performing the duties of an executive, administrative, professional, outside sales or computer employee.

### § 541.706 Emergencies.

(a) An exempt employee will not lose the exemption by performing work of a normally nonexempt nature because of the existence of an emergency. Thus, when emergencies arise that threaten the safety of employees, a cessation of operations or serious damage to the employer's property, any work performed in an effort to prevent such results is considered exempt work.

(b) An "emergency" does not include occurrences that are not beyond control or for which the employer can reasonably provide in the normal course of business. Emergencies generally occur only rarely, and are events that the employer cannot reasonably anticipate.

(c) The following examples illustrate the distinction between emergency work considered exempt work and routine work that is not exempt work:

(1) A mine superintendent who pitches in after an explosion and digs out workers who are trapped in the mine is still a bona fide executive.

(2) Assisting nonexempt employees with their work during periods of heavy workload or to handle rush orders is not exempt work.

(3) Replacing a nonexempt employee during the first day or partial day of an illness may be considered exempt emergency work depending on factors such as the size of the establishment and of the executive's department, the nature of the industry, the consequences that would flow from the failure to replace the ailing employee immediately, and the feasibility of filling the employee's place promptly.

(4) Regular repair and cleaning of equipment is not emergency work, even when necessary to prevent fire or explosion; however, repairing equipment may be emergency work if the breakdown of or damage to the equipment was caused by accident or carelessness that the employer could not reasonably anticipate.

### § 541.707 Occasional tasks.

Occasional, infrequently recurring tasks that cannot practicably be performed by nonexempt employees, but are the means for an exempt employee to properly carry out exempt functions and responsibilities, are considered exempt work. The following factors should be considered in determining whether such work is exempt work: Whether the same work is performed by any of the exempt employee's subordinates; practicability of delegating the work to a nonexempt employee; whether the exempt employee performs the task frequent or occasionally; and existence of an industry practice for the exempt employee to perform the task.

### § 541.708 Combination exemptions.

Employees who perform a combination of exempt duties as set forth in the regulations in this part for executive, administrative, professional outside sales and computer employees may qualify for exemption. Thus, for example, an employee whose primary duty involves a combination of exempt administrative and exempt executive work may qualify for exemption. In other words, work that is exempt under one section of this part will not defeat the exemption under any other section.

### § 541.709 Motion picture producing industry.

The requirement that the employee be paid "on a salary basis" does not apply to an employee in the motion picture producing industry who is compensated at a base rate of at least $695 a week (exclusive of board, lodging, or other facilities). Thus, an employee in this industry who is otherwise exempt under subparts B, C or D of this part, and who is employed at a base rate of at least $695 a week is exempt if paid a proportionate amount (based on a week of not more than 6 days) for any week in which the employee does not work a full workweek for any reason. Moreover, an otherwise exempt employee in this industry qualifies for exemption if the employee is employed at a daily rate under the following circumstances:

(a) The employee is in a job category for which a weekly base rate is not provided and the daily base rate would yield at least $695 if 6 days were worked; or

(b) The employee is in a job category having a weekly base rate of at least $695 and the daily base rate is at least one-sixth of such weekly base rate.

### § 541.710 Employees of public agencies.

(a) An employee of a public agency who otherwise meets the salary basis requirements of § 541.602 shall not be disqualified from exemption under §§ 541.100, 541.200, 541.300 or 541.400 on the basis that such employee is paid according to a pay system established by statute, ordinance or regulation, or by a policy or practice established pursuant to principles of public accountability, under which the employee accrues personal leave and sick leave and which requires the public agency employee's pay to be reduced or such employee to be placed on leave without pay for absences for personal reasons or because

# *14 Penn Plaza LLC v. Pyett*

Supreme Court of the United States

December 1, 2008, Argued; April 1, 2009, Decided

No. 07-581

**Reporter**

556 U.S. 247 *; 129 S. Ct. 1456 **; 173 L. Ed. 2d 398 ***; 2009 U.S. LEXIS 2497 ****; 77 U.S.L.W. 4260; 105 Fair Empl. Prac. Cas. (BNA) 1441; 157 Lab. Cas. (CCH) P11,208; 92 Empl. Prac. Dec. (CCH) P43,507; 186 L.R.R.M. 2065; 21 Fla. L. Weekly Fed. S 738

14 PENN PLAZA LLC, et al., Petitioners v. STEVEN PYETT, et al.

**Subsequent History:** On remand at, Remanded by *Pyett v. Pa. Bldg. Co., 328 Fed. Appx. 737, 2009 U.S. App. LEXIS 15660 (2d Cir., July 16, 2009)*

**Prior History:** [****1] ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

*Pyett v. Pa. Bldg. Co., 498 F.3d 88, 2007 U.S. App. LEXIS 18242 (2d Cir. N.Y., 2007)*

**Disposition:** Reversed and remanded.

## Case Summary

**Procedural Posture**

Respondent union members sued petitioner building owner and cleaning contractor alleging that their reassignment violated the Age Discrimination in Employment Act of 1967 (ADEA), *29 U.S.C.S. § 621 et seq.*, and state and local laws prohibiting age discrimination. Petitioners filed a motion to compel arbitration under *9 U.S.C.S. §§ 3*, *4*, which was denied. The U.S. Court of Appeals for the Second Circuit affirmed and certiorari was granted.

**Overview**

The building owner was a member of a multiemployer bargaining association for the New York City real-estate industry. The union members worked as night lobby watchmen and in other similar capacities in the building and were directly employed by the cleaning contractor. With the union's consent, the building owner engaged a unionized security services contractor and affiliate of the cleaning contractor to provide licensed security guards to staff the lobby and entrances of its building. Because this rendered the union members' lobby services unnecessary, the cleaning contractor reassigned them to jobs as night porters and light duty cleaners in other locations in the building. The union and the multiemployer bargaining association, negotiating on behalf of the building owner, collectively bargained in good faith and agreed that employment-related discrimination claims, including claims brought under the ADEA, would be resolved in arbitration. This freely negotiated term between the union and the association qualified as a condition of employment that was subject to mandatory bargaining under *29 U.S.C.S. § 159(a)*. The ADEA did not preclude arbitration.

**Outcome**

The judgment denying the motion to compel arbitration was reversed, and the case was remanded for further proceedings. 5-4 Decision; 2 Dissents.

## Syllabus

[***403] [**1458] [*247] Respondents are members of the Service Employees International Union, Local 32BJ (Union). Under the National Labor Relations Act, the Union is the exclusive bargaining representative of employees within the building-services industry in New York City, which includes building cleaners, porters, and doorpersons. The Union has exclusive authority to bargain on behalf of its members over their "rates of pay, wages, hours of employment, or other conditions of employment," *29 U.S.C. § 159(a)*, and engages in industry wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreement for Contractors and Building Owners (CBA). The CBA requires Union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures.

Petitioner 14 Penn Plaza LLC is a member of the RAB. It owns and operates the New York City [****2] office building where respondents worked as night lobby watchmen and in

other similar capacities. Respondents were directly employed by petitioner Temco Service Industries, Inc. (Temco), a maintenance service and cleaning contractor. After 14 Penn Plaza, with the Union's consent, engaged a unionized security contractor affiliated with Temco to provide licensed security guards for the building, Temco reassigned respondents to jobs as porters and cleaners. Contending that these reassignments led to a loss in income, other damages, and were otherwise less desirable than their former positions, respondents asked the Union to file grievances alleging, among other things, that petitioners violated the CBA's ban on workplace discrimination by reassigning respondents on the basis of their age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), *29 U.S.C. § 621 et seq.* The Union requested arbitration under the CBA, but after the initial hearing, withdrew the age-discrimination claims on the ground that its consent to the new security contract precluded it from objecting to respondents' reassignments as discriminatory. Respondents then filed a complaint with the Equal Employment [****3] Opportunity Commission (EEOC) alleging that petitioners had violated their ADEA [*248] rights, and the EEOC issued each of them a right-to-sue notice. In the ensuing lawsuit, the District Court denied petitioners' motion to compel arbitration of respondents' age discrimination claims. The Second Circuit affirmed, holding that *Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, forbids enforcement of collective-bargaining provisions requiring arbitration of ADEA claims.

*Held:* A provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. Pp. 255-274.

[**1459] (a) Examination of the two federal statutes at issue here, the ADEA and the National Labor Relations Act [***404] (NLRA), yields a straightforward answer to the question presented. The Union and the RAB, negotiating on behalf of 14 Penn Plaza, collectively bargained in good faith and agreed that employment-related discrimination claims, including ADEA claims, would be resolved in arbitration. This freely negotiated contractual term easily qualifies as a "conditio[n] of employment" subject to mandatory bargaining under the NLRA, *29 U.S.C. § 159(a)*. See, *e.g.*, *[****4] Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB, 501 U.S. 190, 199, 111 S. Ct. 2215, 115 L. Ed. 2d 177*. As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer, and courts generally may not interfere in this bargained-for exchange. See *NLRB v. Magnavox Co., 415 U.S. 322, 328, 94 S. Ct. 1099, 39 L. Ed. 2d 358*. Thus, the CBA's arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA's broad sweep. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444*. It does not. This Court has squarely held that the ADEA does not preclude arbitration of claims brought under the statute. See *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-33, 111 S. Ct. 1647, 114 L. Ed. 2d 26*. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. *Pp. 255-260*.

(b) The CBA's arbitration provision is also fully enforceable under the *Gardner-Denver* line [****5] of cases. Respondents incorrectly interpret *Gardner-Denver* and its progeny as holding that an agreement to arbitrate ADEA claims provided for in a collective-bargaining agreement cannot waive an individual employee's right to a judicial forum under federal antidiscrimination statutes. *Pp. 260-272*.

(i) The facts underlying *Gardner-Denver* and its progeny reveal the narrow scope of the legal rule they engendered. Those cases "did not involve the issue of the enforceability of an agreement to arbitrate statutory [*249] claims," but "the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims." *Gilmer, supra, at 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26*. *Gardner-Denver* does not control the outcome where, as here, the collective-bargaining agreement's arbitration provision expressly covers both statutory and contractual discrimination claims. *Pp. 260-264*.

(ii) Apart from their narrow holdings, the *Gardner-Denver* line of cases included broad dicta highly critical of using arbitration to vindicate statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned. First, contrary to *Gardner-Denver*'s [****6] erroneous assumption, *415 U.S., at 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, the decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance, see, *e.g.*, *Gilmer, supra, at 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26*. Second, *Gardner-Denver*'s mistaken [***405] suggestion that certain informal features of arbitration made it a forum "well suited to the resolution of contractual disputes," but "a comparatively inappropriate forum for the final resolution of [employment] rights," [**1460] *415 U.S., at 56, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, has been corrected. See, *e.g.*, *Shearson/American Express Inc. v. McMahon, 482 U.S. 220,*

232, 107 S. Ct. 2332, 96 L. Ed. 2d 185. Third, *Gardner-Denver*'s concern that, in arbitration, a union may subordinate an individual employee's interests to the collective interests of all employees in the bargaining unit, 415 U.S., at 58, n. 19, 94 S. Ct. 1011, 39 L. Ed. 2d 147, cannot be relied on to introduce a qualification into the ADEA that is not found in its text. Until Congress amends the ADEA to meet the conflict-of-interest concern identified in the *Gardner-Denver* dicta, there is "no reason to color the lens through which the arbitration clause is read." Mitsubishi, supra, at 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444. In [****7] any event, the conflict-of-interest argument amounts to an unsustainable collateral attack on the NLRA, see Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62, 95 S. Ct. 977, 43 L. Ed. 2d 12, and Congress has accounted for the conflict in several ways: Union members may bring a duty of fair representation claim against the union; a union can be subjected to direct liability under the ADEA if it discriminates on the basis of age; and union members may also file age-discrimination claims with the EEOC and the National Labor Relations Board. Pp. 265-272.

(c) Because respondents' arguments that the CBA does not clearly and unmistakably require them to arbitrate their ADEA claims were not raised in the lower courts, they have been forfeited. Moreover, although a substantive waiver of federally protected civil rights will not be upheld, see, *e.g.*, Mitsubishi, supra, at 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444, and n 19, this Court is not positioned to resolve in the first instance respondents' claim that the CBA allows the Union to prevent them from effectively vindicating [*250] their federal statutory rights in the arbitral forum, given that this question would require resolution of contested factual allegations, was not fully briefed [****8] here or below, and is not fairly encompassed within the question presented. Resolution now would be particularly inappropriate in light of the Court's hesitation to invalidate arbitration agreements based on speculation. See, *e.g.*, Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 121 S. Ct. 513, 148 L. Ed. 2d 373. Pp. 272-274.

498 F.3d 88, reversed and remanded.

**Counsel: Paul Salvatore** argued the cause for petitioners.
**David C. Frederick** argued the cause for respondents.

**Judges:** Thomas, J., delivered the opinion of the Court, in which Roberts, C. J., and Scalia, Kennedy, and Alito, JJ., joined. Stevens, J., filed a dissenting opinion, *post*, p. 274 Souter, J., filed a dissenting opinion, in which Stevens, Ginsburg, and Breyer, JJ., joined, *post*, p. 277.

**Opinion by:** THOMAS

## Opinion

[**1461] [*251] Justice **Thomas** delivered the opinion of the Court.

The question presented by this case is whether a provision in a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate claims arising under the Age Discrimination in Employment [***406] Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq., is enforceable. The United States Court of Appeals for the Second Circuit held that this Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974), forbids enforcement of such arbitration provisions. We disagree and reverse the judgment of the Court of [****9] Appeals.

I

Respondents are members of the Service Employees International Union, Local 32BJ (Union). [1] Under the National Labor Relations Act (NLRA), 49 Stat. 449, as amended, the Union is the exclusive bargaining representative of employees within the building-services industry in New York City, which includes building cleaners, porters, and doorpersons. See 29 U.S.C. § 159(a). In this role, the Union has exclusive authority to bargain on behalf of its members over their "rates of pay, wages, hours of employment, or other conditions of employment." *Ibid.* Since the 1930's, the Union has engaged in industry wide collective bargaining with the Realty Advisory Board on Labor Relations, Inc. (RAB), a multiemployer bargaining association for the New York City real-estate industry. The agreement between the Union and the RAB is embodied in their Collective Bargaining Agreement for Contractors and Building Owners (CBA). The CBA requires union members to submit all claims of employment discrimination to binding arbitration under the CBA's grievance and dispute resolution procedures:

> [*252] "30. NO DISCRIMINATION "There shall be no discrimination against any present or future employee by reason of race, [****10] creed, color, age, disability, national origin, sex, union membership, or any characteristic protected by law, including, but not limited to, claims made pursuant to Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the New York State Human Rights Law, the New York City Human Rights Code, . . . or any other similar laws, rules, or regulations. All such claims shall be subject to the grievance and arbitration procedure (Articles V and VI) as the sole and exclusive remedy for violations. Arbitrators shall apply appropriate law in rendering decisions based upon claims

of discrimination." App. to Pet. for Cert. 48a.[1]

Petitioner 14 Penn Plaza LLC is a member of the RAB. It owns and operates the New York City office building where, prior to August 2003, respondents worked as night lobby watchmen and in other similar capacities. Respondents were directly employed by petitioner Temco Service Industries, Inc. (Temco), a maintenance service [**1462] and cleaning contractor. In August 2003, with the Union's consent, 14 Penn Plaza engaged Spartan Security, a unionized security services contractor and affiliate of Temco, to provide licensed security guards to staff the lobby and entrances [***407] of its building. Because this rendered respondents' lobby services unnecessary, Temco reassigned them to jobs as night porters [*253] and light-duty cleaners in other locations in the building. Respondents contend that these reassignments led to a loss in income, caused them emotional distress, and were otherwise less desirable than their former positions.

At respondents' request, the Union filed grievances challenging the reassignments. The grievances alleged that petitioners: (1) violated the CBA's ban on workplace discrimination by reassigning respondents on account [****12] of their age; (2) violated seniority rules by failing to promote one of the respondents to a handyman position; and (3) failed to equitably rotate overtime. After failing to obtain relief on any of these claims through the grievance process, the Union requested arbitration under the CBA.

After the initial arbitration hearing, the Union withdrew the first set of respondents' grievances--the age-discrimination claims--from arbitration. Because it had consented to the contract for new security personnel at 14 Penn Plaza, the Union believed that it could not legitimately object to respondents' reassignments as discriminatory. But the Union continued to arbitrate the seniority and overtime claims, and, after several hearings, the claims were denied.

In May 2004, while the arbitration was ongoing but after the Union withdrew the age-discrimination claims, respondents filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that petitioners had violated their rights under the ADEA. Approximately one month later, the EEOC issued a Dismissal and Notice of Rights, which explained that the agency's "'review of the evidence . . . fail[ed] to indicate that a violation [****13] ha[d] occurred,'" and notified each respondent of his right to sue. *Pyett v. Pa. Bldg. Co., 498 F.3d 88, 91 (CA2 2007)*.

Respondents thereafter filed suit against petitioners in the United States District Court for the Southern District of New York, alleging that their reassignment violated the [*254] ADEA and state and local laws prohibiting age discrimination.[2] Petitioners filed a motion to compel arbitration of respondents' claims pursuant to *§§ 3* and *4 of the Federal Arbitration Act* (FAA), *9 U.S.C. §§ 3, 4*.[3] The District Court denied the motion because under Second Circuit precedent, "even a clear and unmistakable union-negotiated waiver of a right to litigate certain federal and [**1463] state statutory claims in a judicial forum is unenforceable." App. to Pet. for Cert. [***408] 21a. Respondents immediately appealed the ruling under [2]*§ 16 of the FAA*, which authorizes an interlocutory appeal of "an order . . . refusing a stay of any action under *section 3* of this title" or "denying a petition under *section 4* of this title to order arbitration to proceed." *9 U.S.C. §§ 16(a)(1)(A)-(B)*.

The Court of Appeals affirmed. *498 F.3d 88*. According to the Court of Appeals, it could not compel arbitration of the dispute because *Gardner-Denver*, which "remains good law," held "that a collective bargaining agreement could not waive covered workers' rights to a judicial forum for causes of action created [****15] by Congress." *498 F.3d at 92, n. 3* (citing *Gardner-Denver, 415 U.S., at 49-51, 94 S. Ct. 1011, 39 L. Ed. 2d 147*). The Court of Appeals observed that the *Gardner-Denver* decision was in tension with this Court's more recent decision in *Gilmer v. [*255] Interstate/Johnson*

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[1] Article V establishes the grievance process, which applies to all claims regardless of whether they are subject to arbitration under the CBA. Article VI establishes the procedures for arbitration and postarbitration judicial review, and, in particular, provides that the arbitrator "shall . . . decide all differences arising between the parties as to interpretation, application or performance of any part of this Agreement and such other issues as the parties are expressly required to arbitrate before him [****11] under the terms of this Agreement." App. to Pet. for Cert. 43a-47a.

[2] Respondents also filed a "hybrid" lawsuit against the Union and petitioners under ***§ 301*** of the Labor Management [****14] Relations Act, 1947, ***29 U.S.C. § 185***, see also *DelCostello v. Teamsters, 462 U.S. 151, 164-165, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983)*, alleging that the Union breached its "duty of fair representation" under the NLRA by withdrawing support for the age-discrimination claims during the arbitration and that petitioners breached the CBA by reassigning respondents. Respondents later voluntarily dismissed this suit with prejudice.

[3] Petitioners also filed a motion to dismiss the complaint for failure to state a claim. The District Court denied the motion, holding that respondents had sufficiently alleged an ADEA claim by claiming that they "were over the age of 40, . . . they were reassigned to positions which led to substantial losses in income, and . . . their replacements were both younger and had less seniority at the building." App. to Pet. for Cert. 20a (footnote omitted). Petitioners have not appealed that ruling.

*Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*, which "held that an individual employee who had agreed individually to waive his right to a federal forum *could* be compelled to arbitrate a federal age discrimination claim." *498 F.3d at 91, n. 3* (citing *Gilmer, supra, at 33-35, 111 S. Ct. 1647, 114 L. Ed. 2d 26*; emphasis in original). The Court of Appeals also noted that this Court previously declined to resolve this tension in *Wright v. Universal Maritime Service Corp., 525 U.S. 70, 82, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998)*, where the waiver at issue was not "clear and unmistakable." *498 F.3d at 91, n. 3*.

The Court of Appeals attempted to reconcile *Gardner-Denver* and *Gilmer* by holding that arbitration provisions in a collective-bargaining agreement, "which purport to waive employees' rights to a federal forum with respect to statutory claims, are unenforceable." *498 F.3d at 93-94*. As a result, an individual employee would be free to choose compulsory arbitration under *Gilmer*, but a labor union could not collectively bargain for arbitration **[****16]** on behalf of its members. We granted certiorari, *552 U.S. 1178, 128 S. Ct. 1223, 170 L. Ed. 2d 57 (2008)*, to address the issue left unresolved in *Wright*, which continues to divide the Courts of Appeals,[4] and now reverse.

II

A

[3] The NLRA governs federal labor-relations law. As permitted by that statute, respondents designated the Union as their "exclusive representativ[e] . . . for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." *29 U.S.C. § 159(a)*. As the employees' exclusive bargaining representative, the Union "enjoys broad authority . . . in the **[*256]** negotiation and administration of [the] collective bargaining contract." *Communications Workers v. Beck, 487 U.S. 735, 739, 108 S. Ct. 2641, 101 L. Ed. 2d 634 (1988)* (internal quotation marks omitted). But this broad authority "is accompanied by a responsibility of equal scope, the responsibility and duty of fair **[****17]** representation." *Humphrey v. Moore, 375 U.S. 335, 342, 84 S. Ct. 363, 11 L. Ed. 2d 370 (1964)*. The employer has a corresponding **[***409]** duty under the NLRA to bargain in good faith "with the representatives of his employees" on wages, hours, and conditions of employment. **[**1464]** *29 U.S.C. § 158(a)(5)*; see also *§ 158(d)*.

In this instance, the Union and the RAB, negotiating on behalf of 14 Penn Plaza, collectively bargained in good faith and agreed that employment-related discrimination claims, including claims brought under the ADEA, would be resolved in arbitration. This freely negotiated term between the Union and the RAB easily qualifies as a "conditio[n] of employment" that is subject to mandatory bargaining under *§ 159(a)*. See *Litton Financial Printing Div., Litton Business Systems, Inc. v. NLRB, 501 U.S. 190, 199, 111 S. Ct. 2215, 115 L. Ed. 2d 177 (1991)* ([4] "[A]rrangements for arbitration of disputes are a term or condition of employment and a mandatory subject of bargaining"); *Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 578, 80 S. Ct. 1347, 4 L. Ed. 2d 1409 (1960)* ("[A]rbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself"); *Textile Workers v. Lincoln Mills of Ala., 353 U.S. 448, 455, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957)* ("Plainly the agreement **[****18]** to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike"). The decision to fashion a collective bargaining agreement to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing grievance machinery.[5]

**[*257]** Respondents, however, contend that the arbitration clause here is outside the permissible scope of the collective-bargaining process because it affects the "employees' individual, non-economic statutory rights." Brief for Respondents 22; see also *post, at 281-283, 173 L. Ed. 2d, at 425-426* (Souter, J., dissenting). We disagree. Parties

[4] Compare, *e.g.*, *Rogers v. New York Univ., 220 F.3d 73, 75 (CA2 2000) (per curiam)*; *O'Brien v. Agawam, 350 F.3d 279, 285 (CA1 2003)*; *Mitchell v. Chapman, 343 F.3d 811, 824 (CA6 2003)*; *Tice v. American Airlines, Inc., 288 F.3d 313, 317 (CA7 2002)*, with, *e.g.*, *Eastern Associated Coal Corp. v. Massey, 373 F.3d 530, 533 (CA4 2004)*.

[5] Justice Souter claims that this understanding is "impossible to square with our conclusion in *[Alexander v.] Gardner-Denver [Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)*," that 'Title VII . . . stands on plainly different ground' from 'statutory rights related to collective activity': 'it concerns not majoritarian processes, but an individual's right to equal employment opportunities.'" *Post, at 282, 173 L. Ed. 2d, at 425* (dissenting opinion) (quoting *Gardner-Denver, 415 U.S., at 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147*). As explained below, however, Justice Souter repeats the key analytical mistake made in *Gardner-Denver*'s dicta by equating the decision to arbitrate Title VII and ADEA claims to a decision to forgo these substantive guarantees against workplace discrimination. See *infra, at 265-267, 173 L. Ed. 2d, at 413-415*. The right to a judicial forum is not the nonwaivable "substantive" right protected by the ADEA. See *infra, at 259, 173 L. Ed. 2d, at 410, 420*. Thus, although Title VII and ADEA rights may well stand on "different ground" than statutory **[****19]** rights that protect "majoritarian processes," *Gardner-Denver, supra, at 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, the voluntary decision to collectively bargain for arbitration does not deny those statutory antidiscrimination rights the full protection they are due.

generally favor arbitration precisely because of the economics of dispute resolution. See *Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 123, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)* ("Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts"). As in any contractual negotiation, a union may agree to the inclusion of an arbitration provision in a collective-bargaining agreement in return for other concessions from the employer. [5] Courts generally may not interfere in this bargained-for exchange. "Judicial nullification [****20] of contractual concessions [***410] . . . is contrary to what the Court has recognized as one of the fundamental policies of the National Labor Relations Act--freedom of contract." *NLRB v. Magnavox Co., 415 U.S. 322, 328, 94 S. Ct. 1099, 39 L. Ed. 2d 358 (1974)* (Stewart, J., concurring in part and dissenting in part) [**1465] (internal quotation marks and brackets omitted).

As a result, the CBA's arbitration provision must be honored unless the ADEA itself removes this particular class of [*258] grievances from the NLRA's broad sweep. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*. It does not. This Court has squarely held that the [6] ADEA does not preclude arbitration of claims brought under the statute. See *Gilmer, 500 U.S., at 26-33, 111 S. Ct. 1647, 114 L. Ed. 2d 26*

In *Gilmer*, the Court explained that [7] "[a]lthough all statutory claims may not be appropriate for arbitration, '[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Id., at 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26* (quoting *Mitsubishi Motors Corp., supra, at 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444*). And [8] "[i]f Congress intended the substantive protection afforded by the ADEA to include protection against waiver [****21] of the right to a judicial forum, that intention will be deducible from text or legislative history." *500 U.S., at 29, 111 S. Ct. 1647, 114 L. Ed. 2d 26* (internal quotation marks and some brackets omitted). The Court determined that "nothing in the text of the ADEA or its legislative history explicitly precludes arbitration." *Id., at 26-27, 111 S. Ct. 1647, 114 L. Ed. 2d 26*. The Court also concluded that arbitrating ADEA disputes would not undermine the statute's "remedial and deterrent function." *Id., at 28, 111 S. Ct. 1647, 114 L. Ed. 2d 26* (internal quotation marks omitted). In the end, the employee's "generalized attacks" on "the adequacy of arbitration procedures" were "insufficient to preclude arbitration of statutory claims," *id., at 30, 111 S. Ct. 1647, 114 L. Ed. 2d 26*, because there was no evidence that "Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act," *id., at 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26*

The *Gilmer* Court's interpretation of the ADEA fully applies in the collective-bargaining context. [9] Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative. This Court has required only that an agreement to arbitrate statutory antidiscrimination claims be "explicitly stated" in the collective-bargaining agreement. [****22] *Wright, 525 U.S., at 80, 119 S. Ct. 391, 142 L. Ed. 2d 361* (internal [*259] quotation marks omitted). The CBA under review here meets that obligation. Respondents incorrectly counter that an individual employee must personally "waive" a "[substantive] right" to proceed in court for a waiver to be "knowing and voluntary" under the ADEA. *29 U.S.C. § 626(f)(1)*. As explained below, however, the agreement to arbitrate ADEA claims is not the waiver of a "substantive right" as that term is employed in the ADEA. *Wright, supra, at 80, 119 S. Ct. 391, 142 L. Ed. 2d 361*; see *infra, at 265-266, 173 L. Ed. 2d, at 414-415*. Indeed, if the "right" referred to in *§ 626(f)(1)* included the prospective waiver of the right to [***411] bring an ADEA claim in court, even a waiver signed by an individual employee would be invalid as the statute also prevents individuals from "waiv[ing] rights or claims that may arise after the date the waiver is executed." *§ 626(f)(1)(C)*.[6]

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[6] Respondents' contention that ***§ 118 of the Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat. 1081***, note following ***42 U.S.C. § 1981 (2000 ed.)***, precludes the enforcement of this arbitration agreement also is misplaced. See Brief for Respondents 31-32. [10] Section 118 expresses Congress' support for alternative [****23] dispute resolution: "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under" the ADEA. 105 Stat. 1081, note following ***42 U. S. C. § 1981***. Respondents argue that the legislative history actually signals Congress' intent to preclude arbitration waivers in the collective-bargaining context. In particular, respondents point to a House Report that, in spite of the statute's plain language, interprets § 118 to support their position. See H. R. Rep. No. 102-40, pt. 1, p 97 (1991) ("[A]ny agreement to submit disputed issues to arbitration . . . in the context of a collective bargaining agreement . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII. This view is consistent with the Supreme Court's interpretation of Title VII in *Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)*"). But the legislative history mischaracterizes the holding of *Gardner-Denver*, which does not prohibit collective bargaining for arbitration of ADEA claims. See *infra, at 260-264, 173 L. Ed. 2d, at 411-413*. Moreover, reading the legislative history in the manner

[**1466] [*260] Examination of the two federal statutes at issue in this case, therefore, yields a straightforward answer to the question presented: The NLRA provided the Union and the RAB with statutory authority to collectively bargain for arbitration of workplace discrimination claims, and Congress did not terminate that authority with respect to federal age-discrimination claims in the ADEA. Accordingly, there is no legal basis for the Court to strike down the arbitration clause in this CBA, which was freely negotiated by the Union and the RAB, and which clearly and unmistakably requires respondents to arbitrate the age-discrimination claims at issue in this appeal. Congress has chosen to allow arbitration of ADEA claims. The Judiciary must respect that choice.

B

The CBA's arbitration provision is also fully enforceable [****25] under the *Gardner-Denver* line of cases. Respondents interpret *Gardner-Denver* and its progeny to hold that "a union cannot waive an employee's right to a judicial forum under the federal antidiscrimination statutes" because "allowing the union to waive this right would substitute the union's interests for the employee's antidiscrimination rights." Brief for Respondents 12. The "combination of union control over the process and inherent conflict of interest with respect to discrimination claims," they argue, "provided the foundation for the Court's holding [in *Gardner-Denver*] that arbitration under a collective bargaining agreement could not preclude an individual employee's right to bring a lawsuit in court to vindicate a statutory discrimination claim." *Id.*, at 15. We disagree.

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The holding of *Gardner-Denver* is not as broad as respondents suggest. [***412] The employee in that case was covered by a [*261] collective-bargaining agreement that prohibited "discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry" and that guaranteed that "[n]o employee will be discharged . . . except for just cause." *415 U.S., at 39, 94 S. Ct. 1011, 39 L. Ed. 2d 147* (internal quotation marks omitted). [****26] The agreement also included a "multistep grievance procedure" that culminated in compulsory arbitration for any "differences aris[ing] between the Company and the Union as to the meaning and application of the provisions of this Agreement" and "any trouble aris[ing] in the plant." *Id., at 40-41, 94 S. Ct. 1011, 39 L. Ed. 2d 147* (internal quotation marks omitted).

[**1467] The employee was discharged for allegedly producing too many defective parts while working for the respondent as a drill operator. He filed a grievance with his union claiming that he was "'unjustly discharged'" in violation of the "'just cause'" provision within the collective-bargaining agreement. *Id., at 39, 42*. Then at the final prearbitration step of the grievance process, the employee added a claim that he was discharged because of his race. *Id., at 38-42, 94 S. Ct. 1011, 39 L. Ed. 2d 147*.

The arbitrator ultimately ruled that the employee had been "'discharged for just cause,'" but "made no reference to [the] claim of racial discrimination." *Id., at 42, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. After obtaining a right-to-sue letter from the EEOC, the employee filed a claim in Federal District Court, alleging racial discrimination in violation of Title VII of the Civil Rights Act of 1964. The District Court issued a decision, affirmed by the Court of Appeals, which granted [****27] summary judgment to the employer because it concluded that "the claim of racial discrimination had been submitted to the arbitrator and resolved adversely to [the employee]." *Id., at 43, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. In the District Court's view, "having voluntarily elected to pursue his grievance to final arbitration under the nondiscrimination clause of the collective-bargaining agreement," the employee was "bound by the arbitral decision" and precluded from suing his employer on any other grounds, such as a statutory claim under Title VII. *Ibid.*

[*262] This Court reversed the judgment on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims. As a result, the lower courts erred in relying on the "doctrine of election of remedies" to bar the employee's Title VII claim. *Id., at 49, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. "That doctrine, which refers to situations where an individual pursues remedies that are legally or factually inconsistent" with each other, did not apply to the employee's dual pursuit of arbitration and a Title VII discrimination claim in district court. *Ibid.*. The employee's collective-bargaining agreement did not mandate arbitration of statutory antidiscrimination claims. [****28] *Id., at 49-50, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. "As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties." *Id., at 53, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. Because the collective-bargaining agreement gave the arbitrator "authority to resolve only questions of contractual rights," his decision could not prevent the employee from bringing the Title VII claim in federal court "regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by

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[****24] suggested by respondents would create a direct conflict with the statutory text, which encourages the use of arbitration for dispute resolution without imposing any constraints on collective bargaining. In such a contest, the text must prevail. See *Ratzlaf v. United States, 510 U.S. 135, 147-148, 114 S. Ct. 655, 126 L. Ed. 2d 615 (1994)* ([11] "[W]e do not resort to legislative history to cloud a statutory text that is clear").

Title [***413] VII." *Id., at 53-54, 94 S. Ct. 1011, 39 L. Ed. 2d 147*; see also *id., at 50, 94 S. Ct. 1011, 39 L. Ed. 2d 147*.

The Court also explained that the employee had not waived his right to pursue his Title VII claim in federal court by participating in an arbitration that was premised on the same underlying facts as the Title VII claim. See *id., at 52, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. Thus, whether the legal theory of preclusion advanced by the employer rested on "the doctrines of election of remedies" or was recast "as resting instead on the doctrine of equitable estoppel and on themes of res judicata and collateral estoppel," *id., at 49, n. 10, 94 S. Ct. 1011, 39 L. Ed. 2d 147* (internal quotation marks omitted), it could not prevail in light of the collective-bargaining agreement's failure to address arbitration of Title VII claims. See *id., at 46, n. 6, 94 S. Ct. 1011, 39 L. Ed. 2d 147* ("[W]e [****29] hold that the federal policy favoring arbitration does not establish that an arbitrator's resolution of a *contractual* claim is dispositive of a statutory claim under Title VII" (emphasis added)).

[*263] The Court's decisions following *Gardner-Denver* have not broadened its holding [**1468] to make it applicable to the facts of this case. In *Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)*, the Court considered "whether an employee may bring an action in federal district court, alleging a violation of the minimum wage provisions of the Fair Labor Standards Act, . . . after having unsuccessfully submitted a wage claim based on the same underlying facts to a joint grievance committee pursuant to the provisions of his union's collective-bargaining agreement." *Id., at 729-730, 101 S. Ct. 1437, 67 L. Ed. 2d 641*. The Court held that the unsuccessful arbitration did not preclude the federal lawsuit. Like the collective-bargaining agreement in *Gardner-Denver*, the arbitration provision under review in *Barrentine* did not expressly reference the statutory claim at issue. See *450 U.S., at 731, n. 5, 101 S. Ct. 1437, 67 L. Ed. 2d 641*. The Court thus reiterated that an "arbitrator's power is both derived from, and limited by, the collective-bargaining agreement" [****30] and "[h]is task is limited to construing the meaning of the collective-bargaining agreement so as to effectuate the collective intent of the parties." *Id., at 744, 101 S. Ct. 1437, 67 L. Ed. 2d 641*.

*McDonald v. West Branch, 466 U.S. 284, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984)*, was decided along similar lines. The question presented in that case was "whether a federal court may accord preclusive effect to an unappealed arbitration award in a case brought under [*42 U.S.C. § 1983*]." *Id., at 285, 104 S. Ct. 1799, 80 L. Ed. 2d 302*. The Court declined to fashion such a rule, again explaining that "because an arbitrator's authority derives solely from the contract, *Barrentine, supra, at 744, [101 S. Ct. 1437, 67 L. Ed. 2d 641]*, an arbitrator may not have the authority to enforce *§ 1983*" when that provision is left unaddressed by the arbitration agreement. *Id., at 290, 104 S. Ct. 1799, 80 L. Ed. 2d 302*. Accordingly, as in both *Gardner-Denver* and *Barrentine*, the Court's decision in *McDonald* hinged on the scope of the collective-bargaining agreement and the arbitrator's parallel mandate.

The facts underlying *Gardner-Denver*, *Barrentine*, and *McDonald* reveal the narrow scope of the legal rule arising from that trilogy of decisions. Summarizing those opinions [*264] in [***414] *Gilmer*, this Court made clear that the *Gardner-Denver* line of cases "did not involve the issue of the enforceability [****31] of an agreement to arbitrate statutory claims." *500 U.S., at 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26*. Those decisions instead "involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions." *Ibid.*; see also *Wright, 525 U.S., at 76, 119 S. Ct. 391, 142 L. Ed. 2d 361*; *Livadas v. Bradshaw, 512 U.S. 107, 127, n. 21, 114 S. Ct. 2068, 129 L. Ed. 2d 93 (1994)*.[7] *Gardner-Denver* [**1469] and its progeny thus do not control the outcome where, as is the case here, the collective-bargaining agreement's arbitration provision expressly covers

[7] Justice Souter's reliance on *Wright v. Universal Maritime Service Corp., 525 U.S. 70, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998)*, to support its view of *Gardner-Denver* is misplaced. See *post, at 281, 283, 173 L. Ed. 2d, at 425, 426-427*. *Wright* identified the "tension" between the two lines of cases represented by *Gardner-Denver* and *Gilmer*, but found "it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it [was] apparent . . . on [****32] the facts and arguments presented . . . that no such waiver [had] occurred." *525 U.S., at 76-77, 119 S. Ct. 391, 142 L. Ed. 2d 361*. And although his dissent describes *Wright*'s characterization of *Gardner-Denver* as "raising a 'seemingly absolute prohibition of union waiver of employees' federal forum rights,'" *post, at 283, 173 L. Ed. 2d, at 426* (quoting ***Wright, 525 U.S., at 80, 119 S. Ct. 391, 142 L. Ed. 2d 361***), it wrenches the statement out of context: "Although [the right to a judicial forum] is not a substantive right, see *Gilmer, 500 U.S., at 26, [111 S. Ct. 1647, 114 L. Ed. 2d 26]*, and *whether or not Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights *survives Gilmer, Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA," ***id., at 80, 119 S. Ct. 391, 142 L. Ed. 2d 361*** (emphasis added). *Wright* therefore neither endorsed *Gardner-Denver*'s broad language nor suggested a particular result in this case.

both statutory and contractual discrimination claims.[8]

[*265] 2

We recognize that apart from their narrow holdings, the *Gardner-Denver* line of cases included broad dicta that were highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights. That skepticism, however, rested on a misconceived view of arbitration that this Court has since abandoned.

First, the Court in *Gardner-Denver* erroneously assumed that an agreement to submit statutory discrimination claims to arbitration was tantamount to a waiver of those rights. See *415 U.S., at 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147* ("[T]here can be no prospective *waiver* of an employee's rights under Title VII" (emphasis added)). For this reason, the Court stated, "the rights conferred [****34] [by Title VII] can form no part of the collective-bargaining process since waiver of [***415] these rights would defeat the paramount congressional purpose behind Title VII." *Ibid.;* see also *id., at 56, 94 S. Ct. 1011, 39 L. Ed. 2d 147* ("[W]e have long recognized that 'the choice of forums inevitably affects the scope of the substantive right to be vindicated'" (quoting *U.S. Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351, 359-360, 91 S. Ct. 409, 27 L. Ed. 2d 456 (1971)* (Harlan, J., concurring))).

The Court was correct in concluding that [12] federal antidiscrimination rights may not be prospectively waived, see *29 U.S.C. § 626(f)(1)(C)*; see *supra, at 259, 173 L. Ed. 2d, at 410*, but it confused an agreement to arbitrate those statutory claims with a prospective waiver of the substantive right. [13] The decision to resolve ADEA claims by way of arbitration instead of litigation does not waive the statutory right to be free from workplace age discrimination; it waives only the right to seek relief [*266] from a court in the first instance. See *Gilmer, supra, at 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26* ("'[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum'" (quoting *Mitsubishi Motors Corp., 473 U.S., at 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444*)). [****35] This "Court has been quite specific in holding that arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law." *Circuit City Stores, Inc., 532 [**1470] U.S., at 123, 121 S. Ct. 1302, 149 L. Ed. 2d 234*. The suggestion in *Gardner-Denver* that the decision to arbitrate statutory discrimination claims was tantamount to a substantive waiver of those rights, therefore, reveals a distorted understanding of the compromise made when an employee agrees to compulsory arbitration.

In this respect, *Gardner-Denver* is a direct descendant of the Court's decision in *Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953)*, which held that an agreement to arbitrate claims under the Securities Act of 1933 was unenforceable. See *id., at 438, 74 S. Ct. 182, 98 L. Ed. 168*. The Court subsequently overruled *Wilko* and, in so doing, characterized the decision as "pervaded by . . . 'the old judicial hostility to arbitration.'" *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 480, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)*. The Court added: "To the extent that *Wilko* rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be [****36] complainants, it has fallen far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes." *Id., at 481, 109 S. Ct. 1917, 104 L. Ed. 2d 526*; see also *Mitsubishi Motors Corp., supra, at 626-627, 105 S. Ct. 3346, 87 L. Ed. 2d 444* ("[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution"). The timeworn "mistrust of the arbitral process" harbored by the Court in *Gardner-Denver* thus weighs against reliance on [*267] anything more than its core holding. *Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 231-232, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)*; see also *Gilmer, 500 U.S., at 34, n. 5, 111 S. Ct. 1647, 114 L. Ed. [***416] 2d 26* (reiterating that *Gardner-Denver*'s view of arbitration "has been undermined by [the Court's] recent arbitration decisions"). Indeed, in light of the "radical change, over two decades, in the Court's receptivity to arbitration," *Wright, 525 U.S., at 77, 119 S. Ct. 391, 142 L. Ed. 2d 361*, reliance on any judicial decision similarly littered with *Wilko*'s overt hostility to the enforcement of arbitration

[8] Because today's decision does not contradict the holding of *Gardner-Denver*, we need not resolve the *stare decisis* concerns raised by the dissenting opinions. See *post, at 280-281, 285-286, 173 L. Ed. 2d, at 424, 427* (opinion of Souter, J.); *post, at 275-277, 173 L. Ed. 2d, at 421-422* (opinion of Stevens, J.). But given the development of this [****33] Court's arbitration jurisprudence in the intervening years, see *infra, at 266-269, 173 L. Ed. 2d, at 414-417*, *Gardner-Denver* would appear to be a strong candidate for overruling if the dissents' broad view of its holding, see *post, at 282-283, 173 L. Ed. 2d, at 425-426* (opinion of Souter, J.), were correct. See *Patterson v. McLean Credit Union, 491 U.S. 164, 173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)* (explaining that it is appropriate to overrule a decision where there "has been [an] intervening development of the law" such that the earlier "decision [is] irreconcilable with competing legal doctrines or policies").

agreements would be ill advised.[9]

**[**1471] [*268]** Second, *Gardner-Denver* mistakenly suggested that certain features of arbitration made it a forum "well suited to the resolution of contractual disputes," but "a comparatively inappropriate forum for the final resolution of rights created by Title VII." *415 U.S., at 56, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. According to the Court, the "factfinding process in arbitration" is "not equivalent to judicial factfinding" and the "informality **[****39]** of arbitral procedure . . . makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts." *Id., at 57, 58, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. The Court also questioned the competence of arbitrators to decide federal statutory claims. See *id., at 57, 94 S. Ct. 1011, 39 L. Ed. 2d 147* ("[T]he specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land"); *Barrentine, 450 U.S., at 743, 101 S. Ct. 1437, 67 L. Ed. 2d 641* ("Although an arbitrator may be competent to resolve many preliminary factual questions, such as whether the employee 'punched in' when he said he did, he may lack the competence to decide the ultimate legal issue whether an employee's right to a minimum wage or to overtime pay under the statute has been violated"). In the Court's view, "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law **[***417]** concepts." *Gardner-Denver, supra, at 57, 94 S. Ct. 1011, 39 L. Ed. 2d 147*; see also *McDonald, 466 U.S., at 290, 104 S. Ct. 1799, 80 L. Ed. 2d 302* ("An arbitrator may not . . . have the expertise required to resolve the complex legal questions that arise in *§ 1983* **[****40]** actions").

These misconceptions have been corrected. For example, the Court has "recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision" and that "there is no reason to assume at the outset that arbitrators will not follow the law." *McMahon, supra, at 232, 107 S. Ct. 2332, 96 L. Ed. 2d 185*; *Mitsubishi Motors Corp., 473 U.S., at 634, 105 S. Ct. 3346, 87 L. Ed. 2d 444* ("We decline to indulge the presumption that the parties **[*269]** and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators"). An arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA. Moreover, the recognition that arbitration procedures are more streamlined than federal litigation is not a basis for finding the forum somehow inadequate; the relative informality of arbitration is one of the chief reasons that parties select arbitration. Parties "trad[e] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration." *Id., at 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444*. In any event, "[i]t **[****41]** is unlikely . . . that age discrimination claims require more extensive discovery than other claims that we have found to be arbitrable, such as [Racketeer Influenced and Corrupt Organizations Act] and antitrust claims." *Gilmer, supra, at 31, 111 S. Ct. 1647, 114 L. Ed. 2d 26*. At bottom, objections centered on the nature of arbitration do not offer a credible basis for discrediting the choice of that forum to resolve statutory antidiscrimination claims.[10]

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[9] Justice Stevens suggests that the Court is displacing its "earlier determination of the relevant **[****37]** provisions' meaning" based on a "preference for arbitration." *Post, at 275, 173 L. Ed. 2d, at 421*. But his criticism lacks any basis. We are not revisiting a settled issue or disregarding an earlier determination; the Court is simply deciding the question identified in *Wright* as unresolved. See *supra, at 255, 173 L. Ed. 2d, at 408*; see also *infra, at 272-273, 173 L. Ed. 2d, at 419-420*. And, contrary to Justice Stevens' accusation, it is the Court's fidelity to the ADEA's text--not an alleged preference for arbitration--that dictates the answer to the question presented. As *Gilmer* explained, nothing in the text of Title VII or the ADEA precludes contractual arbitration, see *supra, at 258, 173 L. Ed. 2d, at 410-411*, and Justice Stevens has never suggested otherwise. Rather, he has always contended that permitting the "compulsory arbitration" of employment-discrimination claims conflicts with his perception of "the congressional purpose animating the ADEA." *Gilmer, 500 U.S., at 41, 111 S. Ct. 1647, 114 L. Ed. 2d 26* (Stevens, J., dissenting); see also *id., at 42, 111 S. Ct. 1647, 114 L. Ed. 2d 26* ("Plainly, it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts" **[****38]** (internal quotation marks omitted)). The *Gilmer* Court did not adopt Justice Stevens' personal view of the purposes underlying the ADEA, for good reason: That view is not embodied within the statute's text. Accordingly, it is not the statutory text that Justice Stevens has sought to vindicate--it is instead his own "preference" for mandatory judicial review, which he disguises as a search for congressional purpose. This Court is not empowered to incorporate such a preference into the text of a federal statute. See *infra, at 270, 173 L. Ed. 2d, at 417-418*. It is for this reason, and not because of a "policy favoring arbitration," see *post, at 274, 275, 173 L. Ed. 2d, at 420, 422* (Stevens, J., dissenting), that the Court overturned *Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953)*. And it is why we disavow the antiarbitration dicta of *Gardner-Denver* and its progeny today.

[10] Moreover, [14] an arbitrator's decision as to whether a unionized employee has been discriminated against on the basis of age in violation of the ADEA remains subject to judicial review under the FAA. *9 U.S.C. § 10(a)*. "[A]lthough judicial scrutiny of arbitration

[**1472] Third, the Court in *Gardner-Denver* raised in a footnote a "further concern" regarding "the union's exclusive control over the manner and extent to which an individual grievance is presented." *415 U.S., at 58, n. 19, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. The Court suggested that in arbitration, as in the collective-bargaining process, a union may subordinate the interests of an individual employee [****42] to the collective interests of all employees in the bargaining unit. *Ibid.*; see also *McDonald, supra, at 291, 104 S. Ct. 1799, 80 L. Ed. 2d 302* ("The union's interests and those of the individual employee are not always identical or even compatible. As a result, the [*270] union may present the employee's grievance less vigorously, or make different strategic choices, than would the employee"); see also *Barrentine, supra, at 742, 101 S. Ct. 1437, 67 L. Ed. 2d 641*; *post, at 284, n. 4, 173 L. Ed. 2d, at 427* (Souter, J., dissenting).

We cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the [***418] ADEA that is not found in its text. [15] Absent a constitutional barrier, "it is not for us to substitute our view of . . . policy for the legislation which has been passed by Congress." *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc., 554 U.S. 33, 52 , 128 S. Ct. 2326, 171 L. Ed. 2d 203 (2008)* (internal quotation marks omitted). Congress is fully equipped "to identify any category of claims as to which agreements to arbitrate will be held unenforceable." *Mitsubishi Motors Corp., supra, at 627, 105 S. Ct. 3346, 87 L. Ed. 2d 444*. Until Congress amends the ADEA to meet the conflict-of-interest concern identified in the *Gardner-Denver* dicta, and seized on by respondents here, there is "no reason [****43] to color the lens through which the arbitration clause is read" simply because of an alleged conflict of interest between a union and its members. *Mitsubishi Motors Corp., supra, at 628, 105 S. Ct. 3346, 87 L. Ed. 2d 444*. This is a "battl[e] that should be fought among the political branches and the industry. Those parties should not seek to amend the statute by appeal to the Judicial Branch." *Barnhart v. Sigmon Coal Co., 534 U.S. 438, 462, 122 S. Ct. 941, 151 L. Ed. 2d 908 (2002)*.

The conflict-of-interest argument also proves too much. Labor unions certainly balance the economic interests of some employees against the needs of the larger work force as they negotiate collective-bargaining agreements and implement them on a daily basis. But this attribute of organized labor does not justify singling out an arbitration provision for disfavored treatment. This "principle of majority rule" to which respondents object is in fact the central premise of the NLRA. *Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50, 62, 95 S. Ct. 977, 43 L. Ed. 2d 12 (1975)*. "In establishing a regime of majority rule, Congress sought to secure to all members of the unit the benefits of their collective [*271] strength and bargaining power, in full awareness that the superior strength of some [****44] individuals or groups might be subordinated to the interest of the majority." *Ibid.* (footnote omitted); see also *Ford Motor Co. v. Huffman, 345 U.S. 330, 338, 73 S. Ct. 681, 97 L. Ed. 1048 (1953)* ("The complete satisfaction of all who are represented is hardly to be expected"); *Pennsylvania R. Co. v. Rychlik, 352 U.S. 480, 498, 77 S. Ct. 421, 1 L. Ed. 2d 480 (1957)* (Frankfurter, J., concurring). It was Congress' verdict that the benefits of organized labor outweigh the sacrifice of individual liberty that this system necessarily [**1473] demands. Respondents' argument that they were deprived of the right to pursue their ADEA claims in federal court by a labor union with a conflict of interest is therefore unsustainable; it amounts to a collateral attack on the NLRA.

In any event, Congress has accounted for this conflict of interest in several ways. As indicated above, [16] the NLRA has been interpreted to impose a "duty of fair representation" on labor unions, which a union breaches "when its conduct toward a member of the bargaining unit is arbitrary, discriminatory, or in bad faith." *Marquez v. Screen Actors, 525 U.S. 33, 44, 119 S. Ct. 292, 142 L. Ed. 2d 242 (1998)*. This duty extends to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation [****45] activities as well." *Beck, 487 U.S., at 743, 108 S. Ct. 2641, 101 L. Ed. 2d 634* (citation omitted). Thus, a union is subject to liability under the NLRA if it illegally discriminates against [***419] older workers in either the formation or governance of the collective-bargaining agreement, such as by deciding not to pursue a grievance on behalf of one of its members for discriminatory reasons. See *Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967)* (describing the duty of fair representation as the "statutory obligation to serve the interests of *all* members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct" (emphasis added)). Respondents in fact brought a fair representation suit against the Union based on its withdrawal of support for their age-discrimination [*272] claims. See n. 2, *supra*. Given this avenue that Congress has made available to redress a union's violation of its duty to its members, it is particularly inappropriate to ask this Court to impose an artificial limitation on the collective-bargaining process.

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awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute." *Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)*.

In addition, [17] a union is subject to liability under the ADEA if the union itself discriminates against its members on the basis of age. [****46] See 29 U.S.C. § 623(d); see also 1 B. Lindemann & P. Grossman, Employment Discrimination Law 1575-1581 (4th ed. 2007) (explaining that a labor union may be held jointly liable with an employer under federal antidiscrimination laws for discriminating in the formation of a collective-bargaining agreement, knowingly acquiescing in the employer's discrimination, or inducing the employer to discriminate); cf. *Goodman v. Lukens Steel Co., 482 U.S. 656, 669, 107 S. Ct. 2617, 96 L. Ed. 2d 572 (1987)*. Union members may also file age-discrimination claims with the EEOC and the National Labor Relations Board, which may then seek judicial intervention under this Court's precedent. See *EEOC v. Waffle House, Inc., 534 U.S. 279, 295-296, 122 S. Ct. 754, 151 L. Ed. 2d 755 (2002)*. In sum, Congress has provided remedies for the situation where a labor union is less than vigorous in defense of its members' claims of discrimination under the ADEA.

III

Finally, respondents offer a series of arguments contending that the particular CBA at issue here does not clearly and unmistakably require them to arbitrate their ADEA claims. See Brief for Respondents 44-47. But respondents did not raise these contract-based arguments in the District Court or the Court of Appeals. To the contrary, [****47] respondents acknowledged on appeal that the CBA provision requiring arbitration of their federal antidiscrimination statutory claims "is sufficiently explicit" in precluding their federal lawsuit. Brief for Plaintiffs-Appellees in No. 06-3047-cv(L) etc. (CA2), p 9. In light of respondents' litigating position, both lower courts assumed that the CBA's arbitration [**1474] clause [*273] clearly applied to respondents and proceeded to decide the question left unresolved in *Wright*. We granted review of the question presented on that understanding.

[18] "Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals.'" *Granfinanciera, S. A. v. Nordberg, 492 U.S. 33, 38-39, 109 S. Ct. 2782, 106 L. Ed. 2d 26 (1989)* (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation, [***420] 439 U.S. 463, 476, n. 20, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979)*). But this Court will affirm on grounds that have "'not been raised below . . . "only in exceptional cases."'" *Nordberg, supra, at 39, 109 S. Ct. 2782, 106 L. Ed. 2d 26* (quoting *Heckler v. Campbell, 461 U.S. 458, 468-469, n. 12, 103 S. Ct. 1952, 76 L. Ed. 2d 66 (1983)*). This is not an "exceptional case." As a result, [****48] we find that respondents' alternative arguments for affirmance have been forfeited. See, *e.g.*, *Rita v. United States, 551 U.S. 338, 360, 127 S. Ct. 2456, 168 L. Ed. 2d 203 (2007)*; *Sprietsma v. Mercury Marine, 537 U.S. 51, 56, n. 4, 123 S. Ct. 518, 154 L. Ed. 2d 466 (2002)*. We will not resurrect them on respondents' behalf.

Respondents also argue that the CBA operates as a substantive waiver of their ADEA rights because it not only precludes a federal lawsuit, but also allows the Union to block arbitration of these claims. Brief for Respondents 28-30. Petitioners contest this characterization of the CBA, see Reply Brief for Petitioners 23-27, and offer record evidence suggesting that the Union has allowed respondents to continue with the arbitration even though the Union has declined to participate, see App. to Pet. for Cert. 42a. But not only does this question require resolution of contested factual allegations, it was not fully briefed to this or any court and is not fairly encompassed within the question presented, see this Court's *Rule 14.1(a)*. Thus, although a substantive waiver of federally protected civil rights will not be upheld, see *Mitsubishi Motors Corp., 473 U.S., at 637, 105 S. Ct. 3346, 87 L. Ed. 2d 444, and n. 19*; *Gilmer, 500 U.S., at 29, 111 S. Ct. 1647, 114 L. Ed. 2d 26*, we are not positioned to resolve [****49] in the first instance whether the CBA allows the Union [*274] to prevent respondents from "effectively vindicating" their "federal statutory rights in the arbitral forum," *Green Tree Financial Corp.-Ala. v. Randolph, 531 U.S. 79, 90, 121 S. Ct. 513, 148 L. Ed. 2d 373 (2000)*. Resolution of this question at this juncture would be particularly inappropriate in light of our hesitation to invalidate arbitration agreements on the basis of speculation. See *id., at 91, 121 S. Ct. 513, 148 L. Ed. 2d 373*.

IV

We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate ADEA claims is enforceable as a matter of federal law. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

**Dissent by:** STEVENS; SOUTER

## Dissent

Justice **Stevens,** dissenting.

Justice Souter's dissenting opinion, which I join in full, explains why our decision in *Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)*, answers the question presented in this case. My concern

regarding the Court's subversion of precedent to the policy favoring arbitration prompts these additional remarks.

[**1475] Notwithstanding the absence of change in any relevant statutory provision, the Court has recently retreated [****50] from, and in some cases reversed, prior decisions based on its changed view of the merits of arbitration. Previously, the Court approached [***421] with caution questions involving a union's waiver of an employee's right to raise statutory claims in a federal judicial forum. After searching the text and purposes of Title VII of the Civil Rights Act of 1964, the Court in *Gardner-Denver* held that a clause of a collective-bargaining agreement (CBA) requiring arbitration of discrimination claims could not waive an employee's right to a judicial forum for statutory claims. See *415 U.S., at 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. The Court's decision rested on several features of the statute, [*275] including the individual nature of the rights it confers, the broad remedial powers it grants federal courts, and its expressed preference for overlapping remedies. See *id., at 44-48, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. The Court also noted the problem of entrusting a union with certain arbitration decisions given the potential conflict between the collective interest and the interests of an individual employee seeking to assert his rights. See *id., at 58, n. 19, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. That concern later provided a basis for our decisions in *Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 742, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)*, [****51] and *McDonald v. West Branch, 466 U.S. 284, 291, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984)*, which similarly held that a CBA may not commit enforcement of certain rights-creating statutes exclusively to a union-controlled arbitration process. Congress has taken no action signaling disagreement with those decisions.

The statutes construed by the Court in the foregoing cases and in *Wilko v. Swan, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953)*, have not since been amended in any relevant respect. But the Court has in a number of cases replaced our predecessors' statutory analysis with judicial reasoning espousing a policy favoring arbitration and thereby reached divergent results. I dissented in those cases to express concern that my colleagues were making policy choices not made by Congress. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)*; *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 486, 109 S. Ct. 1917, 104 L. Ed. 2d 526 (1989)*; *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 36, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*; and *Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 124, 121 S. Ct. 1302, 149 L. Ed. 2d 234 (2001)*.

Today the majority's preference for arbitration again leads it to disregard our precedent. Although it purports to ascertain the relationship between the Age Discrimination [****52] in Employment Act of 1967 (ADEA), the National Labor Relations Act, and the Federal Arbitration Act, the Court ignores our earlier determination of the relevant provisions' meaning. The Court concludes that "[i]t was Congress' verdict [*276] that the benefits of organized labor outweigh the sacrifice of individual liberty" that the system of organized labor "necessarily demands," even when the sacrifice demanded is a judicial forum for asserting an individual statutory right. *Ante, at 271, 173 L. Ed. 2d, at 418*. But in *Gardner-Denver* we determined that "Congress' verdict" was otherwise when we held that Title VII does not permit a CBA to waive an employee's right to a federal judicial forum. Because the purposes and relevant provisions of Title VII and the [***422] ADEA are not meaningfully distinguishable, it is only by reexamining the statutory questions resolved in *Gardner-Denver* through the lens of the policy favoring arbitration that [**1476] the majority now reaches a different result.*

Under the circumstances, I believe a passage from one of my earlier dissents merits repetition. The Court in *Rodriguez de Quijas* overruled our decision in *Wilko* and held that predispute agreements to arbitrate claims under the Securities Act of 1933 are enforceable. *490 U.S., at 484, 109 S. Ct. 1917, 104 L. Ed. 2d 526*; see also *id., at 481, 109 S. Ct. 1917, 104 L. Ed. 2d 526* (noting *Wilko*'s reliance on "the outmoded presumption of disfavoring arbitration proceedings"). I observed in dissent:

> "In the final analysis, a Justice's vote in a case like this depends more on his or her views about the respective lawmaking responsibilities of Congress and this Court than on conflicting policy interests. Judges who have confidence in their [****54] own ability to fashion public policy [*277] are less hesitant to change the law than those of us who are inclined to give wide latitude to the

* Referring to the potential conflict between individual and collective interests, the Court asserts that it "cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found [****53] in its text." *Ante, at 270, 173 L. Ed. 2d, at 417*. That potential conflict of interests, however, was a basis for our decision in several pertinent cases, including *Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)*, and *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*, and in the intervening years Congress has not seen fit to correct that interpretation. The Court's derision of that "policy concern" is particularly disingenuous given its subversion of *Gardner-Denver*'s holding in the service of an extratextual policy favoring arbitration.

views of the voters' representatives on nonconstitutional matters. Cf. *Boyle v. United Technologies Corp., 487 U.S. 500, [108 S. Ct. 2510, 101 L. Ed. 2d 442] (1988)*. As I pointed out years ago, *Alberto-Culver Co. v. Scherk, 484 F.2d 611, 615-620 (CA7 1973)* (dissenting opinion), rev'd, *417 U.S. 506, [94 S. Ct. 2449, 41 L. Ed. 2d 270] (1974)*, there are valid policy and textual arguments on both sides regarding the interrelation of federal securities and arbitration Acts. None of these arguments, however, carries sufficient weight to tip the balance between judicial and legislative authority and overturn an interpretation of an Act of Congress that has been settled for many years." *Rodriguez de Quijas, 490 U.S., at 487, 109 S. Ct. 1917, 104 L. Ed. 2d 526* (footnote and citation omitted).

As was true in *Rodriguez de Quijas*, there are competing arguments in this case regarding the interaction of the relevant statutory provisions. But the Court in *Gardner-Denver* considered these arguments, including "the federal policy favoring arbitration of labor disputes," *415 U.S., at 59, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, and held that Congress did not intend to permit the result petitioners seek. In the absence of an [****55] intervening amendment to the relevant statutory language, we are bound by that decision. It is for Congress, rather than this Court, to reassess the policy arguments favoring arbitration and revise the relevant provisions to reflect its views.

Justice **Souter,** with whom Justice **Stevens,** Justice **Ginsburg,** and Justice **Breyer** join, dissenting.

The issue here is whether employees subject to a collective-bargaining [***423] agreement (CBA) providing for conclusive arbitration of all grievances, including claimed breaches of the Age Discrimination in Employment Act of 1967 (ADEA), *29 U.S.C. § 621 et seq.*, lose their statutory right to bring an ADEA claim in court, *§ 626(c)*. Under the 35-year-old holding in *Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S. Ct. 1011, 39 L. Ed. 2d 147 [*278] (1974)*, they do [**1477] not, and I would adhere to *stare decisis* and so hold today.

I

Like Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, the ADEA is aimed at "'the elimination of discrimination in the workplace,'" *McKennon v. Nashville Banner Publishing Co., 513 U.S. 352, 358, 115 S. Ct. 879, 130 L. Ed. 2d 852 (1995)* (quoting *Oscar Mayer & Co. v. Evans, 441 U.S. 750, 756, 99 S. Ct. 2066, 60 L. Ed. 2d 609 (1979)*), and, again like Title VII, the ADEA "contains a vital element . . . : It grants an injured employee [****56] a right of action to obtain the authorized relief," *513 U.S., at 358, 115 S. Ct. 879, 130 L. Ed. 2d 852*. "Any person aggrieved" under the ADEA "may bring a civil action in any court of competent jurisdiction for such legal or equitable relief," *29 U.S.C. § 626(c)*, thereby "not only redress[ing] his own injury but also vindicat[ing] the important congressional policy against discriminatory employment practices," *Gardner-Denver, supra, at 45, 94 S. Ct. 1011, 39 L. Ed. 2d 147*.

*Gardner-Denver* considered the effect of a CBA's arbitration clause on an employee's right to sue under Title VII. One of the employer's arguments was that the CBA entered into by the union had waived individual employees' statutory cause of action subject to a judicial remedy for discrimination in violation of Title VII. Although Title VII, like the ADEA, "does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements," *415 U.S., at 47, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, we unanimously held that "the rights conferred" by Title VII (with no exception for the right to a judicial forum) cannot be waived as "part of the collective bargaining process," *id., at 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. We stressed the contrast between two categories of rights in labor and employment [****57] law. There were "statutory rights related to collective activity," which "are conferred on employees collectively to foster the processes of bargaining[, which] properly may be exercised or relinquished by the union as collective-bargaining agent to obtain economic benefits for union members." *Ibid.* But "Title VII . . . stands [*279] on plainly different [categorical] ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities." *Ibid.* Thus, as the Court previously realized, *Gardner-Denver* imposed a "seemingly absolute prohibition of union waiver of employees' federal forum rights." *Wright v. Universal Maritime Service Corp., 525 U.S. 70, 80, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998)*.[1]

We supported the judgment with several other lines of complementary reasoning. First, we explained that antidiscrimination statutes "have [***424] long evinced a general intent to accord parallel or overlapping remedies against discrimination," and Title [****58] VII's statutory scheme carried "no suggestion . . . that a prior arbitral decision either forecloses an individual's right to sue or divests federal courts of jurisdiction." *Gardner-Denver, 415 U.S., at 47, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. We accordingly concluded that "an individual does not forfeit his private

[1] *Gardner-Denver* also contained some language seemingly prohibiting even individual prospective waiver of federal forum rights, see *415 U.S., at 51-52, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, an issue revisited in *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)*, and not disputed here.

cause of action if he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." *Id., at 49, 94 S. Ct. 1011, 39 L. Ed. 2d 147*.

Second, we rejected the District Court's view that simply participating in the arbitration amounted to electing the arbitration [**1478] remedy and waiving the plaintiff's right to sue. We said that the arbitration agreement at issue covered only a contractual right under the CBA to be free from discrimination, not the "independent statutory rights accorded by Congress" in Title VII. *Id., at 49-50, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. Third, we rebuffed the employer's argument that federal courts should defer to arbitral rulings. We declined to make the "assumption that arbitral processes are commensurate with judicial processes," *id., at 56, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, and described arbitration as "a less appropriate forum for final resolution of Title VII issues than the federal courts," *id., at 58, 94 S. Ct. 1011, 39 L. Ed. 2d 147*.

[*280] Finally, we took note that [****59] "[i]n arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit," *ibid.*, *415 U.S. 36, n. 19, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, a result we deemed unacceptable when it came to Title VII claims. In sum, *Gardner-Denver* held that an individual's statutory right of freedom from discrimination and access to court for enforcement were beyond a union's power to waive.

Our analysis of Title VII in *Gardner-Denver* is just as pertinent to the ADEA in this case. The "interpretation of Title VII . . . applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA 'were derived *in haec verba* from Title VII,'" and indeed neither petitioners nor the Court points to any relevant distinction between the two statutes. *Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985)* (quoting *Lorillard v. Pons, 434 U.S. 575, 584, 98 S. Ct. 866, 55 L. Ed. 2d 40 (1978)*; see also *McKennon, 513 U.S., at 358, 115 S. Ct. 879, 130 L. Ed. 2d 852* ("The ADEA and Title VII share common substantive features and also a common purpose"). Given the unquestionable applicability of the *Gardner-Denver* rule to this ADEA issue, the argument that its precedent be followed [****60] in this case of statutory interpretation is equally unquestionable. "Principles of *stare decisis* . . . demand respect for precedent whether judicial methods of interpretation change or stay the same. Were that not so, those principles would fail to achieve the legal stability that they seek and upon which the rule of law depends." *CBOCS West, Inc. v. Humphries, 553 U.S. 442, 457, 128 S. Ct. 1951, 170 L. Ed. 2d 864 (2008)*And "[c]onsiderations of *stare decisis* have special force" over an issue of statutory interpretation, which is unlike constitutional interpretation owing to the capacity of Congress to alter any reading we adopt simply by amending the statute. [***425] *Patterson v. McLean Credit Union, 491 U.S. 164, 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132 (1989)*. Once we have construed a statute, stability is the rule, and "we will not depart from [it] without some compelling justification." *Hilton v. South Carolina Public Railways [*281] Comm'n, 502 U.S. 197, 202, 112 S. Ct. 560, 116 L. Ed. 2d 560 (1991)*. There is no argument for abandoning precedent here, and *Gardner-Denver* controls.

II

The majority evades the precedent of *Gardner-Denver* as long as it can simply by ignoring it. The Court never mentions the case before concluding that the ADEA and the National Labor Relations Act, [****61] *29 U.S.C. § 151 et seq.*, "yiel[d] a straightforward answer to the question presented," *ante, at 260, 173 L. Ed. 2d, at 411*, that is, that unions can bargain away individual rights to a federal forum for antidiscrimination claims. If this were a case of first impression, it would at least be possible to consider that conclusion, but the issue is settled and the time is too late by 35 years to make the bald assertion that "[n]othing in the law suggests a distinction between the status [**1479] of arbitration agreements signed by an individual employee and those agreed to by a union representative," *ante, at 258, 173 L. Ed. 2d, at 410*. In fact, we recently and unanimously said that the principle that "federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts . . . assuredly finds support in" our case law, *Wright, at 77, 119 S. Ct. 391, 142 L. Ed. 2d 361*, and every Court of Appeals save one has read our decisions as holding to this position, *Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc., 199 F.3d 477, 484, 339 U.S. App. D.C. 264 (CADC 1999)* ("We see a clear rule of law emerging from *Gardner-Denver and Gilmer [v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)]*: . . . an individual may prospectively waive his own [****62] statutory right to a judicial forum, but his union may not prospectively waive that right for him. All of the circuits to have considered the meaning of *Gardner-Denver* after *Gilmer*, other than the Fourth, are in accord with this view").

Equally at odds with existing law is the majority's statement that "[t]he decision to fashion a [CBA] to require arbitration of employment-discrimination claims is no different from the many other decisions made by parties in designing [*282] grievance machinery." *Ante, at 256, 173 L. Ed. 2d, at 409*. That is simply impossible to square with our conclusion in *Gardner-Denver* that "Title VII . . . stands on plainly different

ground" from "statutory rights related to collective activity": "it concerns not majoritarian processes, but an individual's right to equal employment opportunities." *415 U.S., at 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147*; see also *Atchison, T. & S. F. R. Co. v. Buell, 480 U.S. 557, 565, 107 S. Ct. 1410, 94 L. Ed. 2d 563 (1987)* ("[N]otwithstanding the strong policies encouraging arbitration, 'different considerations apply where the employee's claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers'" (quoting *Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 737, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)*)).

When **[****63]** the majority does speak to *Gardner-Denver*, it misreads the case **[***426]** in claiming that it turned solely "on the narrow ground that the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims." *Ante, at 262, 173 L. Ed. 2d, at 412*. That, however, was merely one of several reasons given in support of the decision, see *Gardner-Denver, 415 U.S., at 47-59, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, and we raised it to explain why the District Court made a mistake in thinking that the employee lost his Title VII rights by electing to pursue the contractual arbitration remedy, see *id., at 49-50, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. One need only read *Gardner-Denver* itself to know that it was not at all so narrowly reasoned, and we have noted already how later cases have made this abundantly clear. *Barrentine, supra, at 737, 101 S. Ct. 1437, 67 L. Ed. 2d 641*, provides further testimony:

> "Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining. While courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim **[****64]** is based on **[*283]** rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.
>
> "These considerations were the basis for our decision in *[Gardner-Denver]*."

See also *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)* ("An important concern" in *Gardner-Denver* "was the tension between collective representation and individual statutory **[**1480]** rights . . . "). Indeed, if the Court can read *Gardner-Denver* as resting on nothing more than a contractual failure to reach as far as statutory claims, it must think the Court has been wreaking havoc on the truth for years, since (as noted) we have unanimously described the case as raising a "seemingly absolute prohibition of union waiver of employees' federal forum rights." *Wright, 525 U.S., at 80, 119 S. Ct. 391, 142 L. Ed. 2d 361*.[2] Human ingenuity is not equal to the task of reconciling statements like this with the majority's representation that *Gardner-Denver* held only that "the arbitration was not preclusive because the collective-bargaining agreement did not cover statutory claims." *Ante, at 262, 173 L. Ed. 2d, at 412*.[3]

**[*284]** Nor, finally, does the majority have any better chance of being rid of another **[***427]** of *Gardner-Denver*'s statements supporting its rule of decision, set out and repeated in previous quotations: "in arbitration, as in the collective-bargaining process, a union may subordinate the interests of an individual employee to the collective interests of all employees in the bargaining unit," *ante, at 269, 173 L. Ed. 2d, at 417* (citing *415 U.S., at 58, n. 19, 94 S. Ct. 1011, 39 L. Ed. 2d 147*), an unacceptable result when it comes to "an individual's right to equal employment opportunities," *id., at 51, 94 S. Ct. 1011, 39 L. Ed. 2d 147*. The majority tries to diminish this reasoning, and the previously stated holding it supported, by making the remarkable rejoinder that "[w]e cannot rely on this judicial policy concern as a source of authority for introducing a qualification into the ADEA that is not found in its text." *Ante, at 270, 173 L. Ed. 2d, at*

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[2] The majority seems inexplicably to think that the statutory right to a federal forum is not a right, or that *Gardner-Denver* failed to recognize it because it is not "substantive." *Ante, [****65] at 256-257, n 5, 173 L. Ed. 2d, at 409*. But *Gardner-Denver* forbade union waiver of employees' federal forum rights in large part because of the importance of such rights and a fear that unions would too easily give them up to benefit the many at the expense of the few, a far less salient concern when only economic interests are at stake. See, *e.g., Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 737, 101 S. Ct. 1437, 67 L. Ed. 2d 641 (1981)*.

[3] There is no comfort for the Court in making the one point on which we are in accord, that *Gardner-Denver* relied in part on what the majority describes as "broad dicta that was highly critical of the use of arbitration for the vindication of statutory antidiscrimination rights." *Ante, at 265, 173 L. Ed. 2d, at 413-414*. I agree that *Gardner-Denver*'s "'mistrust of the arbitral process' . . . has been undermined by our recent arbitration decisions," *Gilmer, 500 U.S., at 34, n. 5, 111 S. Ct. 1647, 114 L. Ed. 2d 26* (quoting *Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 231, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987)*), but if the statements are "dicta," their obsolescence is as irrelevant to *Gardner-Denver*'s continued vitality as their currency was to the case's holding when it came down; in *Gardner-Denver* itself we acknowledged "the federal policy favoring arbitration," *415 U.S., at 46, n. 6, 94 S. Ct. 1011, 39 L. Ed. 2d 147*, **[****66]** but nonetheless held that a union could not waive its members' statutory right to a federal forum in a CBA.

417-418.[4] It is enough to [**1481] recall that respondents are not seeking [*285] to "introduc[e] a qualification into" the law; they are justifiably relying on statutory-interpretation precedent decades old, never overruled, and serially reaffirmed over the years. See, *e.g.*, *McDonald v. West Branch, 466 U.S. 284, 291, 104 S. Ct. 1799, 80 L. Ed. 2d 302 (1984)*; [****67] *Barrentine, 450 U.S., at 742, 101 S. Ct. 1437, 67 L. Ed. 2d 641*. With that precedent on the books, it makes no sense for the majority to claim that "judicial policy concern[s]" about unions sacrificing individual antidiscrimination rights should be left to Congress.

For that matter, Congress has unsurprisingly understood *Gardner-Denver* the way we have repeatedly explained it and has operated on the assumption that a CBA cannot waive employees' rights to a judicial forum to enforce antidiscrimination statutes. See, *e.g.*, H. R. Rep. No. 102-40, pt. 1, p 97 (1991) (stating that, "consistent with the Supreme Court's interpretation of Title VII in *[Gardner-Denver]*," "any agreement to submit disputed issues to arbitration . . . in the context of a collective bargaining agreement . . . does not preclude the affected person from seeking relief under the enforcement provisions of Title VII"). And Congress apparently does not share the Court's demotion of *Gardner-Denver*'s holding to a suspect judicial policy concern: "Congress has had [over] 30 years in which it could [***428] have corrected [****69] our decision . . . if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding." *Hilton, 502 U.S., at 202, 112 S. Ct. 560, 116 L. Ed. 2d 560*; see also *Patterson, 491 U.S., at 172-173, 109 S. Ct. 2363, 105 L. Ed. 2d 132*.

III

On one level, the majority opinion may have little effect, for it explicitly reserves the question whether a CBA's waiver of a judicial forum is enforceable when the union controls access to and presentation of employees' claims in arbitration, *ante, at 273-274, 173 L. Ed. 2d, at 419-420*, which "is usually the case," *McDonald, supra, at 291, 104 S. Ct. 1799, 80 L. Ed. 2d 302*. But as a treatment of precedent in statutory interpretation, the majority's opinion cannot be [*286] reconciled with the *Gardner-Denver* Court's own view of its holding, repeated over the years and generally understood, and I respectfully dissent.

[4] The majority says it would be "particularly inappropriate" to consider *Gardner-Denver*'s conflict-of-interest rationale because "Congress has made available" another "avenue" to protect workers against union discrimination, namely, a duty of fair representation claim. *Ante, at 272, 173 L. Ed. 2d, at 417*. This answer misunderstands the law, for unions may decline for a variety of reasons to pursue potentially meritorious discrimination claims without succumbing to a member's suit for failure of fair representation. See, *e.g.*, *Barrentine, 450 U.S., at 742, 101 S. Ct. 1437, 67 L. Ed. 2d 641* ("[E]ven if the employee's claim were meritorious, his union might, without breaching its duty of fair representation, reasonably and in good faith decide not to support the claim vigorously in arbitration"). More importantly, we have rejected precisely this argument in the past, making this yet another occasion where the majority ignores precedent. See, *e.g.*, *ibid.*; *Gardner-Denver, supra, at 58, n. 19, 94 S. Ct. 1011, 39 L. Ed. 2d 147* (noting that a duty of fair representation [****68] claim would often "prove difficult to establish"). And we were wise to reject it. When the Court construes statutes to allow a union to eliminate a statutory right to sue in favor of arbitration in which the union cannot represent the employee because it agreed to the employer's challenged action, it is not very consoling to add that the employee can sue the union for being unfair.

## References

*9 U.S.C.S. §§ 3, 4; 29 U.S.C.S. §§ 159(a), 621 et seq.*

2 Labor and Employment Arbitration § 44.11 (Matthew Bender)

L Ed Digest, Arbitration § 2; Civil Rights § 78

L Ed Index, Age Discrimination; Arbitration and Award

Validity, construction, and application of Age Discrimination in Employment Act (ADEA), as amended (*29 U.S.C.S. §§ 621 et seq.*)--Supreme Court cases. *157 L. Ed. 2d 1307*.

What kinds of contracts containing arbitration agreements are subject to stay and enforcement provisions of §§ 1-4 and 8 of Federal Arbitration Act (FAA) (*9 U.S.C.S. §§ 1-4* and *8*), and similar predecessor provisions)--Supreme Court cases. [****70] *130 L. Ed. 2d 1189*.

Validity, under Federal Constitution, of arbitration statutes--Supreme Court cases. *87 L. Ed. 2d 787*.

What issues will the Supreme Court consider, though not, or not properly, raised by the parties. *42 L. Ed. 2d 946*.

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796 F.3d 199
United States Court of Appeals,
Second Circuit.

Dorian CHEEKS, Plaintiff–Appellant,
v.
FREEPORT PANCAKE HOUSE, INC., W.P.S. Industries, Inc., Defendants–Appellees.

Docket No. 14–299–cv.
|
Argued: Nov. 14, 2014.
|
Decided: Aug. 7, 2015.

**Synopsis**

**Background:** Former employee brought action against former employer under Fair Labor Standards Act (FLSA) and New York Labor Law. The United States District Court for the Eastern District of New York, Joanna Seybert, J., refused to enter parties' stipulation of settlement dismissing, with prejudice, former employee's FLSA claims. Former employee filed interlocutory appeal, seeking certification of question of whether FLSA actions are exception to general rule that parties may stipulate to dismissal of an action without involvement of court.

**[Holding:]** The Court of Appeals, Pooler, Circuit Judge, held that, as a matter of first impression the FLSA is an "applicable federal statute," for purposes of the rule governing voluntary dismissal of an action by a plaintiff, and therefore stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the Department of Labor (DOL) to take effect.

Affirmed; remanded.

West Headnotes (6)

[1] **Labor and Employment**
Waiver and estoppel

Employees may not waive the right to recover liquidated damages due under the Fair Labor Standards Act (FLSA). Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

24 Cases that cite this headnote

[2] **Labor and Employment**
Compromise and settlement

Employees may not privately settle the issue of whether an employer is covered under the Fair Labor Standards Act (FLSA). Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

16 Cases that cite this headnote

[3] **Federal Civil Procedure**
Stipulations

The Fair Labor Standards Act (FLSA) is an "applicable federal statute," for purposes of the rule governing voluntary dismissal of an action by a plaintiff, and therefore stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the Department of Labor (DOL) to take effect. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.; Fed.Rules Civ.Proc.Rule 41(a)(1)(A), 28 U.S.C.A.

80 Cases that cite this headnote

[4] **Labor and Employment**
Fair Labor Standards Act

The underlying purposes of the Fair Labor Standards Act (FLSA) is to extend the frontiers of social progress by insuring to all able-bodied working men and women a fair day's pay for a fair day's work. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

12 Cases that cite this headnote

[5] **Labor and Employment**
Fair Labor Standards Act

The Fair Labor Standards Act (FLSA) was designed to remedy the evil of overwork by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

1 Cases that cite this headnote

[6] **Labor and Employment**
Fair Labor Standards Act

The Fair Labor Standards Act's (FLSA) primary remedial purpose is to prevent abuses by unscrupulous employers, and to remedy the disparate bargaining power between employers and employees. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

11 Cases that cite this headnote

**Attorneys and Law Firms**

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Laura Moskowitz, Senior Attorney, U.S. Department of Labor, Office of the Solicitor, (M. Patricia Smith, Solicitor of Labor, Jennifer S. Brand, Associate Solicitor, Paul L. Frieden, Counsel for Appellate Litigation, on the brief), Washington, D.C., for Amicus Curiae U.S. Department of Labor.

Before: POOLER, PARKER and WESLEY, Circuit Judges.

**Opinion**

POOLER, Circuit Judge:

Dorian Cheeks appeals, pursuant to 28 U.S.C. § 1292(b), from the refusal of the United States District Court for the Eastern District of New York (Joanna Seybert, *J.*) to enter the parties' stipulation of settlement dismissing, with prejudice, Cheeks' claims under the Fair Labor Standards Act ("FLSA") and New York Labor Law. The district court held that parties cannot enter into private settlements of FLSA claims without either the approval of the district court or the Department of Labor ("DOL"). We agree that absent such approval, parties cannot settle their FLSA claims through a private stipulated dismissal with prejudice pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii). We thus affirm, and remand for further proceedings consistent with this opinion.

**BACKGROUND**

Cheeks worked at both Freeport Pancake House, Inc. and W.P.S. Industries, Inc. (together, "Freeport Pancake House") as a restaurant server and manager over the course of several years. In August 2012, Cheeks sued Freeport Pancake House seeking to recover overtime wages, liquidated damages and attorneys' fees under both the FLSA and New York Labor Law. Cheeks also alleged he was demoted, and ultimately fired, for complaining about Freeport Pancake House's failure to pay him and other employees the required overtime wage. Cheeks sought back pay, front pay in lieu of reinstatement, and damages for the unlawful retaliation. Freeport Pancake House denied Cheeks' allegations.

After appearing at an initial conference with the district court, and engaging in a period of discovery, the parties agreed on a private settlement of Cheeks' action. The parties then filed a joint stipulation and order of dismissal with prejudice pursuant to Rule 41(a)(1)(A)(ii). *Cheeks v. Freeport Pancake House, Inc.,* No. 2:12–cv–04199 (E.D.N.Y. Dec. 27, 2013) ECF No. 15. The district court declined to accept the stipulation as submitted, concluding that Cheeks could not agree to a private settlement of his FLSA claims without either the approval of the district court or the supervision of the DOL. The district court directed the parties to "file a copy of the settlement agreement on the public docket," and to "show cause why the proposed settlement reflects a reasonable compromise of disputed issues rather than a mere waiver of statutory rights brought about by an employer's overreaching." App'x at 35 (internal quotation marks omitted). The district court further ordered ***201** the parties to "show cause by providing the Court with additional information in the form of affidavits or other documentary evidence explaining why the proposed settlement is fair and reasonable." App'x at 35.

Rather than disclose the terms of their settlement, the parties instead asked the district court to stay further proceedings and to certify, pursuant to 28 U.S.C. § 1292(b), the question of whether FLSA actions are an exception to Rule 41(a)(1)(A)(ii)'s general rule that parties may stipulate to the dismissal of an action without the involvement of the court. On February 20, 2014, the district court entered an order staying the case and certifying the question for interlocutory appeal. Our Court granted the motion. *Cheeks v. Freeport Pancake House, Inc.,* 14–299–cv (2d Cir. May 7, 2014), ECF No. 44. Our Court heard oral argument on November 14, 2014. As both parties advocated in favor of reversal, following oral argument we solicited the views of the DOL on the issues raised in this matter. The DOL submitted a letter brief on March 27, 2015, taking the position that the FLSA falls within the "applicable federal statute" exception to Rule 41(a)(1)(A), such that the parties may not stipulate to the dismissal of FLSA claims with prejudice without the involvement of a court or the DOL." Cheeks submitted supplemental briefing in response to the DOL's submission on April 20, 2015, and we find no need for additional oral argument.

## DISCUSSION

The current appeal raises the issue of determining whether parties may settle FLSA claims with prejudice, without court approval or DOL supervision[1], under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). The question of whether judicial approval of, and public access to, FLSA settlements is required is an open one in our Circuit.[2] We review this question of law de novo. *See Cmty. Health Care Ass'n of N.Y. v. Shah, 770 F.3d 129, 150 (2d Cir.2014)*.

Rule 41(a)(1)(A) provides in relevant part that:

> Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:
>
> (i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or
>
> (ii) a stipulation of dismissal signed by all parties who have appeared.

Fed.R.Civ.P. 41(a)(1)(A).

The FLSA is silent as to Rule 41. We must determine, then, if the FLSA is an "applicable federal statute" within the meaning of the rule. If it is not, then Cheeks' case was dismissed by operation of Rule 41(a)(1)(A)(ii), and the parties did not need approval from the district court for the dismissal to be effective. *Hester Indus., Inc. v. Tyson Foods, Inc., 160 F.3d 911, 916 (2d Cir.1998)* ("The judge's signature on the stipulation did not change the nature of the dismissal. Because the dismissal ***202** was effectuated by stipulation of the parties, the court lacked the authority to condition [the] dismissal...") (collecting cases).

We start with a relatively blank slate, as neither the Supreme Court nor our sister Circuits have addressed the precise issue before us. District courts in our Circuit, however, have grappled with the issue to differing results. Those requiring court approval of private FLSA settlements regularly base their analysis on a pair of Supreme Court cases: *Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 65 S.Ct. 895, 89 L.Ed. 1296 (1945)* and *D.A. Schulte, Inc. v. Gangi, 328 U.S. 108, 66 S.Ct. 925, 90 L.Ed. 1114 (1946)*.

*Brooklyn Savings* involved a night watchman who worked at Brooklyn Savings Bank for two years. 324 U.S. at 699, 65 S.Ct. 895. The watchman was entitled to overtime pay for his work, but was not compensated for his overtime while he worked for the bank. *Id. at 700, 65 S.Ct. 895*. The watchman left the bank's employ, and two years later the bank computed the statutory overtime it owed him and offered the watchman a check for $423.16 in exchange for a release of all his FLSA rights. *Id.* The watchman signed the release, took the check, and then sued the bank for liquidated damages pursuant to the FLSA, which were admittedly not included in the settlement. *Id.*

The Supreme Court held that in the absence of a genuine dispute as to whether employees are entitled to damages, employees could not waive their rights to such damages in a private FLSA settlement. *Id. at 704, 65 S.Ct. 895*. Because the only issue before the court was the issue of liquidated damages, which were a matter of statutory calculation, the Court concluded that there was no bona fide dispute between the parties as to the amount in dispute. *Id. at 703, 65 S.Ct. 895*. The Court noted that the FLSA's legislative history "shows an intent on the part of Congress to protect certain groups of the population from substandard wages and excessive hours which endangered the national health and well-being and the free flow of goods in interstate commerce." *Id. at 706, 65 S.Ct. 895*. In addition, the FLSA "was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required

federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce." *Id. at 706–07, 65 S.Ct. 895*. Concluding that the FLSA's statutory language indicated that "Congress did not intend that an employee should be allowed to waive his right to liquidated damages," the Court refused to enforce the release and allowed the watchman to proceed on his claim for liquidated damages. *Id. at 706, 65 S.Ct. 895*. However, the Court left unaddressed the issue of whether parties could privately settle FLSA claims if such settlements resolved "a bona fide dispute between the parties." *Id. at 703, 65 S.Ct. 895*.

A year later, in *D.A. Schulte,* the Supreme Court answered that question in part, barring enforcement of private settlements of bona fide disputes where the dispute centered on whether or not the employer is covered by the FLSA. 328 U.S. at 114, 66 S.Ct. 925. Again, the Supreme Court looked to the purpose of the FLSA, which "was to secure for the lowest paid segment of the nation's workers a subsistence wage," and determined "that neither wages nor the damages for withholding them are capable of reduction by compromise of controversies over coverage." *Id. at 116, 66 S.Ct. 925*. However, the Supreme Court again specifically declined to opine as to "the possibility of compromises in other situations which may ***203** arise, such as a dispute over the number of hours worked or the regular rate of employment." *Id. at 114–15, 66 S.Ct. 925*.

[1] [2] *Brooklyn Savings* and *Gangi* establish that (1) employees may not waive the right to recover liquidated damages due under the FLSA; and (2) that employees may not privately settle the issue of whether an employer is covered under the FLSA. These cases leave open the question of whether employees can enforce private settlements of FLSA claims where there is a bona fide dispute as to liability, i.e., the number of hours worked or the amount of compensation due. In considering that question, the Eleventh Circuit answered "yes," but only if the DOL or a district court first determines that the proposed settlement "is a fair and reasonable resolution of a bona fide dispute over FLSA provisions." *Lynn's Food Stores, Inc. v. United States Dep't of Labor, 679 F.2d 1350, 1355 (11th Cir.1982)*.[3]

In *Lynn's Food,* an employer sought a declaratory judgment that the private settlements it had entered into with its employees absolved it of any future liability under the FLSA. *Id. at 1351–52*. The private settlements were entered into after the DOL found the employer "was liable to its employees for back wages and liquidated damages," *id. at 1352*, but were not made with DOL approval. The putative settlements paid the employees far less than the DOL had calculated the employees were owed.

In rejecting the settlements, the Eleventh Circuit noted that "FLSA rights cannot be abridged by contract or otherwise waived because this would nullify the purposes of the statute and thwart the legislative policies it was designed to effectuate." *Id.* (internal quotation marks omitted). The court reasoned that requiring DOL or district court involvement maintains fairness in the settlement process given the great disparity in bargaining power between employers and employees. *Id.* The Eleventh Circuit noted that the employer's actions were "a virtual catalog of the sort of practices which the FLSA was intended to prohibit." *Id.* at 1354. For example, the employees had not brought suit under the FLSA and were seemingly "unaware that the Department of Labor had determined that Lynn's owed them back wages under the FLSA, or that they had any rights at all under the statute." *Id.* Despite that, the employer "insinuated that the employees were not really entitled to any back wages," and suggested "that only malcontents would accept back wages owed them under the FLSA." *Id.* The employees were not represented by counsel, and in some cases did not speak English. *Id.* The Eleventh Circuit noted that these practices were "illustrative of the many harms which may occur when employers are allowed to 'bargain' with their employees over minimum wages and overtime compensation, and convinces us of the necessity of a rule to prohibit such invidious practices." *Id.* at 1354–55.[4]

***204** The Fifth Circuit, however, concluded that a private settlement agreement containing a release of FLSA claims entered into between a union and an employer waived employees' FLSA claims, even without district court approval or DOL supervision. *Martin v. Spring Break '83 Prods., L.L.C., 688 F.3d 247, 253–57 (5th Cir.2012)*. In *Martin,* the plaintiffs were members of a union, and the union had entered into a collective bargaining agreement with the employer. *Id. at 249*. The plaintiffs filed a grievance with the union regarding the employer's alleged failure to pay wages for work performed by the plaintiffs. *Id.* Following an investigation, the union entered into an agreement with the employer settling the disputed compensation for hours worked. *Id.* However, before the settlement agreement was executed, the plaintiffs sued, seeking to recover unpaid wages pursuant to the FLSA. *Id. at 249–50*.

The Fifth Circuit concluded that the agreement between the union and employer was binding on the plaintiffs and barred the plaintiffs from filing a FLSA claim against the employer. *Id. at 253–54*. The Fifth Circuit carved out an exception from the general rule barring employees' waiver of FLSA claims and adopted the rationale set forth in *Martinez v. Bohls Bearing Equipment Co., 361 F.Supp.2d 608, 633 (W.D.Tex.2005)* ("[A] private compromise of claims under the FLSA is permissible where there exists a bona fide dispute as to liability."). The Fifth Circuit reasoned that "[t]he Settlement Agreement was a way to resolve a bona fide dispute as to the number of hours worked—not the rate at which

Appellants would be paid for those hours—and though Appellants contend they are yet not satisfied, they received agreed-upon compensation for the disputed number of hours worked." *Martin, 688 F.3d at 256*. The Fifth Circuit noted that the concerns identified in *Lynn's Food*—unrepresented workers unaware of their FLSA rights—"[were] not implicated." *Id.* at 256 n. 10. *Martin,* however, cannot be read as a wholesale rejection of *Lynn's Food*: it relies heavily on evidence that a bona fide dispute between the parties existed, and that the employees who accepted the earlier settlement were represented by counsel. *Id. at 255, 256* n. 10; *Bodle v. TXL Mortg. Corp., 788 F.3d 159, 165 (5th Cir.2015)* (emphasizing that the private settlements approved in *Martin* did not "undermine the purpose of the FLSA because the plaintiffs did not waive their claims through some sort of bargain but instead received compensation for the disputed hours").

While offering useful guidance, the cases discussed above all arise in the context of whether a private FLSA settlement is enforceable. The question before us, however, asks whether the parties can enter into a private stipulated dismissal of FLSA claims with prejudice, without the involvement of the district court or DOL, that may later be enforceable. The parties do not cite, and our research did not reveal, any cases that speak directly to the issue before us: whether the FLSA is an "applicable federal statute" within the meaning of Rule 41(a)(1)(A). Nor are we aided by the Advisory Committee's notes, which simply state that the language "any applicable federal statute" serves to "preserve" provisions in "such statutes as" 8 U.S.C. § 1329 (immigration violations) and 31 U.S.C. § 3730 (qui tam actions), both of which explicitly require court approval before dismissal. Fed.R.Civ.P. 41 advisory committee's note to 1937 Adoption. As noted above, the FLSA itself is silent on the issue. One district court in our Circuit found that this silence supports the conclusion that the FLSA is not an "applicable federal statute" within the meaning of Rule 41. *Picerni v. Bilingual Seit & Preschool Inc., 925 F.Supp.2d 368, 375 (E.D.N.Y.2013)* ("[W]hile the FLSA expressly ***205** authorizes an individual or collective action for wage violations, it does not condition their dismissal upon court approval. The absence of such a requirement is a strong indication that Congress did not intend it, as it has expressly conditioned dismissals under other statutes upon court approval."). The *Picerni* court concluded that:

> Nothing in *Brooklyn Savings, Gangi*, or any of their reasoned progeny expressly holds that the FLSA is one of those Rule 41—exempted statutes. For it is one thing to say that a release given to an employer in a private settlement will not, under certain circumstances, be enforced in subsequent litigation—that is the holding of *Brooklyn Savings* and *Gangi*—it is quite another to say that even if the parties want to take their chances that their settlement will not be effective, the Court will not permit them to do so.

*Id. at 373*.

The *Picerni* court also noted that "the vast majority of FLSA cases ... are simply too small, and the employer's finances too marginal, to have the parties take further action if the Court is not satisfied with the settlement." *Id.* at 377. Thus, the *Picerni* court concluded, "the FLSA is not one of the qualifying statutes that fall within the exemption from Rule 41." *Id.* at 375; *see also Lima v. Hatsuhana of USA, Inc., No. 13 Civ. 3389(JMF), 2014 WL 177412, at *1–2 (S.D.N.Y. Jan. 16, 2014)* (indicating a willingness to follow *Picerni* but declining to do so given the inadequacy of the parties' briefing on the issue).

Seemingly unpersuaded by *Picerni,* the majority of district courts in our Circuit continue to require judicial approval of private FLSA settlements. *See, e.g., Lopez v. Nights of Cabiria, LLC, —— F.Supp.3d ——, No. 14–cv–1274 (LAK), 2015 WL 1455689, at *3 (S.D.N.Y. March 30, 2015)* ("Some disagreement has arisen among district courts in this circuit as to whether such settlements do in fact require court approval, or may be consummated as a matter of right under Rule 41. The trend among district courts is nonetheless to continue subjecting FLSA settlements to judicial scrutiny.") (citation omitted); *Armenta v. Dirty Bird Grp., LLC, No. 13cv4603, 2014 WL 3344287, at *4 (S.D.N.Y. June 27, 2014)* (same) (collecting cases), *Archer v. TNT USA Inc., 12 F.Supp.3d 373, 384 n. 2 (E.D.N.Y.2014)* (same); *Files, 2013 WL 1874602, at *1–3* (same).

In *Socias v. Vornado Realty L.P.,* the district court explained its disagreement with *Picerni:*

> Low wage employees, even when represented in the context of a pending lawsuit, often face extenuating economic and social circumstances and lack equal bargaining power; therefore, they are more susceptible to coercion or

> more likely to accept unreasonable, discounted settlement offers quickly. In recognition of this problem, the FLSA is distinct from all other employment statutes.

297 F.R.D. 38, 40 (E.D.N.Y.2014). The *Socias* court further noted that "although employees, through counsel, often voluntarily consent to dismissal of FLSA claims and, in some instances, are resistant to judicial review of settlement, the purposes of FLSA require that it be applied even to those who would decline its protections." *Id. at 41* (internal quotation marks, alteration, and emphasis omitted). Finally, the *Socias* court observed that judicial approval furthers the purposes of the FLSA, because "[w]ithout judicial oversight, ... employers may be more inclined to offer, and employees, even when represented by counsel, may be more inclined to accept, private settlements that ultimately are ***206** cheaper to the employer than compliance with the Act." *Id.; see also Armenta, 2014 WL 3344287, at *4* ("Taken to its logical conclusion, *Picerni* would permit defendants to circumvent the FLSA's 'deterrent effect' and eviscerate FLSA protections.").

[3] [4] [5] We conclude that the cases discussed above, read in light of the unique policy considerations underlying the FLSA, place the FLSA within Rule 41's "applicable federal statute" exception. Thus, Rule 41(a)(1)(A)(ii) stipulated dismissals settling FLSA claims with prejudice require the approval of the district court or the DOL to take effect. Requiring judicial or DOL approval of such settlements is consistent with what both the Supreme Court and our Court have long recognized as the FLSA's underlying purpose: "to extend the frontiers of social progress by insuring to all our able-bodied working men and women a fair day's pay for a fair day's work." *A.H. Phillips, Inc. v. Walling, 324 U.S. 490, 493, 65 S.Ct. 807, 89 L.Ed. 1095 (1945)* (internal quotation marks omitted). "[T]hese provisions were designed to remedy the evil of overwork by ensuring workers were adequately compensated for long hours, as well as by applying financial pressure on employers to reduce overtime." *Chao v. Gotham Registry, Inc., 514 F.3d 280, 285 (2d Cir.2008)* (internal quotation marks omitted). Thus, "[i]n service of the statute's remedial and humanitarian goals, the Supreme Court consistently has interpreted the Act liberally and afforded its protections exceptionally broad coverage." *Id. at 285*.

Examining the basis on which district courts recently rejected several proposed FLSA settlements highlights the potential for abuse in such settlements, and underscores why judicial approval in the FLSA setting is necessary. In *Nights of Cabiria,* the proposed settlement agreement included (1) "a battery of highly restrictive confidentiality provisions ... in strong tension with the remedial purposes of the FLSA;" (2) an overbroad release that would "waive practically any possible claim against the defendants, including unknown claims and claims that have no relationship whatsoever to wage-and-hour issues;" and (3) a provision that would set the fee for plaintiff's attorney at "between 40 and 43.6 percent of the total settlement payment" without adequate documentation to support such a fee award. 2015 WL 1455689, at *1–7. In *Guareno v. Vincent Perito, Inc.,* the district court rejected a proposed FLSA settlement in part because it contained a pledge by plaintiff's attorney not to "represent any person bringing similar claims against Defendants." No. 14cv1635, 2014 WL 4953746, at *2 (S.D.N.Y. Sept.26, 2014). "Such a provision raises the specter of defendants settling FLSA claims with plaintiffs, perhaps at a premium, in order to avoid a collective action or individual lawsuits from other employees whose rights have been similarly violated." *Id.; see also, e.g., Nall v. Mal–Motels, Inc., 723 F.3d 1304, 1306 (11th Cir.2013)* (employee testified she felt pressured to accept employer's out-of-court settlement offer because "she trusted [the employer] and she was homeless at the time and needed money") (internal quotation marks omitted); *Walker v. Vital Recovery Servs., Inc., 300 F.R.D. 599, 600 n. 4 (N.D.Ga.2014)* ("According to Plaintiff's counsel, twenty-two plaintiffs accepted the offers of judgment—many for $100—because 'they are unemployed and desperate for any money they can find.' ").

[6] We are mindful of the concerns articulated in *Picerni,* particularly the court's observation that the "vast majority of FLSA cases" before it "are simply too small, and the employer's finances too marginal," for proceeding with litigation to make financial sense if the district court rejects the proposed settlement. ***207** 925 F.Supp.2d at 377 (noting that FLSA cases tend to "settle for less than $20,000 in combined recovery and attorneys' fees, and usually for far less than that; often the employee will settle for between $500 and $2000 dollars in unpaid wages."). However, the FLSA is a uniquely protective statute. The burdens described in *Picerni* must be balanced against the FLSA's primary remedial purpose: to prevent abuses by unscrupulous employers, and remedy the disparate bargaining power between employers and employees. *See Brooklyn Sav. Bank, 324 U.S. at 706–07, 65 S.Ct. 895*. As the cases described above illustrate, the need for such employee protections, even where the employees are represented by counsel, remains.

## CONCLUSION

For the reasons given above, we affirm and remand for further proceedings consistent with this opinion.

**All Citations**

796 F.3d 199, 165 Lab.Cas. P 36,366, 92 Fed.R.Serv.3d 494, 25 Wage & Hour Cas.2d (BNA) 138

Footnotes

1 Pursuant to Section 216(c) of the FLSA, the Secretary of Labor has the authority to "supervise the payment of the unpaid minimum wages or the unpaid overtime compensation owing to any employee or employees under" the FLSA. 29 U.S.C. § 216(c). "[T]he agreement of any employee to accept such payment shall upon payment in full constitute a waiver by such employee of any right he may have ... to such unpaid minimum wages or unpaid overtime compensation and" liquidated damages due under the FLSA. *Id.*

2 As it is not before us, we leave for another day the question of whether parties may settle such cases without court approval or DOL supervision by entering into a Rule 41(a)(1)(A) stipulation without prejudice.

3 Because this appeal was certified before the parties presented the district court with evidence to support their proposed settlement, we express no opinion as to whether a bona fide dispute exists here, or what the district court must consider in deciding whether to approve the putative settlement of Cheeks' claims.

4 Other Circuits agree with the Eleventh Circuit's conclusion that waiver of a FLSA claim in a private settlement is not valid. *Copeland v. ABB, Inc., 521 F.3d 1010, 1014 (8th Cir.2008)* ("FLSA rights are statutory and cannot be waived"); *see also Whiting v. Johns Hopkins Hospital, 680 F.Supp.2d 750, 753 (D.Md.2010) aff'd Whiting v. The Johns Hopkins Hosp., 416 Fed.Appx. 312 (4th Cir.2011)* (same); *Walton v. United Consumers Club, Inc., 786 F.2d 303, 306 (7th Cir.1986)* (same).

Discrimination based on weight

# *Delta Air Lines v. New York State Div. of Human Rights*

Court of Appeals of New York

November 19, 1997, Argued ; December 17, 1997, Decided

No. 256

**Reporter**

91 N.Y.2d 65 *; 689 N.E.2d 898 **; 666 N.Y.S.2d 1004 ***; 1997 N.Y. LEXIS 3710 ****; 8 Am. Disabilities Cas. (BNA) 1805

In the Matter of Delta Air Lines, Respondent, v. New York State Division of Human Rights et al., Respondents, and Roberta N. Brown et al., Appellants. In the Matter of Salvatore Alesci et al., Petitioners, and Roberta N. Brown et al., Appellants, v. New York State Division of Human Rights et al., Respondents.

**Prior History:** [****1] Appeals, by permission of the Appellate Division of the Supreme Court in the First Judicial Department, from a judgment of that Court, entered December 31, 1996, which, with two Justices dissenting, (1) in the first above-entitled proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court, entered in New York County), granted the petition of Delta Air Lines to the extent of annulling the determination of the New York State Division of Human Rights insofar as it sustained certain claims of ***discrimination*** on the basis of national origin, sex and improper preemployment inquiries, and awarded the aggrieved complainants relief, including back pay and damages for mental anguish and humiliation, and (2) in the second above-entitled proceeding pursuant to CPLR article 78 (transferred to the Appellate Division by order of the Supreme Court, entered in New York County), confirmed the determination of the New York State Division of Human Rights insofar as it dismissed certain claims of ***discrimination***, denied the individual petitioners' application, and dismissed the proceeding. The following question was certified by the Appellate Division: [****2] "Was the order of this Court, which confirmed in part and annulled in part the order of the New York State Division of Human Rights, properly made?"

*Delta Air Lines v New York State Div. of Human Rights, 229 AD2d 132*, affirmed.

*Matter of Alesci v New York State Div. of Human Rights, 229 AD2d 132*, affirmed.

**Disposition:** Judgment affirmed, with costs. Certified question not answered upon the ground that it is unnecessary.

## Case Summary

**Procedural Posture**

Appellant applicants sought review of a decision of the Appellate Division of the Supreme Court in the First Judicial Department (New York), which dismissed their ***discrimination in employment*** claims against respondent airline.

**Overview**

Respondent airline entered into an asset purchase agreement with another airline and agreed to hire its employees under specific criteria, including ***weight*** restrictions. Appellant applicants were not hired, and filed an action alleging unlawful ***employment discrimination***. The state determined that respondent discriminated in its preemployment inquiries. The decision was annulled and the complaint dismissed, and appellants sought review. The court affirmed the decision, holding that the lower court had properly rejected the various ***discrimination*** claims because appellants failed to establish that they were medically impaired members of a protected class. The court found that appellants failed to provide any evidence establishing disparate treatment of older flight attendants and there was no indication that respondent hired unequally with respect to ***weight*** requirements between males and females. The court held that the interviews did not effect discriminatory hiring practices and were necessary to comply with federal regulations.

**Outcome**

The court affirmed the dismissal of appellant applicants' complaint against respondent airlines because appellants failed to establish disparate treatment of flight attendants ***based on*** age, and there was no indication that respondent hired unequally with respect to ***weight*** requirements between males and females.

**Counsel:** *Goodkind Labaton Rudoff & Sucharow, L. L. P.*, New York City *(Edward Labaton, Linda P. Nussbaum* and *James M. Strauss* of counsel), and *Starr & Holman, L. L. P. (Thomas A. Holman* of counsel), for appellants. The majority

opinion should be reversed in its entirety, as the substantial evidence before the Division clearly supports appellants' sex, disability, age and unlawful inquiries claims. ( Matter of Stork Rest. v Boland, 282 NY 256; Matter of State Div. of Human Rights [Granelle], 70 NY2d 100; People ex rel. Vega v Smith, 66 NY2d 130; 300 Gramatan Ave. Assocs. v State Div. of Human Rights, 45 NY2d 176; Matter of Sontag v Bronstein, 33 NY2d 197; Matter of Page Airways v New York State Div. of Human Rights, 39 NY2d 877; [****3] Rogers v American Airlines, 527 F Supp 229; Doyle v Buffalo Sidewalk Cafe, 70 Misc 2d 212; Dothard v Rawlinson, 433 US 321; Gerdom v Continental Airlines, 692 F2d 602, 460 US 1074.)

*Rogers & Hardin, L. L. P. (Hunter R. Hughes* and *Benjamin A. Stone,* of the Georgia Bar, admitted *pro hac vice,* of counsel), *Orrick, Herrington & Sutcliffe,* New York City *(Ira G. Rosenstein* and *Michael Delikat* of counsel), *Thomas J. Munger* and *Jay D. Milone,* of the George Bar, admitted *pro hac vice,* for Delta Air Lines, Inc., respondent. I. There was no unlawful ***discrimination*** here. ( Matter of Page Airways v New York State Div. of Human Rights, 50 AD2d 83, 39 NY2d 877; Rogers v American Airlines, 527 F Supp 229; Jarrell v Eastern Air Lines, 430 F Supp 884, 577 F2d 869; Earwood v Continental Southeastern Lines, 539 F2d 1349; In re National Airlines, 434 F Supp 269; Doyle v Buffalo Sidewalk Cafe, 70 Misc 2d 212; Gerdom v Continental Airlines, 692 F2d 602, 460 US 1074; Laffey v Northwest Airlines, 567 F2d 429, 434 US 1086; Migra v Warren City School Dist. Bd. of Educ., 465 US 75; Capital Tel. Co. v Pattersonville [****4] Tel. Co., 56 NY2d 11.) II. Complainants' claims are preempted by the Airline Deregulation Act. ( Parochial Bus Sys. v Board of Educ., 60 NY2d 539; Town of Massena v Niagara Mohawk Power Corp., 45 NY2d 482; French v Pan Am Express, 869 F2d 1; City of Burbank v Lockheed Air Term., 411 US 624; Morales v Trans World Airlines, 504 US 374; Federal Express Corp. v California Pub. Utils. Commn., 936 F2d 1075; In re Hijacking of Pan Am. World Airways Aircraft, 920 F Supp 408; Abdu-Brisson v Delta Air Lines, 927 F Supp 109; Marlow v AMR Servs. Corp., 870 F Supp 295.)

**Judges:** Chief Judge Kaye and Judges Titone, Smith, Levine, Ciparick and Wesley concur.

**Opinion by:** BELLACOSA

## Opinion

**[*69] [***1005] [**899]** Bellacosa, J.

The threshold issue is whether the Federal Airline Deregulation Act preempts appellants' State ***discrimination*** claims against Delta Airlines. If not, this Court must decide whether Delta's use of ***weight*** standards in hiring former Pan American Airways flight attendants constitutes discrete or interrelated disability, age, or sex ***discrimination***. The Appellate Division, with two Justices dissenting in part, annulled the ***discrimination*** determination [****5] of the New York State Division of Human Rights, and then granted leave to the complainants. We now affirm.

I.

After Pan Am's bankruptcy declaration in the summer of 1991, it entered into an Asset Purchase Agreement with Delta, by which [***1006] [**900] Delta acquired a substantial portion of Pan Am's assets. Delta also agreed to hire approximately 6,000 Pan Am employees, predicated on specific criteria. These included seniority, language proficiency, personal interviews, and satisfaction of the least restrictive of the Delta or Pan Am small-to-medium ***weight*** standards referenced in Delta's height/***weight*** charts.

The present dispute ultimately arrives at this Court as a result of Delta's not hiring 10 former Pan Am employees. Notably, Delta interviewed more than 2,600 Pan Am flight attendants, made job offers to approximately 2,000, and ultimately hired approximately 1,800. The complainants-appellants are former Pan Am flight attendants and pursers with at least 14 years of experience at the time Pan Am ceased its operations. They filed individual administrative complaints against Delta with the State Division of Human Rights, alleging unlawful ***employment discrimination***. [****6] Some alleged ***discrimination*** on the basis of age, sex or a perceived disability--***weight***--or a combination of these categories. Some also [*70] complained of ***discrimination*** on the basis of national origin, marital status, and race.

Following investigations, an Administrative Law Judge (ALJ) determined that the complainants should be reinstated with back pay and damages for mental anguish and humiliation. In particular, the ALJ found (1) no Federal preemption; (2) ***discrimination*** of various kinds; (3) violations ***based on*** Delta's preemployment physical examinations; (4) no bona fide occupational qualifications relating to Delta's ***weight*** requirements and preemployment physical examinations; and (5) unlawful preemployment inquiries into applicants' age, disability, marital status, gender, or national origin.

An Executive Deputy Commissioner of the Human Rights Division sustained the gender ***discrimination*** complaints and claims of unlawful preemployment inquiry concerning national origin or sex or both, and dismissed all the remaining claims. The Commissioner adopted the award of back pay, but significantly reduced the proposed damages for mental anguish and humiliation.

Delta [****7] and the complainants commenced cross CPLR

article 78 proceedings in Supreme Court requesting respective relief. Upon transfer, the Appellate Division annulled the Division's determination insofar as it sustained claims of ***discrimination*** on the basis of sex and improper inquiries into national origin or gender, or both (*229 AD2d 132, 142*). The court also held that the preemption doctrine did not apply ( *id., at 138*). For all practical and juridical purposes, it ruled against the complainants, dismissed their article 78 proceeding, and granted Delta's petition, thus functionally nullifying the Division's determination insofar as it was adverse to Delta ( *id., at 142*).

The two dissenting Justices agreed with the majority that Federal law did not preempt State consideration of the ***discrimination*** claims, but urged that the ***discrimination*** claims on sex, age and disability grounds were supported by substantial evidence ( *id., at 143*).

II.

Delta, though it is not an appellant, argues that the State ***discrimination*** claims are preempted by the Federal Airline Deregulation Act of 1978. It thus urges affirmance of the Appellate Division order on that alternative, threshold [****8] ground. Appellants counter that their claims are not preempted because Congress intended only to restrict State regulation of [*71] airline fares, routes and services, not State regulation of ***employment*** practices.

This Court only recently stated that "[t]he preemption question is ultimately one of congressional intent" ( *Guice v Schwab & Co., 89 NY2d 31, 39, cert denied 520 US 1118*). Specifically, "congressional preemptive intent may be shown from express language in the Federal statute; it may also be established implicitly because the Federal legislation is so comprehensive in its scope that it is inferable that Congress wished fully to occupy the field of its subject matter ('field preemption'), or because State law conflicts with the Federal law" ( *id., at 39*). [***1007] Furthermore, "[i]mplied conflict preemption may be found when it is impossible for one to act in compliance with both the Federal and State laws, or when 'the state law ... "stan[ds] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" ' " ( *id., at 39* [quoting *Barnett Bank of Marion County v Nelson, 517 US 25, 31*]).

Using *Guice* as a [****9] principal guidepost, we discern a particularized, subject-specific congressional intent within the Deregulation Act's preemption provision. The provision expressly declares that "a State ... may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation" (*49 USC § 41713 [b]*). The purpose of this provision, according to the United States Supreme Court, is "[t]o ensure that the States would not undo federal deregulation with regulation of their own ... [by] prohibiting the States from enforcing any law 'relating to rates, routes, or services' of any air carrier" ( *Morales v Trans World Airlines, 504 US 374, 378-379*).

The Second Circuit Court of Appeals very recently applied the same provision, finding no preemption with respect to comparable age ***discrimination*** claims under the New York State Human Rights Law (*see, Abdu-Brisson v Delta Air Lines, 128 F3d 77*). That case even arose out of the same Delta-Pan Am 1991 agreement and involved age ***discrimination*** claims by some former Pan Am pilots ( *id., at 80*).

Interestingly, the Federal Court [****10] of Appeals cross-referenced and relied on the Appellate Division's ruling in the instant case ( *id., at 83*; *see, 229 AD2d 132, supra*). The Second Circuit concluded that Delta failed to establish that the New York Human Rights Law would frustrate the purposes of the Deregulation [*72] Act (*id., at 84*). The court reasoned that "[p]ermitting full operation of New York's age ***discrimination*** law will not affect competition between airlines--the primary concern underlying the ADA" (*id., at 84*). The court explained that "whether an airline discriminates on the basis of age (or race or sex) has little or nothing to do with competition or efficiency" (*id., at 84*). Finally, it stated that "the supposed state interference is too 'tenuous, remote or peripheral' to justify the preemption of New York's applicable laws" (*id., at 86*; *see, Morales v Trans World Airlines, 504 US 374, 390, supra; see also, Shaw v Delta Air Lines, 463 US 85, 100, n 21*).

We, thus, conclude that appellant's claims are not preempted, agreeing with the Appellate Division's analysis, as reinforced by the Second Circuit's independent adoption and application in its case.

[****11] III.

A.

Passing to the merits, we conclude that the Appellate Division properly rejected the various ***discrimination*** claims and grounds. We now address and analyze them ***based on*** the record presented here, as applied under the State Human Rights Law.

We turn first in this regard to the claim that Delta's ***weight*** requirements constitute disability ***discrimination***. *Executive Law § 296 (1) (a)* provides that "[i]t shall be an unlawful discriminatory practice ... [f]or an employer ... because of the age, race, creed, color, national origin, sex, or *disability,*

or marital status of any individual, to refuse to hire or employ or to bar or to discharge from ***employment*** such individual" (emphasis added). *Executive Law § 292 (21)* defines the term "disability" as "a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions which prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques."

Appellants failed to establish that they are medically impaired members of a protected class defined under the New York Human Rights Law. Nothing in the record [****12] supports the proposition that appellants suffer from a legally defined or cognizable "medical impairment" [***1008] [**902] which restricts their "normal bodily function." These claims, on this theory, therefore fail under Executive Law and record analysis.

[*73] *State Div. of Human Rights v Xerox Corp. (65 NY2d 213)* is quite a distinct and legally distinguishable matter. There, the ***discrimination*** claim arose out of the allegation that Xerox refused to hire someone because of obesity ( *id., at 215*). The examining physician determined that the complainant, who was 5 feet 6 inches and weighed 249 pounds, suffered from a condition of " 'gross obesity' " ( *id., at 215-216*). The Court held that "the Commissioner could find that the complainant's obese condition itself, which was clinically diagnosed and found to render her medically unsuitable by the respondent's own physician, constituted an impairment and therefore a disability within the contemplation of the statute" ( *id., at 219; see also, Underwood v Trans World Airlines, 710 F Supp 78, 83-84)*. Interpreting and applying the Executive Law to that particular record set of circumstances, the Court [****13] stated that "the statute covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future" ( *State Div. of Human Rights v Xerox Corp., supra, 65 NY2d, at 219*).

The instant case is distinguishable from *Xerox*. The tendered "condition" here is not within the scope of the State Executive Law under these circumstances. Appellants did not proffer evidence or make a record establishing that they are medically incapable of meeting Delta's ***weight*** requirements due to some cognizable medical condition. That was crucial in *Xerox* and is utterly absent here. We are satisfied that ***weight***, in and of itself, does not constitute a disability for ***discrimination*** qualification purposes and the ***discrimination*** claims in that respect are, therefore, correctly unsustainable.

B.

Appellants also claim that Delta's ***weight*** requirements constitute age and sex ***discrimination***. Particularly, with regard to the age claim, they contend that Delta's ***weight*** charts failed to make appropriate allowances for age. Appellants [****14] argue that Delta should be required to take into consideration that older people may generally tend to heavier ***weight*** development.

Appellants fail to provide any evidence establishing disparate treatment of relatively older flight attendants. Indeed and ironically, Delta submitted substantial evidence that it relied heavily on seniority in employing former Pan Am flight attendants and that its flight attendants average over 40 years [*74] of age. We, therefore, agree that the age ***discrimination*** claims may not be sustained.

The sex ***discrimination*** claims do not fare any better on this record. Appellants argue that the ***weight*** charts constitute sex ***discrimination*** because they permitted male applicants of a given height and age to weigh more than female applicants of the same height and age. That claim is entirely unsupportable and there is no basis to find as a matter of legal theory that ***weight*** limitations in these circumstances must be the same for both men and women.

Moreover, Delta demonstrates that it utilized separate ***weight*** charts to ensure that males and females were treated relatively equally, ***based on*** real physiological differences. It shows that its standards [****15] recognize the statistically established norms that males tend to weigh more than females of the same height. There is no indication in the record that Delta's hiring norms in this respect were applied unequally as between men and women, or that the standards were used as a pretext to deprive women of equal opportunity or treatment. Paradoxically, Delta submitted evidence that approximately 90% of its flight attendants are female, somewhat contradicting disparate impact from the ***employment*** practices complained of; evidently, the data show quite the opposite impact on the gender aspect of this case.

[***1009] [**903] C.

Lastly, appellants challenge Delta's preemployment inquiries and medical examinations. They specifically argue that Delta unlawfully asked preemployment questions regarding age, disabilities and physical impairments, family relations, marital status, roommates, and prior treatment for drug or alcohol abuse. We agree with the Appellate Division that the record does not support the contention that the interview inquiries by Delta's representatives contributed to the eventual decision not to hire them. Merely establishing that a particular question [****16] was asked, even one that might be viewed as objectionable out of context or in the abstract, is insufficient, without some causal consequence or relevant

relationship, to establish a claim for ***discrimination*** under the New York Human Rights Law in these circumstances.

The State Executive Law declares unlawful the making of "any inquiry in connection with prospective ***employment***, which expresses directly or indirectly, any limitation, specification [*75] or ***discrimination*** as to age, race, creed, color or national origin, sex, or disability or marital status, or any intent to make any such limitation" (*Executive Law § 296 [1] [d]*). The interview inquiries here are not actionable or sustainable because appellants fail to produce any evidence or suggest any inference that the subject inquiries reflected a " 'limitation, specification or ***discrimination***' " (*see, Matter of New York Times Co. v City of New York Commn. on Human Rights, 41 NY2d 345, 349; see also, Alexander's, Inc. v White, 115 AD2d 424, 426)*.

As to Delta's preemployment physical examinations, suffice it to say that these routine examinations did not effect discriminatory hiring practices but were necessary, [****17] in part, to comply with FAA regulations.

We have considered all the arguments and claims and agree with the Appellate Division that they are not preempted by the Federal Act and that they are not sustainable on the merits.

Accordingly, the judgment of the Appellate Division should be affirmed, with costs, and the certified question not answered upon the ground that it is unnecessary.

Chief Judge Kaye and Judges Titone, Smith, Levine, Ciparick and Wesley concur.

Judgment affirmed, etc.

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811 F.3d 528
United States Court of Appeals,
Second Circuit.

Eric GLATT, Alexander Footman, Eden M. Antalik, on behalf of herself and all others Similarly Situated, Plaintiffs–Appellees,
v.
FOX SEARCHLIGHT PICTURES, INC., Fox Entertainment Group, Inc., Defendants–Appellants.*
Nos. 13–4478–cv, 13–4481–cv.
|
Argued: Jan. 30, 2015.
|
Decided: July 2, 2015.
|
Amended: Jan. 25, 2016.

**Synopsis**
**Background:** Unpaid interns brought putative class action against motion picture distributor and its parent company, claiming compensation as employees under Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL). The United States District Court for the Southern District of New York, William H. Pauley III, J., 293 F.R.D. 516, granted partial summary judgment in favor of interns, certified intern's New York class, and conditionally certified nationwide FLSA collective. Distributor appealed.

**Holdings:** The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that:

[1] as a matter of first impression, the primary beneficiary test is used to determine whether an unpaid intern is an employee under the FLSA and NYLL;

[2] question of whether every member of proposed New York class could prevail on claim that intern was an employee under primary beneficiary test could not be answered with generalized proof; and

[3] under pre-discovery standard, unpaid interns were not similarly situated and could thus not be certified as nationwide FLSA collective.

Vacated and remanded.

Opinion, 791 F.3d 376, amended and superseded.

West Headnotes (17)

[1] **Labor and Employment**
Waiver and estoppel

An employee cannot waive his right to the minimum wage and overtime pay because waiver would nullify the purposes of the Fair Labor Standards Act (FLSA) and thwart the legislative policies it was designed to effectuate. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

1 Cases that cite this headnote

[2] **Labor and Employment**
Employees Included

The strictures of both the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL) apply only to employees. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1); 12 NYCRR 142–2.14(a).

1 Cases that cite this headnote

[3] **Labor and Employment**
Employees Included

Because the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL) define "employee" in nearly identical terms, a court construes the NYLL definition as the same in substance as the definition in the FLSA. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1); 12 NYCRR 142–2.14(a).

Cases that cite this headnote

[4] **Administrative Law and Procedure**
Powers in General

Unlike an agency's interpretation of ambiguous statutory terms or its own regulations, an agency has no special competence or role in interpreting a judicial decision.

1 Cases that cite this headnote

[5] **Labor and Employment**
Learners and apprentices

The "primary beneficiary test," which determines whether an intern or an employer is the primary beneficiary of the relationship, is used to determine whether an unpaid intern is an employee under the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL). Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1); 12 NYCRR § 142–2.14(a).

9 Cases that cite this headnote

[6] **Labor and Employment**
Learners and apprentices

In determining whether unpaid intern is an employee, for purposes of Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL), courts should apply non-exhaustive set of considerations, including extent to which: (1) intern and employer clearly understand that there is no expectation of compensation; (2) internship provides training that would be similar to that which would be given in an educational environment; (3) internship is tied to intern's formal education program by integrated coursework or receipt of academic credit; (4) internship accommodates intern's academic commitments by corresponding to academic calendar; (5) internship's duration is limited to period in which internship provides intern with beneficial learning; (6) intern's work complements, rather than displaces, work of paid employees while providing significant educational benefits to the intern; and (7) intern and employer understand that internship is conducted without entitlement to a paid job at conclusion of internship. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1); 12 NYCRR 142–2.14(a).

10 Cases that cite this headnote

[7] **Labor and Employment**
Learners and apprentices

Applying considerations used to determine whether unpaid intern is an employee, for purposes of Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL), requires weighing and balancing all of the circumstances; no one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee entitled to the minimum wage. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1); 12 NYCRR 142–2.14(a).

3 Cases that cite this headnote

[8] **Labor and Employment**
Learners and apprentices

Factors used to determine whether unpaid intern is an employee, for purposes of Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL), are non-exhaustive—courts may consider relevant evidence beyond the specified factors in appropriate cases; and because the touchstone of this analysis is the economic reality of the relationship, a court may elect in certain cases, including cases that can proceed as collective actions, to consider evidence about an internship program as a whole rather than the experience of a specific intern. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1); 12 NYCRR 142–2.14(a).

5 Cases that cite this headnote

[9] **Labor and Employment**
Learners and apprentices

For purposes of determining whether an unpaid intern is an employee under the Fair Labor Standards Act (FLSA) and New York Labor Law (NYLL), the purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1); 12 NYCRR 142–2.14(a).

1 Cases that cite this headnote

[10] **Federal Courts**
Class actions

The Court of Appeals reviews a district court's class certification ruling for abuse of discretion and the conclusions of law that informed its decision to grant certification de novo.

Cases that cite this headnote

[11] **Federal Civil Procedure**
Common interest in subject matter, questions and relief; damages issues

The class certification rule's predominance requirement is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof. Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[12] **Labor and Employment**
Learners and apprentices

The question of an intern's employment status for purposes of the Fair Labor Standards Act (FLSA) and the New York Labor Law (NYLL) is a highly context-specific inquiry. Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1); 12 NYCRR 142–2.14(a).

Cases that cite this headnote

[13] **Federal Civil Procedure**
Employees

Even if unpaid intern established that motion picture distributor had a policy of replacing paid employees with unpaid interns, such generalized proof could not show that distributor's internship program created employment relationships, as required to satisfy predominance requirement on motion for class certification in intern's action claiming compensation as employee under FLSA and New York Labor Law (NYLL). Fair Labor Standards Act of 1938, § 3(e)(1), 29 U.S.C.A. § 203(e)(1); Fed.Rules Civ.Proc.Rule 23(b)(3), 28 U.S.C.A.; 12 NYCRR 142–2.14(a).

3 Cases that cite this headnote

[14] **Federal Courts**
Wages, hours, and working conditions

The Court of Appeals reviews a district court's decision to conditionally certify a Fair Labor Standards Act (FLSA) collective for abuse of discretion. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

1 Cases that cite this headnote

[15] **Labor and Employment**
Notice and opting-in

Plaintiffs become members of a Fair Labor Standards Act (FLSA) collective only after they affirmatively consent to join it. Fair Labor

Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

2 Cases that cite this headnote

[16] **Labor and Employment**
Actions on Behalf of Others in General

A conditionally certified Fair Labor Standards Act (FLSA) collective does not acquire an independent legal status. Fair Labor Standards Act of 1938, § 16(b), 29 U.S.C.A. § 216(b).

Cases that cite this headnote

[17] **Labor and Employment**
Employees similarly situated

Under pre-discovery standard, unpaid interns for motion picture producer were not similarly situated, and thus could not be certified as Fair Labor Standards Act (FLSA) collective in intern's putative class action against producer, claiming compensation as employee under FLSA and New York Labor Law (NYLL). Fair Labor Standards Act of 1938, §§ 3(e)(1), 16(b), 29 U.S.C.A. §§ 203(e)(1), 216(b); 12 NYCRR 142–2.14(a).

4 Cases that cite this headnote

**Attorneys and Law Firms**

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Maria Van–Buren, U.S. Department of Labor, Washington, DC, (Jennifer S. Brand, Paul L. Frieden, on the brief), for M. Patricia Smith, Solicitor of Labor, U.S. Department of Labor, Washington, DC, as Amicus Curiae.

Before: WALKER, JACOBS, and WESLEY, Circuit Judges.

**Opinion**

JOHN M. WALKER, JR., Circuit Judge:

Plaintiffs, who were hired as unpaid interns, claim compensation as employees under the Fair Labor Standards Act and New York Labor Law. Plaintiffs Eric Glatt and Alexander Footman moved for partial summary judgment on their employment status. Plaintiff Eden Antalik moved to certify a class of all New York interns working at certain of defendants' divisions between 2005 and 2010 and to conditionally certify a nationwide collective of all interns working at those same divisions between 2008 and 2010. The district court (William H. Pauley III, *J.*) granted Glatt and Footman's motion for partial summary judgment, certified Antalik's New York class, and conditionally certified Antalik's nationwide collective. On defendants' interlocutory appeal, we VACATE the district court's order granting partial summary judgment to Glatt and Footman, VACATE its order certifying Antalik's New York class, VACATE its order conditionally certifying Antalik's nationwide collective, and REMAND for further proceedings.

## BACKGROUND

Plaintiffs worked as unpaid interns either on the Fox Searchlight-distributed film *Black Swan* or at the Fox corporate offices in New York City. They contend ***532** that the defendants, Fox Searchlight and Fox Entertainment Group, violated the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 206–07, and New York Labor (NYLL), N.Y. Labor Law § 652, by failing to pay them as employees during their internships as required by the FLSA's and NYLL's minimum wage and overtime provisions. The following background facts are undisputed except where noted.

*Eric Glatt*
Eric Glatt graduated with a degree in multimedia instructional design from New York University. Glatt was enrolled in a non-matriculated (non-degree) graduate program at NYU's School of Education when he started working on *Black Swan.* His graduate program did not offer him credit for his internship.

From December 2, 2009, through the end of February 2010, Glatt interned in *Black Swan's* accounting

department under the supervision of Production Accountant Theodore Au. He worked from approximately 9:00 a.m. to 7:00 p.m. five days a week. As an accounting intern, Glatt's responsibilities included copying, scanning, and filing documents; tracking purchase orders; transporting paperwork and items to and from the *Black Swan* set; maintaining employee personnel files; and answering questions about the accounting department.

Glatt interned a second time in *Black Swan's* post-production department from March 2010 to August 2010, under the supervision of Post Production Supervisor Jeff Robinson. Glatt worked two days a week from approximately 11:00 a.m. until 6:00 or 7:00 p.m. His post-production responsibilities included drafting cover letters for mailings; organizing filing cabinets; filing paperwork; making photocopies; keeping the takeout menus up-to-date and organized; bringing documents to the payroll company; and running errands, one of which required him to purchase a non-allergenic pillow for Director Darren Aronofsky.

*Alexander Footman*

Alexander Footman graduated from Wesleyan University with a degree in film studies. He was not enrolled in a degree program at the time of his *Black Swan* internship. From September 29, 2009, through late February or early March 2010, Footman interned in the production department under the supervision of Production Office Coordinator Lindsay Feldman and Assistant Production Office Coordinator Jodi Arneson. Footman worked approximately ten-hour days. At first, Footman worked five days a week, but, beginning in November 2009, he worked only three days a week. After this schedule change, *Black Swan* replaced Footman with another unpaid intern in the production department.

Footman's responsibilities included picking up and setting up office furniture; arranging lodging for cast and crew; taking out the trash; taking lunch orders; answering phone calls; watermarking scripts; drafting daily call sheets; photocopying; making coffee; making deliveries to and from the film production set, rental houses, and the payroll office; accepting deliveries; admitting guests to the office; compiling lists of local vendors; breaking down, removing, and selling office furniture and supplies at the end of production; internet research; sending invitations to the wrap party; and other similar tasks and errands, including bringing tea to Aronofsky and dropping off a DVD of *Black Swan* footage at Aronofsky's apartment.

*Eden Antalik*

Eden Antalik worked as an unpaid publicity intern in Fox Searchlight's corporate office in New York from the beginning of May 2009 until the second week of August ***533** 2009. During her internship, Antalik was enrolled in a degree program at Duquesne University that required her to have an internship in order to graduate. Antalik was supposed to receive credit for her internship at Fox Searchlight, but, for reasons that are unclear from the record, she never actually received the credit.

Antalik began work each morning around 8:00 a.m. by assembling a brief, referred to as "the breaks," summarizing mentions of various Fox Searchlight films in the media. She also made travel arrangements, organized catering, shipped documents, and set up rooms for press events.

*Prior Proceedings*

On October 19, 2012, plaintiffs filed their first amended class complaint seeking unpaid minimum wages and overtime for themselves and all others similarly situated. Thereafter, Glatt and Footman abandoned their class claims and proceeded as individuals. After discovery, Glatt and Footman moved for partial summary judgment, contending that they were employees under the FLSA and NYLL. The defendants cross-moved for summary judgment claiming that Glatt and Footman were not employees under either statute. At about the same time, Antalik moved to certify a class of New York State interns working at certain Fox divisions and a nationwide FLSA collective of interns working at those same divisions.

On June 11, 2013, the district court concluded that Glatt and Footman had been improperly classified as unpaid interns rather than employees and granted their partial motion for summary judgment. The district court also granted Antalik's motions to certify the class of New York interns and to conditionally certify the nationwide FLSA collective.

On September 17, 2013, the district court, acting on defendants' motion, certified its order for immediate appeal under 28 U.S.C. § 1292(b). On November 26, 2013, we granted defendants' petition for leave to file an interlocutory appeal from the district court's orders. For the reasons that follow, we vacate the district court's orders and remand.

## DISCUSSION

At its core, this interlocutory appeal raises the broad question of under what circumstances an unpaid intern must be deemed an "employee" under the FLSA and therefore compensated for his work. That broad question underlies our answers to the three specific questions on appeal. First, did the district court apply the correct standard in evaluating whether Glatt and Footman were employees, and, if so, did it reach the correct result? Second, did the district court err by certifying Antalik's class of New York interns? Third, did the district court err by conditionally certifying Antalik's nationwide collective?

### I. Glatt's and Footman's Employment Status

We review the district court's order granting partial summary judgment to Glatt and Footman de novo. *See Velez v. Sanchez, 693 F.3d 308, 313–14 (2d Cir.2012)*. Summary judgment is appropriate only if, drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id. at 314*.

[1] With certain exceptions not relevant here, the FLSA requires employers to pay all employees a specified minimum wage, and overtime of time and one-half for hours worked in excess of forty hours per week. 29 U.S.C. §§ 206–07. NYLL requires the same, except that it specifies ***534** a higher wage rate than the federal minimum. *See* N.Y. Labor Law § 652. An employee cannot waive his right to the minimum wage and overtime pay because waiver "would nullify the purposes of the [FLSA] and thwart the legislative policies it was designed to effectuate." *Barrentine v. Arkansas–Best Freight Sys., Inc., 450 U.S. 728, 740, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981)* (internal quotation marks omitted); *see also Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 302, 105 S.Ct. 1953, 85 L.Ed.2d 278 (1985)* (exceptions to coverage under the FLSA affect more people than those workers directly at issue because exceptions are "likely to exert a general downward pressure on wages in competing businesses").

[2] [3] The strictures of both the FLSA and NYLL apply only to employees. The FLSA unhelpfully defines "employee" as an "individual employed by an employer." 29 U.S.C. § 203(e)(1). "Employ" is defined as "to suffer or permit to work." *Id. § 203(g)*. New York likewise defines "employee" as "any individual employed, suffered or permitted to work by an employer." 12 N.Y.C.R.R. § 142–2.14(a). Because the statutes define "employee" in nearly identical terms, we construe the NYLL definition as the same in substance as the definition in the FLSA. *See Zheng v. Liberty Apparel Co., 355 F.3d 61, 78 (2d Cir.2003)*.

The Supreme Court has yet to address the difference between unpaid interns and paid employees under the FLSA. In 1947, however, the Court recognized that unpaid railroad brakemen trainees should not be treated as employees, and thus that they were beyond the reach of the FLSA's minimum wage provision. *See Walling v. Portland Terminal Co., 330 U.S. 148, 67 S.Ct. 639, 91 L.Ed. 809 (1947)*. The Court adduced several facts. First, the brakemen-trainees at issue did not displace any regular employees, and their work did not expedite the employer's business. *Id. at 149–50, 67 S.Ct. 639*. Second, the brakemen-trainees did not expect to receive any compensation and would not necessarily be hired upon successful completion of the course. *See id. at 150, 67 S.Ct. 639*. Third, the training course was similar to one offered by a vocational school. *Id. at 152, 67 S.Ct. 639*. Finally, the employer received no immediate advantage from the work done by the trainees. *Id. at 153, 67 S.Ct. 639*.

In 1967, the Department of Labor ("DOL") issued informal guidance on trainees as part of its Field Operations Handbook. The guidance enumerated six criteria and stated that the trainee is not an employee only if all of the criteria were met. *See* DOL, Wage & Hour Div., Field Operations Handbook, Ch. 10, ¶ 10b11 (Oct. 20, 1993), *available at* http://www.dol.gov/whd/FOH/FOH_Ch10.pdf. In 2010, the DOL published similar guidance for unpaid interns working in the for-profit private sector. This Intern Fact Sheet provides that an employment relationship does not exist if all of the following factors apply:

> 1. The internship, even though it includes actual operation of the facilities of the employer, is similar to training which would be given in an educational environment;
>
> 2. The internship experience is for the benefit of the intern;
>
> 3. The intern does not displace regular employees, but works under close supervision of existing staff;
>
> 4. The employer that provides the training derives no immediate advantage from the activities of the intern; and on occasion its operations may actually be impeded;
>
> 5. The intern is not necessarily entitled to a job at the conclusion of the internship; and
>
> ***535** 6. The employer and the intern understand that the intern is not entitled to wages for the time spent in the internship.

DOL, Wage & Hour Div., Fact Sheet # 71, Internship

Programs Under The Fair Labor Standards Act (April 2010), *available at* http://www.dol.gov/whd/regs/compliance/whdfs71.pdf.

The district court evaluated Glatt's and Footman's employment using a version of the DOL's six-factor test. However, the district court, unlike the DOL, did not explicitly require that all six factors be present to establish that the intern is not an employee and instead balanced the factors. The district court found that the first four factors weighed in favor of finding that Glatt and Footman were employees and the last two factors favored finding them to be trainees. As a result, the district court concluded that Glatt and Footman had been improperly classified as unpaid interns and granted their motion for partial summary judgment.

The specific issue we face—when is an unpaid intern entitled to compensation as an employee under the FLSA?—is a matter of first impression in this Circuit. When properly designed, unpaid internship programs can greatly benefit interns. For this reason, internships are widely supported by educators and by employers looking to hire well-trained recent graduates.[1] However, employers can also exploit unpaid interns by using their free labor without providing them with an appreciable benefit in education or experience. Recognizing this concern, all parties agree that there are circumstances in which someone who is labeled an unpaid intern is actually an employee entitled to compensation under the FLSA. All parties also agree that there are circumstances in which unpaid interns are not employees under the FLSA. They do not agree on what those circumstances are or what standard we should use to identify them.

The plaintiffs urge us to adopt a test whereby interns will be considered employees whenever the employer receives an immediate advantage from the interns' work. Plaintiffs argue that focusing on any immediate advantage that accrues to the employer is appropriate because, in their view, the Supreme Court in *Portland Terminal* rested its holding on the finding that the brakemen trainees provided no immediate advantage to the employer.

The defendants urge us to adopt a more nuanced primary beneficiary test. Under this standard, an employment relationship is not created when the tangible and intangible benefits provided to the intern are greater than the intern's contribution to the employer's operation. They argue that the primary beneficiary test best reflects the economic realities of the relationship between intern and employer. They further contend that a primary beneficiary test that considers the totality of the circumstances is in accordance with how we decide whether individuals are employees in other circumstances.

DOL, appearing as amicus curiae in support of the plaintiffs, defends the six factors enumerated in its Intern Fact Sheet and its requirement that every factor be present before the employer can escape its obligation to pay the worker. DOL argues (1) that its views on employee status are entitled to deference because it is the agency charged with administering the FLSA and (2) that we should use the six ***536** factors because they come directly from *Portland Terminal.*

[4] We decline DOL's invitation to defer to the test laid out in the Intern Fact Sheet. As DOL makes clear in its brief, its six-part test is essentially a distillation of the facts discussed in *Portland Terminal.* DOL Br. at 11–12, 21. Unlike an agency's interpretation of ambiguous statutory terms or its own regulations, "an agency has no special competence or role in interpreting a judicial decision." *State of N.Y. v. Shalala, 119 F.3d 175, 180 (2d Cir.1997)*. And as DOL concedes, DOL Br. at 21, this interpretation is entitled, at most, to *Skidmore* deference to the extent we find it persuasive. *See Skidmore v. Swift & Co., 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)* (the weight given to the Administrator's judgment depends on "all those factors which give it power to persuade"). Because the DOL test attempts to fit *Portland Terminal's* particular facts to all workplaces, and because the test is too rigid for our precedent to withstand, *see, e.g., Velez, 693 F.3d at 326*, we do not find it persuasive, and we will not defer to it.

[5] Instead, we agree with defendants that the proper question is whether the intern or the employer is the primary beneficiary of the relationship. The primary beneficiary test has three salient features. First, it focuses on what the intern receives in exchange for his work. *See Portland Terminal, 330 U.S. at 152, 67 S.Ct. 639* (focusing on the trainee's interests). Second, it also accords courts the flexibility to examine the economic reality as it exists between the intern and the employer. *See Barfield v. N.Y.C. Health & Hosps. Corp., 537 F.3d 132, 141–42 (2d Cir.2008)* (employment for FLSA purposes is "a flexible concept to be determined on a case-by-case basis by review of the totality of the circumstances"). Third, it acknowledges that the intern-employer relationship should not be analyzed in the same manner as the standard employer-employee relationship because the intern enters into the relationship with the expectation of receiving educational or vocational benefits that are not necessarily expected with all forms of employment (though such benefits may be a product of experience on the job).

Although the flexibility of the primary beneficiary test is primarily a virtue, this virtue is not unalloyed. The defendants' conception of the primary beneficiary test requires courts to weigh a diverse set of benefits to the intern against an equally diverse set of benefits received by the employer without specifying the relevance of particular facts. *Cf.* *Brown v. N.Y.C. Dep't of Educ., 755 F.3d 154, 163 (2d Cir.2014)* ("While our ultimate determination [of employment status] is based on the totality of circumstances, our discussion necessarily focuses on discrete facts relevant to particular statutory and regulatory criteria." (internal citation omitted)).

[6] In somewhat analogous contexts, we have articulated a set of non-exhaustive factors to aid courts in determining whether a worker is an employee for purposes of the FLSA. *See, e.g.,* *Velez, 693 F.3d at 330* (domestic workers); *Brock v. Superior Care, Inc., 840 F.2d 1054, 1058–59 (2d Cir.1988)* (independent contractors). In the context of unpaid internships,[2] we think a non-exhaustive set of considerations should include:

> 1. The extent to which the intern and the employer clearly understand that ***537** there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
>
> 2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
>
> 3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
>
> 4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
>
> 5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
>
> 6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
>
> 7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

[7] [8] Applying these considerations requires weighing and balancing all of the circumstances. No one factor is dispositive and every factor need not point in the same direction for the court to conclude that the intern is not an employee entitled to the minimum wage. In addition, the factors we specify are non-exhaustive—courts may consider relevant evidence beyond the specified factors in appropriate cases. And because the touchstone of this analysis is the "economic reality" of the relationship, *Barfield, 537 F.3d at 141*, a court may elect in certain cases, including cases that can proceed as collective actions, to consider evidence about an internship program as a whole rather than the experience of a specific intern.

This flexible approach is faithful to *Portland Terminal.* Nothing in the Supreme Court's decision suggests that any particular fact was essential to its conclusion or that the facts on which it relied would have the same relevance in every workplace. *See* *Portland Terminal, 330 U.S. at 150–53, 67 S.Ct. 639*; *see also* *Solis v. Laurelbrook Sanitarium & Sch., Inc., 642 F.3d 518, 526 n. 2 (6th Cir.2011)* ("While the Court's recitation of the facts [in *Portland Terminal* ] included those that resemble the Secretary's six factors, the Court gave no indication that such facts must be present in future cases to foreclose an employment relationship." (internal citation omitted)).

[9] The approach we adopt also reflects a central feature of the modern internship—the relationship between the internship and the intern's formal education—and is confined to internships and does not apply to training programs in other contexts. The purpose of a bona-fide internship is to integrate classroom learning with practical skill development in a real-world setting,[3] and, unlike the brakemen at issue in *Portland Terminal,* all of the plaintiffs were enrolled in or had recently completed a formal course of post-secondary education. By focusing on the educational aspects of the internship, our approach better reflects the role of internships in today's economy than the DOL factors, which were derived ***538** from a 68–year old Supreme Court decision that dealt with a single training course offered to prospective railroad brakemen.

In sum, we agree with the defendants that the proper question is whether the intern or the employer is the primary beneficiary of the relationship, and we propose the above list of non-exhaustive factors to aid courts in answering that question. The district court limited its review to the six factors in DOL's Intern Fact Sheet. Therefore, we vacate the district court's order granting partial summary judgment to Glatt and Footman and remand for further proceedings. On remand, the district court may, in its discretion, permit the parties to submit additional evidence relevant to the plaintiffs' employment status, such as evidence on Glatt's and Footman's formal education. Of course, we express no opinion with respect to the outcome of any renewed motions for summary judgment the parties might make based on the primary beneficiary test we have set forth.

**II. Antalik's Motion to Certify the New York Class**

[10] We turn now to the defendants' appeal of the district court's order certifying Antalik's proposed class. We review the district court's class certification ruling for abuse of discretion and the conclusions of law that informed its decision to grant certification de novo. *See* *Parker v. Time Warner Entm't Co., 331 F.3d 13, 18 (2d Cir.2003)*.

Antalik moved to certify the following class:

> All individuals who had unpaid internships between September 28, 2005 and September 1, 2010 with one or more of the following divisions of FEG [Fox Entertainment Group]: Fox Filmed Entertainment, Fox Group, Fox Networks Group, and Fox Interactive Media (renamed News Corp. Digital Media).

Pls.' Mot. For Class Cert. 19, Doc. No. 104.

[11] Antalik bore the burden of showing that her proposed class satisfied Rule 23's requirements of: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. *See* Fed.R.Civ.P. 23(a)(1–4). Because Antalik moved to certify the class pursuant to Rule 23(b)(3), she was also required to show that "questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." *See* Fed. R. Civ. P. 23(b)(3). "The predominance requirement is satisfied if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof." *In re U.S. Foodservice Inc. Pricing Litig., 729 F.3d 108, 118 (2d Cir.2013)* (internal quotation marks omitted).

The district court found that common questions pertaining to liability could be answered by evidence tending to show that interns were recruited to help with busy periods, that they displaced paid employees, and that Fox employees overseeing internships did not believe they complied with the law. Because "common questions of liability predominate over individual calculations of damages," the district court concluded that Antalik had satisfied her burden to establish predominance. S.A. 33–34.

On appeal, the defendants argue the district court erred by concluding that Antalik demonstrated predominance because it misconstrued our standards for determining ***539** when common questions predominate over individual ones. We agree and therefore vacate the district court's order certifying Antalik's class.[4]

[12] Antalik points to evidence, relied on by the district court, suggesting that the defendants sometimes used unpaid interns in place of paid employees. Such evidence is relevant but not sufficient to answer the question of whether each intern was an employee entitled to compensation under the FLSA. As our previous discussion of the proper test indicates, the question of an intern's employment status is a highly context-specific inquiry. Antalik's evidence that the defendants received an immediate advantage from the internship program will not help to answer whether the internship program could be tied to an education program, whether and what type of training the internship program provided, whether the internship program continued beyond the primary period of learning, or the many other questions that are relevant in this case. Moreover, defendants' undisputed evidence demonstrated that the various internship programs it offered differed substantially across the many departments and four Fox divisions included in the proposed class.

[13] In sum, even if Antalik established that Fox had a policy of replacing paid employees with unpaid interns, it would not suffice to show that Fox's internship program created employment relationships, the most important issue in each case. Thus, assuming some questions may be answered with generalized proof, they are not more substantial than the questions requiring individualized proof. *See, e.g., Myers v. Hertz Corp., 624 F.3d 537, 548 (2d Cir.2010)* (district court did not abuse its discretion by denying certification of a class of store managers where determination of whether managers were exempt under the FLSA would be resolved only "by examining the employees' actual job characteristics and duties"); *In re Wells Fargo Home Mortgage Overtime Pay Litig., 571 F.3d 953, 958–59 (9th Cir.2009)* (district court abused its discretion by certifying a class of mortgage consultants because employer's centralized policy of exempting consultants did not predominate over individual variation in job responsibilities).

Because the most important question in this litigation cannot be answered with generalized proof on this record in light of the new legal standard, we vacate the district court's order certifying Antalik's proposed class and remand for further proceedings consistent with this opinion.[5]

### III. Antalik's Motion to Conditionally Certify the Nationwide FLSA Collective

[14] Finally, we turn to the defendants' appeal of the district court's order conditionally certifying Antalik's proposed nationwide FLSA collective. Like the district court's certification determination pursuant to Rule 23, we review its decision to conditionally certify an FLSA collective for abuse of discretion. *See Myers, 624 F.3d at 554*; *Morgan v. Family Dollar Stores, Inc., 551 F.3d 1233, 1260 (11th Cir.2008)*.

***540** [15] [16] The FLSA permits employees to create a collective by opting-in to a backpay claim brought by a similarly situated employee. 29 U.S.C. § 216(b). The unique FLSA collective differs from a Rule 23 class because plaintiffs become members of the collective only after they affirmatively consent to join it. *See Genesis Healthcare Corp. v. Symczyk, —— U.S. ——, 133 S.Ct. 1523, 1530, 185 L.Ed.2d 636 (2013)*. As a result, unlike a Rule 23 class, a conditionally certified FLSA collective does not acquire an independent legal status. *Id.*

In *Myers,* we endorsed a two-step process for certifying FLSA collective actions. At step one, the district court permits a notice to be sent to potential opt-in plaintiffs if the named plaintiffs make a modest factual showing that they and others together were victims of a common policy or plan that violated the law. 624 F.2d at 555. At step two, with the benefit of additional factual development, the district court determines whether the collective action may go forward by determining whether the opt-in plaintiffs are in fact similarly situated to the named plaintiffs. *Id.*

Antalik moved, at step one, to conditionally certify the following nationwide collective:

> All individuals who had unpaid internships between September 28, 2008 and September 1, 2010 with one or more of the following divisions of FEG: Fox Filmed Entertainment, Fox Group, Fox Networks Group, and Fox Interactive Media (renamed News Corp. Digital Media).

Pls.' Mot. For Class Cert. 28, Doc. No. 104.

After some discovery had been completed, the district court, relying primarily on its analysis of commonality with respect to Antalik's Rule 23 motion, authorized plaintiffs to send the opt-in notice because Antalik put forth generalized proof that interns were victims of a common policy to replace paid workers with unpaid interns. On defendants' motion for reconsideration, the district court narrowed the opt-in notice to include only those individuals who held unpaid internships between January 18, 2010, and September 1, 2010, because the statute of limitations precluded claims by earlier Fox interns.

[17] We certified for immediate review the question of whether a higher standard, urged by defendants, applies to motions to conditionally certify an FLSA collective made after discovery. We do not need to decide that question, however, because in light of the new test for when an internship program creates an employment relationship, we cannot, on the record before us, conclude that the plaintiffs in Antalik's proposed collective are similarly situated, even under the minimal pre-discovery standard.[6] The common proof identified by Antalik, and relied on by the district court, addresses only some of the relevant factors outlined above. If anything, Antalik's proposed collective presents an even wider range of experience than her proposed class because it is nationwide in scope, rather than limited to just New York interns.

Accordingly, for substantially the same reasons as with respect to Antalik's Rule 23 motion, we vacate the district court's order conditionally certifying Antalik's proposed nationwide collective action and remand for further proceedings.[7]

## *541 CONCLUSION

For the foregoing reasons, the district court's orders are VACATED and the case REMANDED for further proceedings consistent with this opinion.

### All Citations

811 F.3d 528, 25 Wage & Hour Cas.2d (BNA) 1716

Footnotes

* The clerk of the court is directed to amend the caption as set forth above.

1 *See, e.g.,* Nat'l Ass'n of Colleges & Emp'rs, Position Statement: U.S. Internships (July 2011), *available at* http://www.naceweb.org/advocacy/position-statements/united-statesinternships.aspx ("NACE, Position Statement").

2 Like the parties and amici, we limit our discussion to internships at for-profit employers.

3 *See, e.g.,* NACE, Position Statement (defining the internship as "form of experiential learning that integrates knowledge and theory learned in the classroom with practical application and skills development in a professional setting").

4 In light of this disposition, we need not consider defendants' arguments related to commonality. *See* *Myers v. Hertz Corp., 624 F.3d 537, 548 (2d Cir.2010)*.

5 Nevertheless, although the district court's certification order was erroneous in light of the new legal standard we have announced today, we cannot foreclose the possibility that a renewed motion for class certification might succeed on remand under our revised standard.

6 "We are not necessarily limited to the certified issue, as we have the discretion to consider any aspect of the order from which the appeal is taken." *J.S. ex rel. N.S. v. Attica Cent. Sch., 386 F.3d 107, 115 (2d Cir.2004)*; *accord* *Grayson v. K Mart Corp., 79 F.3d 1086, 1096 (11th Cir.1996)* (same applied to order conditionally certifying a collective).

7 Again, we do not foreclose the possibility that a renewed motion for conditional collective certification might succeed on remand under the revised standard. *See supra* n. 5.

# *Lawrence v. Sol G. Atlas Realty Co.*

United States Court of Appeals for the Second Circuit

September 16, 2016, Argued; October 28, 2016, Decided

Docket No. 15-3087

**Reporter**

841 F.3d 81 *; 2016 U.S. App. LEXIS 19446 **; 207 L.R.R.M. 3521; 129 Fair Empl. Prac. Cas. (BNA) 1229; 167 Lab. Cas. (CCH) P10,960

WINSTON LAWRENCE, Plaintiff-Appellant, - v.- SOL G. ATLAS REALTY CO., INC., PETER FIDOS, and SANDRA ATLAS BASS, Defendants-Appellees.

**Prior History:** Winston Lawrence, a union employee, alleges that his employer, and specifically its CEO and Lawrence's direct supervisor, discriminated against him on the basis of his race and/or national origin in violation of *42 U.S.C. § 1981* ("*Section 1981*"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the New York State Human Rights Law ("NYSHRL"), and retaliated against him in violation of *Section 1981*, *Title VII*, the *NYSHRL*, the *Fair Labor Standards Act ("FLSA")* [**1] , and the New York Labor Law ("NYLL"). The sole issue on appeal is whether the collective bargaining agreement ("CBA"), which requires arbitration of disputes over discrimination, requires arbitration of statutory claims. The United States District Court for the Eastern District of New York (Hurley, J.), held that it does. Based on our conclusion that the CBA's arbitration requirement does not encompass statutory discrimination or retaliation claims with wording that is "clear and unmistakable," we vacate the district court's grant of Defendants' motion to compel arbitration and dismiss the complaint, and we remand for further proceedings.

*Lawrence v. Sol G. Atlas Realty Co., 2015 U.S. Dist. LEXIS 114063 (E.D.N.Y., Aug. 27, 2015)*

**Disposition:** Vacated and remanded.

## Case Summary

**Overview**

ISSUE: Whether the collective bargaining agreement (CBA) contained a clear and unmistakable waiver of the employee's right to pursue his statutory claims in federal court. HOLDINGS: [1]-The CBA did not effectuate a clear and unmistakable waiver of the employee's right to pursue his statutory claims in federal court because the "No Discrimination" provision could have plausibly been interpreted to require arbitration of contractual disputes only because it made no mention of claims or causes of action, and it cited no statutes; [2]-Because the CBA did not clearly and unmistakably require arbitration of statutory discrimination claims (and did not treat retaliation separately from discrimination), the employee's retaliation claims, like his discrimination claims, could have been pursued in federal court.

**Outcome**

Judgment vacated and remanded.

**Counsel:** ANDREW S. GOODSTADT, Goodstadt Law Group, PLLC, Carle Place, NY, for Plaintiff-Appellant.

JESSICA M. BAQUET (Stanley A. Camhi, on the brief), Jaspan Schlesinger LLP, [**2] Garden City, NY, for Defendants-Appellees.

**Judges:** Before: JACOBS, LIVINGSTON, Circuit Judges, and RAKOFF,* District Judge.

**Opinion by:** DENNIS JACOBS

## Opinion

[*82] DENNIS JACOBS, Circuit Judge:

Winston Lawrence, a union member, alleges that his employer, and specifically its CEO and Lawrence's direct supervisor, discriminated and retaliated against him in violation of several federal and New York state statutes. The sole issue on appeal is whether the collective bargaining agreement ("CBA") contains a "clear and unmistakable" waiver of Lawrence's right to pursue his statutory claims in federal court. The United States District Court for the Eastern District of New York (Hurley, J.) held that it does, granted Defendants' motion to compel arbitration, and dismissed the complaint. We disagree, and accordingly, we vacate and

* Judge Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

remand for further proceedings.

## BACKGROUND

Plaintiff is a black man of West Indian descent who has been employed as a porter by Sol G. Atlas Realty Co., Inc. ("Atlas"), a property management company, since 1994. Plaintiff alleges that Atlas, his Supervisor Peter Fidos, and Atlas CEO Sandra [**3] Atlas Bass (collectively, "Defendants") discriminated against him on the basis of his race and/or national origin in violation of *42 U.S.C. § 1981* ("*Section 1981*"), Title VII of the Civil Rights Act of 1964 ("Title VII"), and the New York State Human Rights Law ("NYSHRL"), and retaliated against him in violation of *Section 1981*, *Title VII*, the *NYSHRL*, the *Fair Labor Standards Act* ("FLSA"), and the New York Labor Law ("NYLL"). Specifically, he claims that Defendants subjected him (and other black and West Indian porters) to unequal scrutiny and discipline, to harassment, and to other disadvantageous conditions of employment, and that they retaliated against him when he registered complaints internally and to the EEOC, and when he opposed Atlas's failure to pay overtime to its employees (in part by participating in a Department of Labor investigation). The alleged acts of retaliation included imposing discipline and docking his pay without basis, threatening to terminate his employment, and manipulating the time clock to create the impression that he was late.

As a member of the Service Employees International Union, Local 32BJ, Plaintiff's employment is governed by a collective bargaining agreement. Collectively bargained agreements to arbitrate statutory discrimination claims must be [**4] "clear and unmistakable." *Wright v. Universal Mar. Serv. Corp., 525 U.S. 70, 80-81, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998)*; see also *Rogers [*83] v. New York University, 220 F.3d 73, 76-77 (2d Cir. 2000)* (per curiam), abrogated on other grounds by *14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 129 S. Ct. 1456, 173 L. Ed. 2d 398 (2009)*. Article X, Clause 23 of the CBA is entitled, "No Discrimination," and it states in pertinent part:

> There shall be no discrimination against any present or future employee by reason of race, creed, color, age, disability of an individual in accordance with applicable law, national origin, sex, sexual orientation, union membership, or any characteristic protected by law. Any disputes under this provision shall be subject to the grievance and arbitration procedure (Article V).

J. App'x 50.

Article V of the CBA sets out the mechanism of arbitration. It states in relevant part that "[a] grievance shall first be taken up directly between the Employer and the Union"; that "[a]ny dispute or grievance between the Employer and the Union which cannot be settled directly by them shall be submitted to the Office of the Contract Arbitrator . . ."; and that "[t]he procedure herein with respect to matters over which a Contract Arbitrator has jurisdiction shall be the sole and exclusive method for the determination of all such issues . . . ." J. App'x 41-42.

Various provisions in CBA Articles II, IX, and X regulate terms and conditions of employment, including [**5] wages and hours. None of these provisions, however, mention Atlas's obligation to comply with *Section 1981*, *Title VII*, the *NYSHRL*, *FLSA*, or NYLL, or with statutory law generally.

Plaintiff brought suit in June 2014 alleging discrimination under *Section 1981*, *Title VII*, and the NYSHRL and retaliation under *Section 1981*, *Title VII*, the *NYSHRL*, the *FLSA*, and the *NYLL*. Defendants' motion to compel arbitration pursuant to the Federal Arbitration Act and dismiss the complaint pursuant to *Federal Rule of Civil Procedure ("Rule") 12(b)(1)* or *12(b)(6)* was referred to Magistrate Judge Gary R. Brown, whose report recommended that Defendants' motion to compel arbitration be granted and the case be dismissed. The district court adopted Magistrate Judge Brown's report and held that the CBA clearly and unmistakably requires arbitration of Plaintiff's claims under this Court's holding in Rogers.[1]

## DISCUSSION

We review de novo a district court's grant of a motion to compel arbitration, *Cohen v. UBS Fin. Servs., Inc., 799 F.3d 174, 177 (2d Cir. 2015)*, and its grant of a motion to dismiss a complaint under *Rules 12(b)(1)* or *12(b)(6)*, *ACLU v. Clapper, 785 F.3d 787, 800 (2d Cir. 2015)*.

Claims under *Section 1981*, *Title VII*, the *NYSHRL*, the *FLSA*, and *NYLL* may be made subject to arbitration. The issue is whether the CBA governing Plaintiff's employment contains a "clear and unmistakable" waiver of Plaintiff's right to pursue his statutory claims in federal court. In order for a mandatory arbitration [**6] provision in a CBA to encompass an employee's statutory discrimination claims, the inclusion of such claims must be unmistakable, so that the wording is not susceptible to a contrary reading. See *Wright, 525 U.S. at 80-81*. In Wright, the CBA stated in pertinent part that "no provision or part of this Agreement shall be violative of any Federal or State Law," *id. at 73*, and [*84] that "[m]atters under dispute which cannot be promptly settled between the Local and an individual Employer shall, no later than 48

[1] The case was dismissed, rather than stayed pending arbitration, because none of the parties requested a stay.

hours after such discussion, be referred in writing covering the entire grievance to a Port Grievance Committee," *id. at 72*. The Court held that these provisions did not clearly and unmistakably require arbitration of the plaintiff's claim under the Americans with Disabilities Act. *Id. at 80*. Among other reasons cited, the Court stated that the "arbitration clause is very general, providing for arbitration of 'matters under dispute,' . . . which could be understood to mean matters in dispute under the contract." Id. (citation omitted).

We had occasion to apply the "clear and unmistakable" standard in Rogers v. New York University, in which an employer sought to compel arbitration of a union employee's claims under the *Americans with Disabilities Act*, the *Family Medical Leave Act*, and *New York State and City Human Rights Laws*. *220 F.3d at 76-77*. The CBA stated, [**7] in relevant part, that: (1) "there shall be no discrimination as defined by applicable Federal, New York State, and New York City laws, against any present or future employee by reason of . . . physical or mental disability"; and (2) "any dispute concerning the interpretation, application, or claimed violation of a specific term or provision of this Agreement" must be arbitrated. *Id. at 74, 76* (alteration in original). We held that the provisions at issue did not clearly and unmistakably waive the employee's federal forum rights because they neither explicitly compelled arbitration of statutory (as opposed to contractual) causes of action, nor did they incorporate specific antidiscrimination statutes. *Id. at 77*.

Our holding in *Rogers* finds support among our sister circuits, which have likewise interpreted the "clear and unmistakable" standard to require specific references in the CBA either to the statutes in question or to statutory causes of action generally. See, e.g., *Cavallaro v. UMass Memorial Healthcare, Inc., 678 F.3d 1, 7 n.7 (1st Cir. 2012)* ("A broadly-worded arbitration clause . . . will not suffice; rather, something closer to specific enumeration of the statutory claims to be arbitrated is required."); *Carson v. Giant Food, Inc., 175 F.3d 325, 331-32 (4th Cir. 1999)* (explaining that the "requisite degree of clarity can be achieved [**8] by two different approaches," either: (1) "the CBA must contain a clear and unmistakable provision under which the employees agree to submit to arbitration all federal causes of action arising out of their employment"; or (2) it "must include an explicit incorporation of statutory antidiscrimination requirements" (internal quotation marks omitted)); *Ibarra v. United Parcel Serv., 695 F.3d 354, 359-60 (5th Cir. 2012)* ("[C]ourts have concluded that for a waiver of an employee's right to a judicial forum for statutory discrimination claims to be clear and unmistakable, the CBA must, at the very least, identify the specific statutes the agreement purports to incorporate or include an arbitration clause that explicitly refers to statutory claims."); *Bratten v. SSI Servs., Inc., 185 F.3d 625, 631 (6th Cir. 1999)* ("[A] statute must specifically be mentioned in a CBA for it to even approach Wright's 'clear and unmistakable' standard.").

The CBA here does not satisfy this exacting standard. Article X, Clause 23 -- the "No Discrimination" provision -- clearly prohibits discrimination on the basis of "any characteristic protected by law" and compels arbitration of "[a]ny disputes under [that] provision," unmistakably creating a contractual right of employees to be free from unlawful discrimination that is [*85] subject to arbitration. J. [**9] App'x 50. However, a contractual dispute is not the same thing as a statutory claim, even if the issues involved are coextensive. *Wright, 525 U.S. at 76* (observing that "a grievance is designed to vindicate a 'contractual right' under a CBA, while a lawsuit under Title VII asserts 'independent statutory rights accorded by Congress'" (quoting *Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-50, 94 S. Ct. 1011, 39 L. Ed. 2d 147 (1974)*)).

The "No Discrimination" provision may plausibly be interpreted to require arbitration of contractual disputes only. It makes no mention of "claims" or "causes of action." It cites no statutes. It refers to disputes under "this provision," not under statutes. The references to "law" do no more than define the characteristics on which discrimination is contractually forbidden under the CBA. They do not suggest that statutory discrimination claims based on those characteristics are subject to arbitration.[2]

Our conclusion -- that the CBA does not effectuate a clear and unmistakable waiver -- is consistent with both the Supreme Court's decision [**10] in *Wright* and our decision in *Rogers*. As in Wright, the relevant wording here -- the "No Discrimination" provision's reference to "any disputes under this provision" and the arbitration provision's reference to "[a]ny dispute or grievance between the Employer and the Union" -- could be interpreted to mean disputes under the CBA and not claims under antidiscrimination statutes.[3] See

[2] Significantly, the arbitration procedure outlined in Article V of the CBA covers "[a]ny dispute or grievance between the Employer and the Union." J. App'x 41. A statutory discrimination claim would be between the employer and the employee.

[3] As the Supreme Court recently held in *M&G Polymers USA, LLC v. Tackett, 135 S. Ct. 926, 933, 190 L. Ed. 2d 809 (2015)*, "[w]e interpret collective-bargaining agreements, including those establishing [**11] ERISA plans, according to ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy." Defendants argue that such a focus on the plain meaning of the CBA at issue discloses a clear intent to arbitrate all disagreements pertaining to discrimination. However, Tacket did not involve an arbitration provision and did not presume to alter the

*Wright, 525 U.S. at 80*. Likewise, as in Rogers, the CBA here broadly prohibits the employer from engaging in unlawful discrimination and compels arbitration of "disputes" regarding this prohibition without making unmistakably clear that "disputes" includes statutory claims. The CBA in Rogers and the CBA here both reference statutory law: in Rogers, "there shall be no discrimination as defined by applicable Federal, New York State, and New York City laws," *220 F.3d at 74*; here, "[t]here shall be no discrimination . . . by reason of . . . any characteristic protected by law," J. App'x 50; but these references define the discrimination that is prohibited, not the type of dispute (statutory rather than just contractual) that is subject to arbitration.

Our conclusion applies with equal force to Plaintiff's retaliation claims. "Retaliation . . . is a form of discrimination because the complainant is being subjected to differential treatment." *Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173-74, 125 S. Ct. 1497, 161 L. Ed. 2d 361 (2005)* (internal quotation marks omitted). Because the CBA does not clearly and unmistakably require arbitration of statutory discrimination claims (and does not treat retaliation separately from discrimination), Plaintiff's retaliation claims, like his discrimination [*86] claims, may be pursued in federal court.

## CONCLUSION

For the foregoing reasons, we vacate the district court's grant of Defendants' motion to compel arbitration and dismiss the complaint, and we remand for further proceedings.

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End of Document

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well-established "clear and unmistakable" standard applicable to such provisions.

2016 WL 6879615
United States District Court,
E.D. Texas, Sherman Division.

State of Nevada, et al
v.
United States Department of Labor, et al.

Civil Action No. 4:16–CV–00731
|
Filed 11/22/2016

**Synopsis**

**Background:** States and business organizations brought separate actions against the Department of Labor, challenging a rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from the Fair Labor Standards Act's (FLSA) overtime requirements. Following consolidation, plaintiffs moved for emergency preliminary injunctive relief.

**Holdings:** The District Court, Amos L. Mazzant, J., held that:

[1] States had Article III standing to challenge the final rule;

[2] States' challenge to automatic updating mechanism was ripe for adjudication;

[3] Department exceeded its authority in creating a minimum salary requirement for the executive, administrative, and professional exemption;

[4] even if the executive, administrative, and professional exemption were ambiguous, the Department's interpretation not a permissible construction;

[5] States would suffer irreparable harm in the absence of a preliminary injunction;

[6] balance of hardships supported grant of a preliminary injunction; and

[7] public interest factors supported grant of a preliminary injunction.

Motion granted.

West Headnotes (27)

**[1] Labor and Employment**
Parties;standing

States had Article III standing to challenge a Department of Labor (DOL) final rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from the Fair Labor Standards Act's (FLSA) overtime requirements, where States faced imminent monetary loss, in the form of higher wages, that were traceable to the final rule, and States would receive redress if the final rule was found to be unlawful. U.S. Const. art. 3, § 2, cl. 1.; Fair Labor Standards Act of 1938 § 13, 29 U.S.C.A. § 213(a)(1).

Cases that cite this headnote

**[2] Federal Civil Procedure**
In general;injury or interest

**Federal Courts**
Case or Controversy Requirement

A party that cannot present a case or controversy within the meaning of Article III does not have standing. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

**[3] Federal Civil Procedure**
In general;injury or interest

**Federal Civil Procedure**
Causation;redressability

Under the three-part test for Article III standing, a plaintiff must show an injury that is concrete, particularized, and actual or imminent; fairly traceable to the challenged

action; and redressable by a favorable ruling. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[4] **Federal Courts**
Wages, hours, and working conditions

State's challenge to the automatic updating mechanism of a final rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from the Fair Labor Standards Act's (FLSA) overtime requirements was ripe for adjudication, where the States, in questioning whether the rule complied with the Administrative Procedure Act (APA), were only raising legal arguments, the rule was published and set to go into effect, and the facts of the case had been sufficiently developed. 5 U.S.C.A. § 551 et seq.; Fair Labor Standards Act of 1938 § 13, 29 U.S.C.A. § 213(a)(1).

Cases that cite this headnote

[5] **Administrative Law and Procedure**
Finality;ripeness

A challenge to administrative regulations is fit for review if: (1) the questions presented are purely legal ones; (2) the challenged regulations constitute final agency action; and (3) further factual development would not significantly advance the Court's ability to deal with the legal issues presented.

Cases that cite this headnote

[6] **Injunction**
Grounds in general;multiple factors

A party seeking a preliminary injunction must establish the following elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that plaintiffs will suffer irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest.

Cases that cite this headnote

[7] **Injunction**
Extraordinary or unusual nature of remedy

**Injunction**
Standard of proof in general

A preliminary injunction is an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements; nevertheless, a movant is not required to prove its case in full at a preliminary injunction hearing.

Cases that cite this headnote

[8] **Injunction**
Discretionary Nature of Remedy

The decision whether to grant a preliminary injunction lies within the sound discretion of the district court.

Cases that cite this headnote

[9] **Labor and Employment**
Public Employment;Public Works

The Fair Labor Standards Act (FLSA) applies to State governments. Fair Labor Standards Act of 1938 § 6, 29 U.S.C.A. § 206.

Cases that cite this headnote

[10] **Administrative Law and Procedure**
Plain, literal, or clear meaning; ambiguity

**Administrative Law and Procedure**
Erroneous construction;conflict with statute

When reviewing an agency's construction of a statute, a court applies a two-step process: first, the court determines whether Congress has directly spoken to the precise question at issue, and if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect

to the unambiguously expressed intent of Congress, and second, if Congress has not unambiguously expressed its intent regarding the precise question at issue, then the court will defer to the agency's interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute.

Cases that cite this headnote

[11] **Administrative Law and Procedure**
Plain, literal, or clear meaning; ambiguity

At the first step of *Chevron* analysis, a court must apply traditional tools of statutory construction to determine whether the statute is ambiguous.

Cases that cite this headnote

[12] **Statutes**
Language

**Statutes**
Context

Statutory construction begins with the language of the statute, the specific context in which that language is used, and the broader context of the statute as a whole.

Cases that cite this headnote

[13] **Statutes**
Purpose and intent

**Statutes**
Legislative History

A court may consider a statute's legislative history and its purpose to ascertain Congress's intent.

Cases that cite this headnote

[14] **Administrative Law and Procedure**
Erroneous construction;conflict with statute

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.

Cases that cite this headnote

[15] **Labor and Employment**
Injunction against enforcement of regulations

The Department of Labor, in promulgating a final rule requiring executive, administrative, and professional workers to have a minimum salary in order to be exempt from the Fair Labor Standards Act's (FLSA) overtime requirement, exceeded the authority delegated to the Department by Congress, and thus plaintiffs seeking to preliminarily enjoin the rule's enforcement were likely to succeed on the merits, where the Congress defined the executive, administrative, and professional exemption with regard to duties, without mention of salaries. Fair Labor Standards Act of 1938 § 13, 29 U.S.C.A. § 213(a)(1).

Cases that cite this headnote

[16] **Statutes**
Plain language;plain, ordinary, common, or literal meaning

A court assumes Congress's intent from the plain meaning of a word when the statute does not define a term.

Cases that cite this headnote

[17] **Statutes**
Dictionaries

Beyond the law itself, dictionary definitions inform the plain meaning of a statute.

Cases that cite this headnote

[18] **Administrative Law and Procedure**
Labor, employment, and public officials

**Labor and Employment**
Scope of review

Even assuming that executive, administrative, and professional exemption from the Fair

Labor Standards Act's (FLSA) overtime requirements was ambiguous, a Department of Labor rule excluding employees qualifying for the exemption on the basis of salary was not a permissible construction of the FLSA, and thus was not subject to deference under the second step of *Chevron* analysis. Fair Labor Standards Act of 1938 § 13, 29 U.S.C.A. § 213(a)(1).

1 Cases that cite this headnote

**[19] Injunction**

Irreparable injury

**Injunction**

Recovery of damages

Harm is irreparable, as required to grant a preliminary injunction, where there is no adequate remedy at law, such as monetary damages.

Cases that cite this headnote

**[20] Injunction**

Clear, likely, threatened, anticipated, or intended injury

An injunction is appropriate only if the anticipated injury is imminent and not speculative.

Cases that cite this headnote

**[21] Labor and Employment**

Injunction against enforcement of regulations

States would suffer irreparable harm in the absence of a preliminary injunction prohibiting enforcement of a Department of Labor final rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from the Fair Labor Standards Act's (FLSA) overtime requirements, where, in the absence of a preliminary injunction, States claimed that it would cost millions of dollars to comply, and States would have to evaluate whether its agencies should increase the salaries of their employees to the new minimum salary level or allow these employees to become non-exempt and eligible for overtime. Fair Labor Standards Act of 1938 § 13, 29 U.S.C.A. § 213(a)(1).

Cases that cite this headnote

**[22] Injunction**

Balancing or weighing hardship or harm

When deciding whether to grant an injunction, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.

Cases that cite this headnote

**[23] Labor and Employment**

Injunction against enforcement of regulations

Balance of hardships supported grant of a preliminary injunction prohibiting enforcement of a Department of Labor final rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from the Fair Labor Standards Act's (FLSA) overtime requirements, where, in the absence of a preliminary injunction, States would be required to spend substantial sums of unrecoverable public funds, and the rule would cause interference with government services, administrative disruption, employee terminations or reclassifications. Fair Labor Standards Act of 1938 § 13, 29 U.S.C.A. § 213(a)(1).

Cases that cite this headnote

**[24] Injunction**

Public interest considerations

In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.

Cases that cite this headnote

[25] **Labor and Employment**
Injunction against enforcement of regulations

Public interest supported grant of a preliminary injunction prohibiting enforcement of a Department of Labor final rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from the Fair Labor Standards Act's (FLSA) overtime requirements, where, if the Department lacked the authority to promulgate the rule, than the rule would be rendered invalid and the public would not be harmed by its enforcement, and if the rule was valid, a preliminary injunction would only delay the regulation's implementation. Fair Labor Standards Act of 1938 § 13, 29 U.S.C.A. § 213(a)(1).

1 Cases that cite this headnote

[26] **Injunction**
Authority of court;jurisdiction and venue

Absent contrary intent from Congress, federal courts have the power to issue injunctions in cases where they have jurisdiction.

Cases that cite this headnote

[27] **Injunction**
Scope of Relief in General

The scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class.

Cases that cite this headnote

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## MEMORANDUM OPINION AND ORDER

AMOS L. MAZZANT, UNITED STATES DISTRICT JUDGE

***1** Pending before the Court is the Emergency Motion for Preliminary Injunction (Dkt. # 10) filed by the State of Nevada and twenty other states (the "State Plaintiffs"). After considering the relevant pleadings, exhibits, and argument at the preliminary injunction hearing, the Court enters the findings of fact and conclusions of law set forth below. Based on these findings and conclusions, the Court grants the State Plaintiffs' motion.

## BACKGROUND

Congress enacted the Fair Labor Standards Act ("FLSA") in 1938. The FLSA requires that employees engaged in commerce receive not less than the federal minimum wage (currently, $7.25 per hour) for all hours worked. Employees are also entitled to overtime pay at one and one-half times the employee's regular rate of pay for all hours worked above forty in a week. When enacted, the FLSA contained a number of exemptions to the overtime requirement. Section 213(a)(1) of the FLSA exempts from both minimum wage and overtime requirements "any employee employed in a bona fide executive, administrative, or professional capacity." 29 U.S.C. § 213(a)(1). This exemption is commonly referred to as the "white collar" or "EAP" exemption. While the FLSA did not define the terms "bona fide executive, administrative, or professional capacity," Congress delegated to the Secretary of Labor the power to define and delimit these terms through regulations. The Secretary of Labor authorized the Department of Labor (the "Department") to issue regulations to interpret the EAP exemption.

The Department's initial regulations, found in 29 C.F.R. § 541, defined "executive," "administrative," and "professional" employees based on the duties they performed in 1938. Two years later, the Department

revised the regulations to require EAP employees to be paid on a salary basis.

In 1949, the Department again amended the regulations. These regulations established the "long" test and the "short" test for assessing whether an employee qualified for the EAP exemption. The long test combined a low minimum salary level with a rigorous duties test, which restricted the amount of nonexempt work an employee could do to remain exempt. The short test combined a higher minimum salary level with an easier duties test that did not restrict amounts of nonexempt work. After the Department implemented the long and short tests, Congress amended 29 U.S.C. § 213(a)(1) in 1961. This amendment permitted the Department to define and delimit the EAP categories "from time to time."

In 2004, the Department eliminated the long and short tests, replacing them with the "standard" duties test that did not restrict the amount of nonexempt work an exempt employee could perform. The Department also set a salary level equivalent to the lower salary that the Department previously used for the long test. The 2004 regulations, which are currently in effect, require an employee to meet the following three criteria to qualify for the EAP exemption. First, the employee must be paid on a salary basis (the "salary-basis test"). Second, an employee must be paid at least the minimum salary level established by the regulations (the "salary-level test"). The current minimum salary level to qualify for the exemption is $455 per week ($23,660 annually). And third, an employee must perform executive, administrative, or professional duties (the "duties test").

***2** On March 23, 2014, President Obama issued a memorandum directing the Secretary of Labor to "modernize and streamline the existing overtime regulations for executive, administrative, and professional employees." Presidential Memorandum of March 13, 2014; Updating and Modernizing Overtime Regulations, 79 Fed. Reg. 18,737, 18,737 (Mar. 13, 2014). Although the Department revised the regulations in 2004, the President opined, "regulations regarding...overtime requirements...for executive, administrative, and professional employees...have not kept up with our modern economy." *Id.* In response to the President's memorandum, the Department published a Notice of Proposed Rulemaking to revise 29 C.F.R. Part 541. The Department received more than 293,000 comments on the proposed rule, including comments from businesses and state governments, before publishing the final version of the rule (the "Final Rule") on May 23, 2016.

Effective December 1, 2016, the Final Rule will increase the minimum salary level for exempt employees from $455 per week ($23,660 annually) to $921 per week ($47,892 annually). The new salary level is based upon the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country, which is currently the South. The Final Rule also establishes an automatic updating mechanism that adjusts the minimum salary level every three years. The first automatic increase will occur on January 1, 2020.

The State Plaintiffs filed suit against the Department, the Wage and Hour Division of the Department, and their agents (collectively, "Defendants") challenging the Final Rule (Dkt. # 1). On October 12, 2016, the State Plaintiffs moved for emergency preliminary injunctive relief (Dkt. # 10). Defendants filed their response on October 31, 2016 (Dkt. # 37). The State Plaintiffs filed their reply on November 10, 2016 (Dkt. # 50). Defendants filed their sur-reply on November 15, 2016 (Dkt. # 51).

The Plano Chamber of Commerce and over fifty other business organizations (the "Business Plaintiffs") challenged the Final Rule in *Plano Chamber of Commerce et al. v. Perez et al.*, No. 4:16–cv–732 (E.D. Tex. Sept. 20, 2016). On October 14, 2016, the Business Plaintiffs moved for expedited summary judgment (No. 4:16–cv–732, Dkt. # 7; No. 4:16–cv–731, Dkt. # 35). The Court consolidated the Business Plaintiffs' action with the State Plaintiffs' action on the unopposed motion from the Business Plaintiffs. In evaluating the merits of the State Plaintiffs' preliminary injunction, the Court considered the Business Plaintiffs' summary judgment motion as an amicus brief in support of the preliminary injunction for overlapping issues (Dkt. # 33). The Court also considered Defendants' opposing amicus brief (Dkt. # 46).

On November 16, 2016, the Court held a preliminary injunction hearing to consider oral argument regarding the State Plaintiffs' motion.

## JURISDICTION

This matter presents a federal question and therefore the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331. The Court has authority to grant injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure and review administrative decisions pursuant to 5 U.S.C. § 702 of the Administrative Procedures Act ("APA").

[1] [2] [3] The Court begins by examining whether the State Plaintiffs have standing to sue in federal court. Article III of the Constitution limits federal jurisdiction to "Cases" and "Controversies." A party that cannot present a case or controversy within the meaning of Article III does not have standing. Under the three-part test for Article III standing, a plaintiff must show an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, —— U.S. ——, 133 S.Ct. 1138, 1147, 185 L.Ed.2d 264 (2013) (internal quotation marks and citation omitted). The State Plaintiffs face imminent monetary loss that is traceable to the Department's Final Rule. They would also receive redress if the Court determines the Final Rule is unlawful. Defendants do not contest standing. Therefore, the Court confirms that the State Plaintiffs have Article III standing.

*3 [4] [5] Defendants claim the State Plaintiffs' challenges to the automatic updating mechanism are not ripe for adjudication. The Court is not persuaded by this argument. A challenge to administrative regulations is fit for review if "(1) the questions presented are 'purely legal one[s],' (2) the challenged regulations constitute 'final agency action,' and (3) further factual development would not 'significantly advance [the Court's] ability to deal with the legal issues presented.' " *Texas v. United States*, 497 F.3d 491, 498–99 (5th Cir. 2007) (internal quotation marks omitted) (citing *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 812, 123 S.Ct. 2026, 155 L.Ed.2d 1017 (2003)). Here, the State Plaintiffs make only legal arguments. They question the lawfulness of the Final Rule, the Department's authority to promulgate it, and whether the automatic updating mechanism complies with APA requirements. All parts of the Final Rule constitute final agency action because the rule was published and is set to go into effect on December 1, 2016. Further, the Final Rule creates new legal obligations for employers who must pay a higher salary level for certain employees to be exempt from overtime. *See Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (stating the two-part test for "final agency action" to include an action that marks the consummation of the agency's decision-making process and an action where "rights or obligations have been determined, or from which legal consequences will flow"). The facts of this case have sufficiently developed to address the legality of the Department's Final Rule at this stage in the litigation. Accordingly, the automatic updating mechanism is ripe for review.

## LEGAL STANDARD

[6] [7] [8] A party seeking a preliminary injunction must establish the following elements: (1) a substantial likelihood of success on the merits; (2) a substantial threat that plaintiffs will suffer irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any damage that the injunction might cause the defendant; and (4) that the injunction will not disserve the public interest. *Nichols v. Alcatel USA, Inc.*, 532 F.3d 364, 372 (5th Cir. 2008). "A preliminary injunction is an extraordinary remedy and should only be granted if the plaintiffs have clearly carried the burden of persuasion on all four requirements." *Id.* Nevertheless, a movant " 'is not required to prove its case in full at a preliminary injunction hearing.' " *Fed. Sav. & Loan Ins. Corp. v. Dixon*, 835 F.2d 554, 558 (5th Cir. 1987) (quoting *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981)). The decision whether to grant a preliminary injunction lies within the sound discretion of the district court. *Weinberger v. Romero–Barcelo*, 456 U.S. 305, 320, 102 S.Ct. 1798, 72 L.Ed.2d 91 (1982).

## ANALYSIS

A. Likelihood of Success on the Merits

To prevail on their motion for preliminary injunction, the State Plaintiffs must demonstrate a substantial likelihood of success on the merits. This requires a movant to present a prima facie case. *Daniels Health Scis., LLC v. Vascular Health Scis.*, 710 F.3d 579, 582 (5th Cir. 2013) (citing *Janvey v. Alguire*, 647 F.3d 585, 595–96 (5th Cir. 2011)). A prima face case does not mean the State Plaintiffs must prove they are entitled to summary judgment. *Byrum v. Landreth*, 566 F.3d 442, 446 (5th Cir. 2009).

1. The FLSA's Application to the States

The State Plaintiffs argue the FLSA's overtime requirements violate the Constitution by regulating the States and coercing them to adopt wage policy choices that adversely affect the States' priorities, budgets, and services. The State Plaintiffs rely on *National League of Cities v. Usery*, which held the Tenth Amendment limited Congress's power to apply the FLSA's minimum wage and overtime protections to the States. 426 U.S. 833, 851–52, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). The Supreme Court recognized:

> One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided where these employees may be called upon to work overtime.

*Id.* at 845, 96 S.Ct. 2465. The State Plaintiffs acknowledge that the Supreme Court overruled *Usery* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985). However, they urge *Garcia* has been, or should be, overruled because subsequent decisions have called into question *Garcia*'s continuing validity. Accordingly, the State Plaintiffs claim the Department's Final Rule displaces the State Plaintiffs' independence to set employee compensation, similar to the FLSA amendments at issue in *Usery*.

***4** Defendants contend that Supreme Court precedent in *Garcia* forecloses the State Plaintiffs' argument.

*Garcia* controls the disposition of this issue. The Supreme Court in *Garcia* established that Congress had authority under the Commerce Clause to impose the FLSA's minimum wage and overtime requirements on state and local employees. 469 U.S. at 554, 105 S.Ct. 1005. The Supreme Court overruled *Usery* because it found rules based on the subjective determination of "integral" or "traditional" governmental functions provide little or no guidance in determining the boundaries of federal and state power. *Id.* at 546–47, 105 S.Ct. 1005. In the line of cases following *Garcia*, the Supreme Court has imposed limits on the power of Congress to enact legislation that affects state and local governments. *See, e.g., Printz v. United States*, 521 U.S. 898, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (holding Congress cannot compel the states to enact or administer a federal regulatory program). However, no Supreme Court case has specifically overruled *Garcia*. The Supreme Court has declared that lower courts must follow precedent and allow the Supreme Court to overrule its decisions. *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)).

Therefore, the Court will follow *Garcia* and apply the FLSA to the States.

**[9]** The State Plaintiffs also argue the FLSA does not apply to the States based on the clear statement rule. This argument likewise does not succeed. Under the FLSA, employers are required to pay the federal minimum wage to their employees or those "employed in an enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. § 206. "Enterprise engaged in commerce or in the production of goods for commerce" is defined to include the "activity of a public agency." *Id.* § 203(s)(1)(C). A "public agency" means "the government of a State or political subdivision thereof; any agency of...a State, or a political subdivision of a State." *Id.* § 203(x). Thus, Congress was clear in its intention for the FLSA to apply to States.

2. Statutory Construction and *Chevron* Deference

**[10]** When reviewing an agency's construction of a statute, the Court applies a two-step process. The Court first determines "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43, 104 S.Ct. 2778. Second, if Congress has not unambiguously expressed its intent regarding the precise question at issue, then the Court will defer to the agency's interpretation unless it is "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844, 104 S.Ct. 2778.

**[11] [12] [13] [14]** At the first step, the Court must apply "traditional tools of statutory construction" to determine whether the statute is ambiguous. *Id.* at 843 n.9, 104 S.Ct. 2778. A statute is ambiguous if it is susceptible to more than one reasonable interpretation or more than one accepted meaning. *United Servs. Auto Ass'n v. Perry*, 102 F.3d 144, 146 (5th Cir. 1996). Statutory construction begins with the language of the statute, "the specific context in which that language is used, and the broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). The Court may also consider the statute's legislative history and its purpose to ascertain Congress's intent. *Bellum v. PCE Constructors, Inc.*, 407 F.3d 734, 739 (5th Cir. 2005). "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778.

***5 [15]** Section 213(a)(1) provides, in relevant part, that "any employee employed in a bona fide executive, administrative, or professional capacity...as such terms are defined and delimited from time to time by regulations of the Secretary" shall be exempt from minimum wage and overtime requirements. 29 U.S.C. § 213(a)(1).

The State Plaintiffs assert the plain language of the EAP exemption is clear and illustrates Congress's intent. They argue Congress directly and unambiguously spoke about the type of employees that must be exempt from overtime and the considerations to evaluate such employees. Thus, the State Plaintiffs maintain that the Court should decide this issue at the first step of the *Chevron* analysis.

Defendants respond that Section 213(a)(1) is ambiguous because Congress did not address or define the terms "bona fide executive, administrative, or professional capacity." Instead, Congress delegated to the Department the broad authority to interpret the terms through regulations. [1] Defendants contend the Final Rule is within its delegated authority and should be reviewed under the deferential standard applied at the second step of *Chevron.*

**[16] [17]** The precise question at issue here is: What constitutes an employee employed in an executive, administrative, or professional capacity? The statute is not silent in answering this question. The Court assumes Congress's intent from the plain meaning of a word when the statute does not define a term. *INS v. Phinpathya*, 464 U.S. 183, 189, 104 S.Ct. 584, 78 L.Ed.2d 401 (1984). Because Section 213 does not define the terms "executive," "administrative," and "professional," the Court considers their plain meaning at or near the time the statute was enacted. *Taniguchi v. Kan Pac. Saipan, Ltd.*, —— U.S. ——, 132 S.Ct. 1997, 2002, 182 L.Ed.2d 903 (2012). "Beyond the law itself, dictionary definitions inform the plain meaning of a statute." *United States v. Radley*, 632 F.3d 177, 182–83 (5th Cir. 2011) (citing *United States v. Ferguson*, 369 F.3d 847, 851 (5th Cir. 2004)).

The Oxford English Dictionary defines "executive" as someone "[c]apable of performance; operative...[a]ctive in execution, energetic...[a]pt or skillful in execution." *Executive*, 8 *The Oxford English Dictionary* (1st ed. 1933). "Administrative" is defined as "[p]ertaining to, or dealing with, the conduct or management of affairs; executive." *Administrative*, 1 *The Oxford English Dictionary* (1st ed. 1933). And the dictionary defines "professional" as "[p]ertaining to, proper to, or connected with a or one's profession or calling...[e]ngaged in one of the learned or skilled professions...[t]hat follows an occupation as his (or her) profession, life-work, or means of livelihood." *Professional*, 8 *The Oxford English Dictionary* (1st ed. Supp. 1933). These words relate to a person's performance, conduct, or function without suggesting salary.

***6** After reading the plain meanings together with the statute, it is clear Congress intended the EAP exemption to apply to employees doing actual executive, administrative, and professional duties. In other words, Congress defined the EAP exemption with regard to duties, which does not include a minimum salary level. The statute's use of "bona fide" also confirms Congress's intent. "Bona fide" modifies the terms "executive, administrative, and professional capacity." The Oxford English Dictionary defines "bona fide" as "[i]n good faith, with sincerity; genuinely." *Bona fide*, 1 *The Oxford English Dictionary* (1st ed. 1933). The plain meaning of "bona fide" and its placement in the statute indicate Congress intended the EAP exemption to apply based upon the tasks an employee actually performs. Therefore, Congress unambiguously expressed its intent for employees doing "bona fide executive, administrative, and professional capacity" duties to be exempt from overtime.

Defendants do not dispute or contest the plain meanings of "executive, administrative, and professional" but argue the EAP exemption carries a status as well as function component. Defendants offer the definitions of "capacity" and "position." In 1930, "capacity" was understood to mean "position, condition, character, relation," or "to be in, put into...a position which enables or renders capable." (Dkt. # 51 at p. 6 (citing *Capacity*, 2 *The Oxford English Dictionary* (1st ed. 1933))). "Position" was understood to mean "relative place, situation, or standing; specif[ically], social or official rank or status." (Dkt. # 51 at p. 7 (citing *Position*, *Webster's Dictionary* (1st ed. 1942))). Despite the reference to "status" in the definition of "position," the Court is not convinced the plain meanings of "capacity" and "position" reference or imply a salary requirement as set out in the Final Rule. [2] The Supreme Court interprets "capacity" to counsel "in favor of a functional, rather than a formal, inquiry, one that views an employee's responsibilities in the context of a particular industry in which the employee works." *Christopher v. SmithKline Beecham Corp.*, — U.S. ——, 132 S.Ct. 2156, 2170, 183 L.Ed.2d 153 (2012). The plain meanings of the terms in Section 213(a)(1), as well as Supreme Court precedent, affirms the Court's conclusion that Congress intended the EAP exemption to depend on an employee's duties rather than an employee's salary.

Section 213(a)(1) authorizes the Department to define and delimit these classifications because an employee's duties can change over time. [3] The plain meaning of "define" is to "state explicitly; to limit; to determine the essential qualities of; to determine the precise signification of; to set forth the meaning or meanings of," and the plain meaning of "delimit" is "to fix or mark the limits of: to demarcate; bound." *Walling v. Yeakley*, 140 F.2d 830, 831 (10th Cir. 1944) (internal quotation marks omitted). While this explicit delegation would give the Department significant leeway to establish the types of duties that might qualify an employee for the exemption, nothing in the EAP exemption indicates that Congress intended the Department to define and delimit with respect to a minimum salary level. Thus, the Department's delegation is limited by the plain meaning of the statute and Congress's intent. Directly in conflict with Congress's intent, the Final Rule states that "[w]hite collar employees subject to the salary level test earning less than $913 per week will not qualify for the EAP exemption, and therefore will be eligible for overtime, irrespective of their job duties and responsibilities." With the Final Rule, the Department exceeds its delegated authority and ignores Congress's intent by raising the minimum salary level such that it supplants the duties test. [4] Consequently, the Final Rule does not meet *Chevron* step one and is unlawful. [5] The Department's role is to carry out Congress's intent. If Congress intended the salary requirement to supplant the duties test, then Congress, and not the Department, should make that change.

*7 **[18]** Moreover, even if Section 213(a)(1) is ambiguous, the Department's Final Rule does not deserve deference at *Chevron* step two. The Final Rule is not "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843, 104 S.Ct. 2778. Specifically, the Final Rule does not comport with Congress's intent. The broad purpose of 213(a)(1) was to exempt from overtime those engaged in executive, administrative, and professional capacity duties. Since the FLSA was enacted, the Department has promulgated regulations to define and delimit the EAP exemption. To be exempt from overtime, the regulations require an employee to (1) have EAP duties; (2) be paid on a salary basis; and (3) meet a minimum salary level. The Final Rule raises the salary level from $455 per week ($23,660 annually) to $913 per week ($47,476 annually). The salary level was purposefully set low to "screen[ ] out the obviously nonexempt employees, making an analysis of duties in such cases unnecessary." Harry Weiss, *Report and Recommendations on Proposed Revisions of Regulations, Part 541*, at 7–8 (1949). The Department has admitted that it cannot create an evaluation "based on salary alone." *Id.* at 23. But this significant increase to the salary level creates essentially a de facto salary-only test. For instance, the Department estimates 4.2 million workers currently ineligible for overtime, and who fall below the minimum salary level, will automatically become eligible under the Final Rule without a change to their duties. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391, 32,405 (May 23, 2016). Congress did not intend salary to categorically exclude an employee with EAP duties from the exemption. [6] Therefore, the Final Rule should not be accorded *Chevron* deference because it is contrary to the statutory text and Congress's intent.

3. The Automatic Updating Mechanism Under the APA

Under the Final Rule, the automatic updating mechanism will change the minimum salary level based on the 40th percentile of weekly earnings of full-time salaried workers in the lowest wage region of the country. The State Plaintiffs claim the mechanism violates the APA because the salary level is adjusted without a notice and comment period.

Because the Final Rule is unlawful, the Court concludes the Department also lacks the authority to implement the automatic updating mechanism. Thus, there is no need to address the State Plaintiffs' other arguments.

For the reasons set forth above, the State Plaintiffs have shown a likelihood of success on the merits because the Final Rule exceeds the Department's authority under *Chevron*.

B. Likelihood of Irreparable Harm

**[19]** **[20]** The State Plaintiffs must demonstrate they are "likely to suffer irreparable harm in the absence of preliminary relief." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). "[H]arm is irreparable where there is no adequate remedy at law, such as monetary damages." *Janvey*, 647 F.3d at 600. An injunction is appropriate only if the anticipated injury is imminent and not speculative. *Winter*, 555 U.S. at 22, 129 S.Ct. 365.

**[21]** Defendants suggest the State Plaintiffs allege only financial injury, which is not enough to justify a preliminary injunction. Defendants also take issue with the State Plaintiffs' estimates of costs incurred under the Final Rule.

The State Plaintiffs' proposed preliminary injunction seeks to enjoin the Department from implementing its Final Rule on December 1, 2016. The State Plaintiffs allege that, in the absence of a preliminary injunction, the significant cost of complying with the Final Rule will cause irreparable injury. The State Plaintiffs offer many examples of such costs. They submit declarations from seven state officials who estimate it will cost their respective states millions of dollars in the first year to comply with the Final Rule. The Department agrees the Final Rule will cause increased costs. Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. at 32,547. Besides costs, the State Plaintiffs also allege that compliance costs will impact governmental programs and services. As one example, the State of Kansas must evaluate whether its agencies should increase the salaries of their employees to the new minimum salary level or allow these employees to become non-exempt and eligible for overtime (Dkt. # 10, Exhibit # 3 at ¶ 7). In particular, the Kansas Department for Children and Families and the Kansas Department of Corrections have over fifty percent of employees affected by the Final Rule (Dkt. # 10, Exhibit # 3 at ¶ 11). The Kansas Department for Children and Families and the Kansas Department of Corrections are unable to increase salaries to comply with the Final Rule, as "limited resources of both agencies are already being prioritized toward...critical, public safety-related functions." (Dkt. # 10, Exhibit # 3 at ¶ 12–13). As a result, agencies with budgets constraints, such as the two in Kansas, have relatively few options to comply with the Final Rule—all of which have a detrimental effect on government services that benefit the public. Should the State Plaintiffs ultimately prevail on the merits of their suit, this type of injury cannot be redressed through a judicial remedy after a hearing on the merits.

***8** Accordingly, State Plaintiffs have shown they will suffer irreparable harm if the preliminary injunction is not granted.

C. Balance of Hardships

**[22]** When deciding whether to grant an injunction, "courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter*, 555 U.S. at 9, 129 S.Ct. 365 (citation omitted).

**[23]** The State Plaintiffs contend the balance of hardships favors granting a preliminary injunction because: (1) the States will be required to spend substantial sums of unrecoverable public funds if the Final Rule goes into effect; and (2) the Final Rule causes interference with government services, administrative disruption, employee terminations or reclassifications, and harm to the general public. Defendants respond that the balance of hardships weighs in favor of Defendants because the State Plaintiffs have not established irreparable harm.

Here, as discussed above, the State Plaintiffs have shown a likelihood of success on the merits and irreparable harm. Defendants have not articulated any harm they will suffer from delaying an implementation of the Final Rule.

Accordingly, the State Plaintiffs have demonstrated that the balance of hardships weighs in favor of preliminary injunctive relief.

D. The Public Interest

**[24]** " 'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.' " *Winter*, 555 U.S. at 24, 129 S.Ct. 365 (quoting *Weinberger*, 456 U.S. at 312, 102 S.Ct. 1798). This factor overlaps substantially with the balance-of-hardships requirement. *Id.*

**[25]** The State Plaintiffs assert the public interest necessitates an injunction. They argue the Final Rule harms the public by increasing state budgets, causing layoffs, and disrupting governmental functions.

Defendants maintain injunctive relief would harm the public. Defendants point out that enjoining the Final Rule would deny additional pay, either from an increased salary or from overtime payments, to those who are misclassified.

The Court finds the public interest is best served by an injunction. If the Department lacks the authority to promulgate the Final Rule, then the Final Rule will be rendered invalid and the public will not be harmed by its enforcement. However, if the Final Rule is valid, then an injunction will only delay the regulation's implementation. Due to the approaching effective date of the Final Rule, the Court's ability to render a meaningful decision on the merits is in jeopardy. A preliminary injunction preserves the status quo while the Court determines the Department's authority to make the Final Rule as well as the Final Rule's validity. *See, e.g.*, *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015), *aff'd by an equally divided court*, — U.S. ——, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (enjoining the Department from applying a new rule pending a full determination of the matter on the merits).

Accordingly, the Court determines that the State Plaintiffs have satisfied all of the elements required for the issuance of a preliminary injunction.

## SCOPE OF THE INJUNCTION

The parties dispute the scope of the injunction. The State Plaintiffs seek to apply the injunction nationwide. Defendants contend a nationwide injunction is inappropriate. Instead, Defendants suggest the injunction should be limited to the states that showed evidence of irreparable harm.

***9** **[26]** **[27]** Absent contrary intent from Congress, federal courts have the power to issue injunctions in cases where they have jurisdiction. *Califano v. Yamasaki*, 442 U.S. 682, 705, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979). It is established that "the scope of injunctive relief is dictated by the extent of the violation established, not by the geographical extent of the plaintiff class." *Id.* at 702, 99 S.Ct. 2545 (citation omitted).

A nationwide injunction is proper in this case. The Final Rule is applicable to all states. Consequently, the scope of the alleged irreparable injury extends nationwide. A nationwide injunction protects both employees and employers from being subject to different EAP exemptions based on location. This Court is not alone in its decision. *See Texas v. United States*, No. 7:16–cv–54, — F.Supp.3d ——, ——, 2016 WL 4426495, at *17 (N.D. Tex. Aug. 21, 2016) (issuing a nationwide injunction to ban enforcement of a Department of Education rule related to transgender bathroom policies); *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16–cv–66, 2016 WL 3766121, at *46 (N.D. Tex. June 21, 2016) (issuing a nationwide injunction to bar implementation of the Department's "Advice Exemption Interpretation").

## CONCLUSION

The Court determines that the State Plaintiffs have satisfied all prerequisites for a preliminary injunction. Fed. R. Civ. P. 65(d). The State Plaintiffs have established a prima facie case that the Department's salary level under the Final Rule and the automatic updating mechanism are without statutory authority. The Court concludes that the governing statute for the EAP exemption, 29 U.S.C. § 213(a)(1), is plain and unambiguous and no deference is owed to the Department regarding its interpretation.

Although the State Plaintiffs have made a persuasive case that *Garcia* may have been implicitly overruled, this Court is constrained to follow *Garcia* absent an express statement from the Supreme Court overruling it. For that reason, the Court cannot address the State Plaintiffs' general objection that any application of the FLSA's overtime requirement to them as sovereign states violates the Tenth Amendment.

Because the Court concludes that 29 U.S.C. § 213(a)(1) does not grant the Department the authority to utilize a salary-level test or an automatic updating mechanism under the Final Rule, the Court does not evaluate the State Plaintiffs' non-delegation argument.

Finally, the Court has authority to enjoin the Final Rule on a nationwide basis and decides that it is appropriate in this case, and therefore **GRANTS** the State Plaintiffs' Emergency Motion for Preliminary Injunction (Dkt. # 10).

Therefore, the Department's Final Rule described at 81 Fed. Reg. 32,391 is hereby enjoined. Specifically, Defendants are enjoined from implementing and enforcing the following regulations as amended by 81 Fed. Reg. 32,391; 29 C.F.R. §§ 541.100, 541.200, 541.204, 541.300, 541.400, 541.600, 541.602, 541.604, 541.605, and 541.607 pending further order of this Court.

The Court has considered the issue of security pursuant to Rule 65(c) of the Federal Rules of Civil Procedure and determines that Defendants will not suffer any financial loss that warrants the need for the State Plaintiffs to post security. The Fifth Circuit has held that a district court has the discretion to "require no security at all." *Kaepa, Inc. v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996). After considering the facts and circumstances of this case, the Court finds that security is unnecessary and exercises its discretion not to require the posting of security in this situation.

***10 IT IS SO ORDERED.**

**All Citations**

--- F.Supp.3d ----, 2016 WL 6879615, 167 Lab.Cas. P 36,489, 27 Wage & Hour Cas.2d (BNA) 25

Footnotes

1 Defendants repeatedly quote *Auer v. Robbins*, which states "[t]he FLSA grants the Secretary broad authority to 'defin[e] and delimi [t]' the scope of the exemption for executive, administrative, and professional employees." 519 U.S. 452, 456, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997). This case analyzed the *application* of the salary-basis test to police sergeants. But the validity of the salary-basis test was not challenged. *Auer*, 519 U.S. at 457, 117 S.Ct. 905. Further, establishing a salary-basis test does not supplant the duties test and Congress's intent.

2 The Court is not making a general statement on the lawfulness of the salary-level test for the EAP exemption. The Court is evaluating only the salary-level test as amended under the Department's Final Rule.

3 The Fifth Circuit dealt with a challenge to the EAP exemption in *Wirtz v. Mississippi Publishers Corp.*, 364 F.2d 603 (5th Cir. 1966). The Fifth Circuit stated the EAP exemption "gives the Secretary broad latitude to 'define and delimit' the meaning of the term 'bona fide executive...capacity.' " *Id.* at 608. *Wirtz* is distinguishable from this case and thus is not binding. *Wirtz* did not evaluate the lawfulness of a salary-level test under *Chevron* step one, as *Wirtz* predated *Chevron*. Further, *Wirtz* offers no guidance on the lawfulness of the Department's Final Rule salary level.

4 The Supreme Court has decided cases in which an agency has overstepped its bounds and offered an interpretation of a statute that "goes beyond the meaning that the statute can bear" without conducting a *Chevron* analysis. *MCI Telecomm. Corp. v. American Telephone & Tel egraph Co.*, 512 U.S. 218, 229, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994); *see also Freeman v. Quicken Loans, Inc.*, —— U.S. ——, 132 S.Ct. 2034, 2040, 182 L.Ed.2d 955 (2012) ("We need not resolve that dispute—or address whether, if *Chevron* deference would otherwise apply, it is eliminated by the policy statement's palpable overreach with regard to price controls.").

5 The Fifth Circuit and the Supreme Court routinely strike down agency interpretations that clearly exceed a permissible interpretation based on the plain language of the statute, particularly if they have great economic or political significance. A recent Supreme Court case, *King v. Burwell*, involved an interpretation of a statute that would affect millions of people and cost billions of dollars. —— U.S. ——, 135 S.Ct. 2480, 192 L.Ed.2d 483 (2015). The Supreme Court determined that the interpretation was an issue of deep "economic and political significance," and "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.* at 2489 (citation omitted). The Supreme Court

rejected the agency's interpretation, finding it "implausible that Congress meant the Act to operate in this manner." *Id.* at 2494; *see also Util. Air Regulatory Grp. v. E.P.A.*, —— U.S. ——, 134 S.Ct. 2427, 2444, 189 L.Ed.2d 372 (2014) ("When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'...we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.' "); *Texas*, 497 F.3d at 501 n.6 ("Additionally, courts 'must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency.' " (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000))).

6 The Supreme Court reasoned:

> Since an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear...the Commission's permissive detariffing policy can be justified only if it makes a less than radical or fundamental change in the Act's tariff-filing requirement...authority to 'modify' does not contemplate fundamental changes.

*MCI Telecomm. Corp.*, 512 U.S. at 228–29, 114 S.Ct. 2223. As in *MCI*, authority to define and delimit does not contemplate fundamental changes or justify a radical change in the statute's operation. Congress gave the Department the authority to define what type of duties qualify—it did not give the Department the authority to supplant the duties test and establish a salary test that causes bona fide EAP's to suddenly lose their exemption "irrespective of their job duties and responsibilities."

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2017 WL 26079
Only the Westlaw citation is currently available.
United States District Court,
E.D. Texas, Sherman Division.

State of Nevada, et al
v.
United States Department of Labor, et al

Civil Action No. 4:16–CV–00731
|
Signed January 3, 2017

**Synopsis**

**Background:** States and business organizations brought action against the Department of Labor (DOL), challenging a rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from the Fair Labor Standards Act's (FLSA) overtime requirements. The United States District Court for the Eastern District of Texas, Amos L. Mazzant, J., 2016 WL 6879615, issued nationwide injunction prohibiting implementation and enforcement of rule. Department of Labor moved to stay proceedings pending appeal.

**Holdings:** The District Court, Mazzant, J., held that:

[1] DOL was required to present a substantial case on the merits and show the balance of equities favored granting a stay, and

[2] DOL's motion for stay did not present a substantial case on the merits.

Motion denied.

West Headnotes (6)

**[1] Action**

A district court has broad discretion to stay proceedings in the interest of justice and to control its docket.

Cases that cite this headnote

**[2] Action**

Proper use of a district court's authority to stay proceedings in the interest of justice calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.

Cases that cite this headnote

**[3] Action**

To determine whether a district court should grant a discretionary stay pending an interlocutory appeal, district courts employ the following four-factor test: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies.

Cases that cite this headnote

**[4] Action**

The movant bears the burden of showing that a stay is warranted.

Cases that cite this headnote

**[5] Action**

Issues presented on appeal of district court order, which issued a nationwide injunction prohibiting implementation and enforcement of Department of Labor's (DOL) rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from FLSA overtime requirements, were serious to both litigants and public at large, and thus DOL was required to present a substantial case on

the merits and show the balance of equities favored granting a stay in order for its motion to stay district court proceedings pending appeal to be granted. Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

Cases that cite this headnote

[6] **Action**

Department of Labor's (DOL) motion to stay district court proceedings pending its appeal of nationwide injunction prohibiting implementation and enforcement of rule increasing the minimum salary level for executive, administrative, and professional workers to be exempt from FLSA overtime requirements did not present a substantial case on the merits, and thus court would not grant stay, where DOL's only argument, that merits of plaintiffs' remaining Administrative Procedure Act (APA) claims would likely have been controlled in large part by the Court of Appeals' decision on appeal, did not demonstrate that DOL was likely to succeed in establishing that the district court improperly issued the injunction. 5 U.S.C.A. § 551 et seq.; Fair Labor Standards Act of 1938, § 1 et seq., 29 U.S.C.A. § 201 et seq.

Cases that cite this headnote

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**MEMORANDUM OPINION AND ORDER**

AMOS L. MAZZANT, UNITED STATES DISTRICT JUDGE

***1** Pending before the Court is Defendants' Motion to Stay Proceedings Pending Appeal (Dkt. #68). On December 30, 2016, the Court conducted a telephone conference regarding the motion. After reviewing the relevant pleadings and listening to the arguments of counsel, the Court concludes the motion should be denied.

**BACKGROUND**

On November 22, 2016, this Court entered a Memorandum Opinion and Order that issued a nationwide injunction prohibiting the Department of Labor from "implementing and enforcing ... regulations as amended by 81 Fed. Reg. 32,391" (Dkt. #60 at p. 19). On December 1, 2016, Defendants filed a notice of appeal with the Fifth Circuit Court of Appeals regarding the November 22, 2016 order (Dkt. #62). The Fifth Circuit granted the Defendants' opposed motion to expedite the appeal and ordered a briefing schedule that will conclude on or before January 31, 2017 (Dkt. #68, Exhibit A). On December 12, 2016, Defendants filed their motion to stay district court proceedings pending appeal (Dkt. #68). On December 15, 2016, the Business Plaintiffs filed a response (Dkt. #71). On December 16, 2016, the State Plaintiffs also filed a response (Dkt. #75). Still pending before the Court is the Business Plaintiffs' Expedited Motion for Summary Judgment (Dkt. #35).

**ANALYSIS**

[1] [2] [3] [4] A district court has broad discretion to stay proceedings in the interest of justice and to control its docket. *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936). "Proper use of this authority 'calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.' " *Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 545 (5th Cir. 1983) (quoting*Landis*, 299 U.S. at 254–55, 57 S.Ct. 163). To determine whether a district court should grant a discretionary stay pending an interlocutory appeal,

district courts employ the following four-factor test: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (internal quotation marks and citation omitted). The movant bears the burden of showing that a stay is warranted. *Id.* at 433–34, 129 S.Ct. 1749. Although each part of the test must be met, the Fifth Circuit has stated that a "movant need not always show a probability of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir. 1981).

**[5]** Here, there is no question that the issues presented on appeal—whether the Department of Labor's proposed overtime regulations are legal—are serious to both the litigants and to the public at large. *See Wildmon v. Berwick Universal Pictures*, 983 F.2d 21, 23–24 (5th Cir. 1992) (deciding a serious legal question exists when there are legal issues that involve significant public concerns and impact federal and or state relations); *see generally* Dkt. #60 (indicating the importance of the matter before the Fifth Circuit). Accordingly, the Court determines that the appeal involves serious legal questions, and therefore Defendants must present a substantial case on the merits and show the balance of equities favor granting a stay.

***2** **[6]** Defendants' motion does not present a substantial case on the merits. Defendants argue only that the "merits of State Plaintiffs' and the Business Plaintiffs' APA claims will likely be controlled in large part by the Fifth Circuit's decision on appeal" (Dkt. #68 at p. 2). While true, this argument alone does not demonstrate that Defendants are likely to succeed in establishing that the Court improperly issued the injunction. Because Defendants have not met its initial burden, the Court will not address whether the balance of equities weigh in favor of granting a stay. Therefore, Defendants are not entitled to extraordinary relief and their motion to stay is **DENIED**.

**IT IS SO ORDERED**.

**All Citations**

--- F.Supp.3d ----, 2017 WL 26079

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# *Rogers v. New York Univ.*

United States Court of Appeals for the Second Circuit

April 7, 2000, Argued ; July 17, 2000, Decided

Docket No. 99-9172

**Reporter**

220 F.3d 73 *; 2000 U.S. App. LEXIS 17370 **; 164 L.R.R.M. 2854; 141 Lab. Cas. (CCH) P10,768; 78 Empl. Prac. Dec. (CCH) P40,131; 6 Wage & Hour Cas. 2d (BNA) 379

SUSAN ROGERS, Plaintiff-Appellee, v. NEW YORK UNIVERSITY, Defendant-Appellant.

**Subsequent History:** [**1] Certiorari Denied December 4, 2000, Reported at: *2000 U.S. LEXIS 8150*.

**Prior History:** Appeal from an order of the United States District Court for the Southern District of New York denying defendant's motion for a stay pending arbitration.

**Disposition:** Affirmed.

## Case Summary

**Procedural Posture**

In an action alleging employment discrimination under the Americans with Disabilities Act of 1990, *42 U.S.C.S. § 12101 et seq.*, the Family and Medical Leave Act, *29 U.S.C.S. § 2611 et seq.*, and various state and city laws, defendant appealed an order from the United States District Court for the Southern District of New York, which denied defendant's motion for a stay pending arbitration.

**Overview**

Defendant university under the terms and conditions of a collective bargaining agreement employed plaintiff clerk. Plaintiff brought an action for employment discrimination under the Americans with Disabilities Act of 1990 (ADA), *42 U.S.C.S. § 12101 et seq.*, the Family and Medical Leave Act (FMLA), *29 U.S.C.S. § 2611 et seq.*, and various state and city laws. Defendant had discharged plaintiff alleging plaintiff's FMLA medical leave had expired. Defendant moved to stay plaintiff's action pursuant to § 3 of the Federal Arbitration Act, *9 U.S.C.S. §§1-307*. The court upheld the lower court decision, finding that the terms of the collective bargaining agreement were not sufficient to waive plaintiff's right to bring an action in federal court based on the same conduct. The court noted that such arbitration provisions were unenforceable when the provision was negotiated by a union. Furthermore, the language of the collective bargaining agreement did not contain a clause whereby employees agreed to submit all federal cases to arbitration. Neither did it contain an explicit incorporation of the antidiscrimination statutes by name or citation.

**Outcome**

The decision of the lower court was affirmed. Defendant's collective bargaining agreement was not sufficiently specific to waive plaintiff's right to bring an action in federal court based on the same conduct.

**Counsel:** JAMES A. BROWN, New York, NY, for Plaintiff-Appellee.

TERRANCE J. NOLAN, S. ANDREW SCHAFFER, New York, NY, for Defendant-Appellant.

PAUL SALVATORE, Proskauer Rose LLP, New York, NY, (John F. Fullerton III, Ravi B. Motwani, of counsel, New York, NY) submitted a brief for amicus curiae The Realty Advisory Board on Labor Relations, Inc. in support of Defendant-Appellant.

PAUL D. RAMSHAW, United States Equal Employment Opportunity Commission, Washington, D.C., (C. Gregory Stewart, General Counsel, Philip Sklover, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Washington, D.C.) submitted a brief for amicus curiae the United States Equal Employment Opportunity Commission in Support of Plaintiff-Appellee.

GEOFFREY A. MORT, Pearl Zuchlewski, Goodman & Zuchlewski LLP, New York, NY, submitted a brief for amicus curiae the National Employment Lawyers Association in Support of Plaintiff-Appellee.

**Judges:** Before: VAN GRAAFEILAND and PARKER,

Circuit Judges, and UNDERHILL, * District [**2] Judge.

## Opinion

[*74] **PER CURIAM:**

In January 1993, Susan Rogers began work for New York University ("NYU") as a clerical employee. A collective bargaining agreement ("CBA") between NYU and Local 3882, United Staff Association of NYU, NYSUT, AFT, AFL-CIO, governed the terms and conditions of Rogers's employment. The CBA contains a "no discrimination" provision, which states that "there shall be no discrimination as defined by applicable Federal, New York State, and New York City laws, against any present or future employee by reason of . . . physical or mental disability . . . ." The CBA also provides that "employees are entitled to all provisions of the Family and Medical Leave Act of 1993 ["FMLA"] that are not specifically provided for in this agreement." A separate grievance and arbitration clause in the CBA provides in substance that disputes arising under the agreement shall be arbitrated.

Asserting medical disorders, Rogers received medical leave under the FMLA on or about August 22, 1997. Allegedly because Rogers's FMLA medical leave time [**3] had expired, NYU terminated Rogers on November 17, 1997. On December 15, 1997, Rogers filed a charge of discrimination against NYU with the Equal Employment Opportunity Commission ("EEOC"). On January 13, 1998, the EEOC issued Rogers a right to sue letter, informing her that she could sue NYU in federal court. Rogers commenced the instant action in the Southern District of New York on March 25, 1998. In an amended complaint filed on January 20, 1999, Rogers asserted that NYU had discriminated against her in violation of the Americans with Disabilities Act ("ADA"), the FMLA, and New York State and City human rights laws.

On April 21, 1999, NYU moved, pursuant to § 3 of the Federal Arbitration Act ("FAA"), to stay Rogers's action. In a memorandum and order dated September 9, 1999, District Judge William H. Pauley, III denied NYU's motion. As Judge Pauley correctly observed, there were two slightly different reasons for denying the stay, either one of which would suffice.

### DISCUSSION

The Second Circuit reviews *de novo* a district court order that denies a [*75] motion to stay an action pending arbitration. *Haviland v. Goldman, Sachs & Co., 947 F.2d 601, 604 (2d Cir. 1991)*. [**4]

#### A. Reason # 1

By requiring arbitration, the CBA in the instant case purports to waive Rogers's right to a federal forum. Such arbitration clauses, however, are not always enforceable. In 1974, the Supreme Court held that a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a CBA was not precluded from bringing an action in federal court based on the same conduct. *Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-51, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974)*; *see Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745-46, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981)* (concluding, consistent with *Gardner-Denver*, that union cannot waive employee's statutory rights under Title VII). Several years later, the Court narrowed the reach of *Gardner-Denver*. In *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33-35, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991)*, the Court held that an employee who had agreed individually to waive his right to a federal forum could be compelled to arbitrate an age discrimination claim.

Following *Gilmer*'s lead, most lower courts have focused on the [**5] party negotiating the waiver of rights. When the arbitration provision has been negotiated by a union in a CBA, these courts have held that *Gardner-Denver* applies. [1] The Second Circuit is no exception. *See Tran v. Tran, 54 F.3d 115, 117-18 (2d Cir. 1995)* (relying on *Barrentine* and *Gardner-Denver* to conclude that employer could not compel union employee to arbitrate federal statutory claims even though CBA required arbitration). Only the Fourth Circuit has concluded otherwise. *See Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 880-86 (4th Cir. 1996)* (holding that CBA requiring arbitration of union member's statutory discrimination claims is enforceable).

[**6] The arbitration provision in the instant case, by which employees purport to waive their right to a federal forum with

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* Honorable Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

[1] *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc., 339 U.S. App. D.C. 264, 199 F.3d 477, 481-86 (D.C. Cir. 1999), judgment reinstated, 341 U.S. App. D.C. 254, 211 F.3d 1312, 2000 WL 567099 (D.C. Cir. 2000)* (*en banc*); *Bratten v. SSI Servs., Inc., 185 F.3d 625, 630-32 (6th Cir. 1999)*; *Albertson's, Inc. v. United Food & Commercial Workers Union, 157 F.3d 758, 760-62 (9th Cir. 1998), cert. denied, 120 S. Ct. 39 (1999)*; *Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 522-27 (11th Cir. 1997)*; *Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1451-54 (10th Cir. 1997), vacated on other grounds, 524 U.S. 947 (1998)*; *Pryner v. Tractor Supply Co., 109 F.3d 354, 363-65 (7th Cir. 1997)*; *Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996)*.

# *Rogers v. New York Univ.*

United States Court of Appeals for the Second Circuit

April 7, 2000, Argued ; July 17, 2000, Decided

Docket No. 99-9172

**Reporter**

220 F.3d 73 *; 2000 U.S. App. LEXIS 17370 **; 164 L.R.R.M. 2854; 141 Lab. Cas. (CCH) P10,768; 78 Empl. Prac. Dec. (CCH) P40,131; 6 Wage & Hour Cas. 2d (BNA) 379

SUSAN ROGERS, Plaintiff-Appellee, v. NEW YORK UNIVERSITY, Defendant-Appellant.

**Subsequent History:** [**1] Certiorari Denied December 4, 2000, Reported at: *2000 U.S. LEXIS 8150*.

**Prior History:** Appeal from an order of the United States District Court for the Southern District of New York denying defendant's motion for a stay pending arbitration.

**Disposition:** Affirmed.

## Case Summary

**Procedural Posture**

In an action alleging employment discrimination under the Americans with Disabilities Act of 1990, *42 U.S.C.S. § 12101 et seq.*, the Family and Medical Leave Act, *29 U.S.C.S. § 2611 et seq.*, and various state and city laws, defendant appealed an order from the United States District Court for the Southern District of New York, which denied defendant's motion for a stay pending arbitration.

**Overview**

Defendant university under the terms and conditions of a collective bargaining agreement employed plaintiff clerk. Plaintiff brought an action for employment discrimination under the Americans with Disabilities Act of 1990 (ADA), *42 U.S.C.S. § 12101 et seq.*, the Family and Medical Leave Act (FMLA), *29 U.S.C.S. § 2611 et seq.*, and various state and city laws. Defendant had discharged plaintiff alleging plaintiff's FMLA medical leave had expired. Defendant moved to stay plaintiff's action pursuant to § 3 of the Federal Arbitration Act, *9 U.S.C.S. §§1-307*. The court upheld the lower court decision, finding that the terms of the collective bargaining agreement were not sufficient to waive plaintiff's right to bring an action in federal court based on the same conduct. The court noted that such arbitration provisions were unenforceable when the provision was negotiated by a union. Furthermore, the language of the collective bargaining agreement did not contain a clause whereby employees agreed to submit all federal cases to arbitration. Neither did it contain an explicit incorporation of the antidiscrimination statutes by name or citation.

**Outcome**

The decision of the lower court was affirmed. Defendant's collective bargaining agreement was not sufficiently specific to waive plaintiff's right to bring an action in federal court based on the same conduct.

**Counsel:** JAMES A. BROWN, New York, NY, for Plaintiff-Appellee.

TERRANCE J. NOLAN, S. ANDREW SCHAFFER, New York, NY, for Defendant-Appellant.

PAUL SALVATORE, Proskauer Rose LLP, New York, NY, (John F. Fullerton III, Ravi B. Motwani, of counsel, New York, NY) submitted a brief for amicus curiae The Realty Advisory Board on Labor Relations, Inc. in support of Defendant-Appellant.

PAUL D. RAMSHAW, United States Equal Employment Opportunity Commission, Washington, D.C., (C. Gregory Stewart, General Counsel, Philip Sklover, Associate General Counsel, Vincent J. Blackwood, Assistant General Counsel, Washington, D.C.) submitted a brief for amicus curiae the United States Equal Employment Opportunity Commission in Support of Plaintiff-Appellee.

GEOFFREY A. MORT, Pearl Zuchlewski, Goodman & Zuchlewski LLP, New York, NY, submitted a brief for amicus curiae the National Employment Lawyers Association in Support of Plaintiff-Appellee.

**Judges:** Before: VAN GRAAFEILAND and PARKER,

Circuit Judges, and UNDERHILL, * District [**2] Judge.

## Opinion

[*74] **PER CURIAM:**

In January 1993, Susan Rogers began work for New York University ("NYU") as a clerical employee. A collective bargaining agreement ("CBA") between NYU and Local 3882, United Staff Association of NYU, NYSUT, AFT, AFL-CIO, governed the terms and conditions of Rogers's employment. The CBA contains a "no discrimination" provision, which states that "there shall be no discrimination as defined by applicable Federal, New York State, and New York City laws, against any present or future employee by reason of . . . physical or mental disability . . . ." The CBA also provides that "employees are entitled to all provisions of the Family and Medical Leave Act of 1993 ["FMLA"] that are not specifically provided for in this agreement." A separate grievance and arbitration clause in the CBA provides in substance that disputes arising under the agreement shall be arbitrated.

Asserting medical disorders, Rogers received medical leave under the FMLA on or about August 22, 1997. Allegedly because Rogers's FMLA medical leave time [**3] had expired, NYU terminated Rogers on November 17, 1997. On December 15, 1997, Rogers filed a charge of discrimination against NYU with the Equal Employment Opportunity Commission ("EEOC"). On January 13, 1998, the EEOC issued Rogers a right to sue letter, informing her that she could sue NYU in federal court. Rogers commenced the instant action in the Southern District of New York on March 25, 1998. In an amended complaint filed on January 20, 1999, Rogers asserted that NYU had discriminated against her in violation of the Americans with Disabilities Act ("ADA"), the FMLA, and New York State and City human rights laws.

On April 21, 1999, NYU moved, pursuant to § 3 of the Federal Arbitration Act ("FAA"), to stay Rogers's action. In a memorandum and order dated September 9, 1999, District Judge William H. Pauley, III denied NYU's motion. As Judge Pauley correctly observed, there were two slightly different reasons for denying the stay, either one of which would suffice.

**DISCUSSION**

The Second Circuit reviews *de novo* a district court order that denies a [*75] motion to stay an action pending arbitration. *Haviland v. Goldman, Sachs & Co., 947 F.2d 601, 604 (2d Cir. 1991)*. [**4]

**A. Reason # 1**

By requiring arbitration, the CBA in the instant case purports to waive Rogers's right to a federal forum. Such arbitration clauses, however, are not always enforceable. In 1974, the Supreme Court held that a discharged employee whose grievance had been arbitrated pursuant to an arbitration clause in a CBA was not precluded from bringing an action in federal court based on the same conduct. *Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-51, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974)*; *see Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 745-46, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981)* (concluding, consistent with *Gardner-Denver*, that union cannot waive employee's statutory rights under Title VII). Several years later, the Court narrowed the reach of *Gardner-Denver*. In *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33-35, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991)*, the Court held that an employee who had agreed individually to waive his right to a federal forum could be compelled to arbitrate an age discrimination claim.

Following *Gilmer*'s lead, most lower courts have focused on the [**5] party negotiating the waiver of rights. When the arbitration provision has been negotiated by a union in a CBA, these courts have held that *Gardner-Denver* applies. [1] The Second Circuit is no exception. *See Tran v. Tran, 54 F.3d 115, 117-18 (2d Cir. 1995)* (relying on *Barrentine* and *Gardner-Denver* to conclude that employer could not compel union employee to arbitrate federal statutory claims even though CBA required arbitration). Only the Fourth Circuit has concluded otherwise. *See Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 880-86 (4th Cir. 1996)* (holding that CBA requiring arbitration of union member's statutory discrimination claims is enforceable).

[**6] The arbitration provision in the instant case, by which employees purport to waive their right to a federal forum with

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* Honorable Stefan R. Underhill, United States District Judge for the District of Connecticut, sitting by designation.

[1] *See Air Line Pilots Ass'n, Int'l v. Northwest Airlines, Inc., 339 U.S. App. D.C. 264, 199 F.3d 477, 481-86 (D.C. Cir. 1999), judgment reinstated, 341 U.S. App. D.C. 254, 211 F.3d 1312, 2000 WL 567099 (D.C. Cir. 2000)* (*en banc*); *Bratten v. SSI Servs., Inc., 185 F.3d 625, 630-32 (6th Cir. 1999)*; *Albertson's, Inc. v. United Food & Commercial Workers Union, 157 F.3d 758, 760-62 (9th Cir. 1998), cert. denied, 120 S. Ct. 39 (1999)*; *Brisentine v. Stone & Webster Eng'g Corp., 117 F.3d 519, 522-27 (11th Cir. 1997)*; *Harrison v. Eddy Potash, Inc., 112 F.3d 1437, 1451-54 (10th Cir. 1997), vacated on other grounds, 524 U.S. 947 (1998)*; *Pryner v. Tractor Supply Co., 109 F.3d 354, 363-65 (7th Cir. 1997)*; *Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996)*.

respect to statutory claims, is contained in a union-negotiated CBA. Under *Gardner-Denver*, to which this Court and a majority of others adhere, such provisions are not enforceable. Because an order staying Rogers's suit would be akin to an order compelling arbitration, the district court correctly denied NYU's motion to stay Rogers's federal action pending arbitration.

**B. Reason # 2**

Although the *Gardner-Denver* rule is sufficient to decide this case, we also address the Supreme Court's recent decision in *Wright v. Universal Maritime Service Corporation*, which could be taken to suggest that, under certain circumstances, a union-negotiated waiver of an employee's statutory right to a judicial forum might be enforceable. *See* 525 U.S. 70, 80-81, 119 S. Ct. 391, 142 L. Ed. 2d 361 (1998). As the district court correctly concluded, such circumstances are not present here. Furthermore, while *Wright* may have called *Gardner-Denver* into question, it did not overrule it.

In *Wright*, the Court, without addressing the issue of enforceability, stated that, as a condition [**7] precedent to enforceability, CBAs, unlike employment contracts executed [*76] by individual employees, that purport to waive an employee's right to bring discrimination claims in federal court must be clear and unmistakable. *Id. at 80*. In *Wright*, a longshoreman who belonged to a union sued his employer under the ADA. *Id. at 72-75*. The CBA governing the plaintiff's employment provided that disputes arising out of the CBA would be arbitrated. *Id. at 73*. The Supreme Court stated that a waiver of statutorily conferred rights in a CBA must be explicit. *Id. at 80*. Noting the broad language of the arbitration clause and that the CBA did not specifically incorporate pertinent statutory antidiscrimination requirements and make compliance therewith a contractual commitment, the Court concluded that the waiver of the right to a federal forum was not clear and unmistakable. *Id. at 80-82*. Because the waiver was not explicit, the Court declined to consider whether clear and unmistakable waivers are enforceable. *Id. at 82*.

Subsequent to *Wright*, other courts have determined that a waiver of statutorily [**8] conferred rights contained in a CBA is sufficiently clear and unmistakable if either of two conditions is met. First, a waiver is sufficiently explicit if the arbitration clause contains a provision whereby employees specifically agree to submit all federal causes of action arising out of their employment to arbitration. *Carson v. Giant Food, Inc., 175 F.3d 325, 331-32 (4th Cir. 1999); see Bratten v. SSI Servs., Inc., 185 F.3d 625, 631 (6th Cir. 1999)* (discussing *Wright* test); *Giles v. City of New York, 41 F. Supp. 2d 308, 311-12 (S.D.N.Y. 1999)* (same); *Beason v. United Techs. Corp., 37 F. Supp. 2d 127, 130 (D. Conn. 1999)* (same). The arbitration clause at issue in the instant case is broad and general. It encompasses "any dispute concerning the interpretation, application, or claimed violation of a specific term or provision of this Agreement." This degree of generality falls far short of a specific agreement to submit all federal claims to arbitration.

Second, a waiver may be sufficiently clear and unmistakable when the CBA contains an explicit incorporation of the statutory anti-discrimination requirements" [**9] in addition to a broad and general arbitration clause. *Carson, 175 F.3d at 332*. Thus, "if another provision, like a nondiscriminatory clause, makes it unmistakably clear that the discrimination statutes at issue are part of the agreement, employees will be bound to arbitrate their federal claims." *Id.* Courts agree that specific incorporation requires identifying the antidiscrimination statutes by name or citation. *Bratten, 185 F.3d at 631; Prince v. Coca-Cola Bottling Co. of N.Y., 37 F. Supp. 2d 289, 293 (S.D.N.Y. 1999)*. Moreover, as the Supreme Court stated in *Wright*, the CBA should make compliance with the named or cited statute a contractual commitment that is subject to the arbitration clause. *Wright*, 525 U.S. at 81; *see Prince, 37 F. Supp. 2d at 293* (citing *Wright*, 525 U.S. at 81).

The instant Agreement contains both a general arbitration clause and a nondiscrimination provision. However, neither incorporates anything explicitly. Furthermore, while the Agreement's "leave of absence" clause does create contractual rights coextensive with the FMLA, the collective bargaining [**10] agreement does not specifically make compliance with *the FMLA* a contractual commitment that is subject to the arbitration clause. As the Supreme Court noted in *Wright*, incorporating federal laws into a collective bargaining agreement merely "creates a contractual right that is coextensive with the federal statutory right." *Wright*, 525 U.S. at 79. However, the Court went on to note that creating coextensive rights "is not the same as making compliance with the [federal statute] a contractual commitment that would be subject to the arbitration clause." *Id. at 81*.

[*77] The foregoing analysis of reason number two reveals that waiver in the instant case is not clear and unmistakable. The CBA does not contain a provision whereby employees explicitly agree to submit all federal claims to arbitration. Moreover, the CBA does not satisfactorily incorporate federal antidiscrimination law both because reference to such law is too broad and because the CBA does not explicitly make compliance with that law a contractual commitment that is subject to the arbitration [**11] provision.

The order of the district court is affirmed.

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Obesity as a disability

# *State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*

Court of Appeals of New York

March 27, 1985, Argued ; May 7, 1985, Decided

No Number in Original

**Reporter**

65 N.Y.2d 213 *; 480 N.E.2d 695 **; 491 N.Y.S.2d 106 ***; 1985 N.Y. LEXIS 14676 ****; 37 Fair Empl. Prac. Cas. (BNA) 1389; 1 Am. Disabilities Cas. (BNA) 750; 37 Empl. Prac. Dec. (CCH) P35,439

State Division of Human Rights, on Complaint of Catherine McDermott, Respondent, v. Xerox Corporation, Appellant

**Prior History:** [****1] Appeal from an order of the Appellate Division of the Supreme Court in the Fourth Judicial Department, entered July 13, 1984, in a proceeding pursuant to *Executive Law § 298*, which (1) granted the petition, (2) vacated the order of the State Human Rights Appeal Board (a) reversing and vacating the determination of the State Division of Human Rights, which, *inter alia*, adjudged that respondent Xerox Corporation discriminated against complainant by refusing to hire complainant on the basis of disability unrelated to ***employment*** in violation of the Human Rights Law, and (b) dismissing the complaint, and (3) reinstated the determination of the State Division of Human Rights.

*State Div. of Human Rights v Xerox Corp., 102 AD2d 543*.

**Disposition:** Order affirmed, with costs.

## Case Summary

**Procedural Posture**

Respondent employer sought review of a decision of the Appellate Division of the Supreme Court in the Fourth Judicial Department (New York), which reinstated the order of the Commissioner and reversed the order of appellant State Human Rights Appeals Board, which adjudged that the employer had discriminated against the complainant by refusing to hire her ***based on*** her disability of obesity.

**Overview**

The employer refused to hire complainant because a pre-***employment*** medical examination stated she was grossly obese. In administrative proceedings before the Human Rights Commissioner, complainant testified and the Commissioner agreed that her ***weight*** had not prevented her from performing any job or life related task. The Commissioner found for complainant, holding that the employer discriminated against her on basis of a disability, but the appeals board rejected the order. On judicial review, the Commissioner's determination was reinstated, and the employer appealed. The court held that the Commissioner had the authority to determine that complainant's obese condition, which was clinically diagnosed and found to render her medically unsuitable by the employer, constituted impairment and was therefore a disability within the contemplation of *N.Y. Exec. Law § 292(20)*. The court rejected the employer's argument that *§ 292(2)* should only apply to immutable disabilities and not to those which were correctable.

**Outcome**

The court affirmed the judgment of the appeals court and the Human Rights Commissioner, which ordered the employer to offer complainant a position of systems consultant, or equivalent title, with back pay, and other remedial measures.

**Counsel:** *Richard N. Chapman* and *Brian P. O'Connor* for appellant. I. The decision below must be reversed because the Commissioner's decision is not supported by substantial evidence and the court below arbitrarily construed the statutory definition of disability in the *Human Rights Law. ( State Off. of Drug Abuse Servs. v State Human Rights Appeal Bd., 48 NY2d 276; 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176.)* II. McDermott is not disabled, because her condition [****4] has not been demonstrated to be involuntary. ( *Greene v Union Pac. R. R. Co., 548 F Supp 3.*)

*Rosamond Prosterman, Roberto Albertorio* and *Albert J. Kostelny, Jr.*, for State Division of Human Rights, respondent. I. The Commissioner properly found on the record as a whole that obesity is a disability within the meaning of the *Human Rights Law. ( Caminetti v United States, 242 U.S. 470; Matter of Howard v Wyman, 28 NY2d 434; Matter of State Div. of Human Rights v Luppino, 35 AD2d 107, 29 NY2d 558; Finger Lakes Racing Assn. v New York State Racing & Wagering Bd., 45 NY2d 471; Mount Sinai Hosp. v Zorek, 50 Misc 2d 1037; Matter of Stanley v Church of St. Helena, 26 AD2d 959; United States v 62 Packages*, 48 F Supp 878;

*Baslee Prods. Corp. v United States Postal Serv., 356 F Supp 841*; *Matter of Perez v New York State Human Rights Appeal Bd., 70 AD2d 558*; *Matter of John P. v Whalen, 54 NY2d 89*.) II. The decision below must be sustained because the Commissioner's finding that respondent-appellant unlawfully discriminated against petitioner-appellee by denying her ***employment*** on the basis of her disability is supported by substantial evidence. [****5] (*Matter of State Div. of Human Rights v Averill Park Cent. School Dist., 59 AD2d 449, 46 NY2d 950*; *State Div. of Human Rights v County of Monroe, 48 NY2d 727*; *Matter of Westinghouse Elec. Corp. v State Div. of Human Rights, 49 NY2d 234*.), *Catherine McDermott*, respondent *pro se*. I. The Commissioner's decision is supported by substantial evidence of disability and the court below misconstrued the Human Rights Law. II. There is a disability because the condition has not been demonstrated to be voluntary.

**Judges:** Judges Meyer, Simons, Kaye and Alexander concur with Chief Judge Wachtler; Judge Jasen dissents and votes to reverse in a separate opinion.

**Opinion by:** WACHTLER

## Opinion

**[*215] [**695] [***106] OPINION OF THE COURT**

The respondent, Xerox Corporation, refused to hire the complainant, Catherine McDermott, because she was obese. In administrative proceedings under the Human Rights Law (*Executive Law art 15*), McDermott's complaint that Xerox unlawfully discriminated against her because of [***107] a disability was sustained by the Commissioner of Human Rights but was rejected by the Human Rights Appeal Board. On judicial review, the Appellate Division [****6] reinstated the Commissioner's determination and Xerox appeals. The question is whether the complainant's obesity constitutes a disability within the meaning of the Human Rights Law (*Executive Law § 292 [21]*).

In 1974 complainant, a computer programmer, applied for a job with Xerox. On [**696] August 8 the company offered her a position as a systems consultant, provided she passed a preemployment medical examination. On August 14 she accepted the offer. The physical examination took place on August 26. The examining physician found that complainant was 5 feet 6 inches and weighed 249 pounds. On the portion of the form labeled "Notes -- Describe every abnormality in detail," the doctor stated that complainant was "obese". No other remarkable clinical or laboratory findings were indicated. On the basis of her ***weight*** alone, the examining physician concluded that complainant was medically "not acceptable".

This report was reviewed by Dr. Wright, the company's Director of Health Services, who concurred in the recommendation. On September 3, 1974, the company sent complainant a letter informing her that she had not passed the physical and thus would not be hired by Xerox. [****7] She was later informed that she had failed the exam solely because of her obesity.

On August 13, 1975, McDermott filed a complaint with the State Division of Human Rights charging Xerox with a discriminatory ***employment*** practice. She relied on a recent amendment to the Human Rights Law which, effective September 1, 1974, prohibited employers from refusing to employ persons with disabilities (*Executive Law § 296 [1] [a]*, L 1974, ch 988, § 2). At that time the statute provided that the "term 'disability' means a physical, mental or medical impairment resulting from anatomical, physiological or neurological conditions with prevents the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques, provided, however, that in all provisions of this article dealing with ***employment***, the term shall be limited to physical, mental [*216] or medical conditions which are unrelated to the ability to engage in the activities involved in the job or occupation which a person claiming protection of this article shall be seeking." (*Executive Law § 292 [20]* [now 21].) [1]

[****8] At the hearing on the complaint, McDermott testified that Dr. Wright informed her that the job offer was withdrawn because she had the "disease" of "active gross obesity". She testified that she had always been overweight, but that it had not prevented her from performing any task or function. It had not interfered with her ability to raise five children under 10 years of age after her husband died. Neither did it prevent her from working outside of the home at jobs similar to the one originally offered by Xerox. In fact, she stated her ***weight*** had not inhibited her in any way, except in carrying bundles for long distances.

Dr. Wright testified that he had not examined complainant but had instructed physicians conducting preemployment physicals to use height and ***weight*** tables published in 1966 by

[1] The agency initially determined that it lacked jurisdiction to hear the complaint because the decision not to hire complainant occurred prior to the effective date of the amendment dealing with disabilities. However the Appellate Division reversed noting the company did not refuse to hire complainant until it withdrew the offer of ***employment*** by the letter sent on September 3, 1974, after the law went into effect (*73 AD2d 806*). That determination is not in issue on this appeal.

an insurance company to ascertain acceptable ***weight*** ranges for job applicants. Complainant exceeded the scheduled ***weight*** range for her height by approximately 100 pounds. Upon receipt of the examining physician's report, Dr. Wright entered a diagnosis of "gross obesity". On the basis of that condition alone, he determined that complainant should not be hired because, in his opinion, [****9] gross obesity [***108] posed a significant risk to short and long term disability and life insurance programs administered by respondent.

The Commissioner sustained the complaint. He found that "complainant's obesity, clinically observed as an abnormality during the course of a pre-***employment*** physical examination administered on August 26, 1974, constituted a physical or medical impairment demonstrable by medically accepted clinical diagnostic techniques." [**697] He also noted that the company had submitted no evidence that persons with this condition were unable to perform the job of a systems consultant satisfactorily. He found that complainant had held comparable positions before she applied to Xerox and afterwards. Although her ***weight*** remained essentially constant throughout that period, she had performed the jobs "in a satisfactory manner, without apparent [*217] difficulty or significant periods of absence due to illness." He rejected as a "semantic equivocation" the company's position that complainant's ability to perform satisfactorily demonstrated that she was free of any impairment, noting that the respondent's own medical examiner "clinically observed an [****10] abnormal medical condition" which resulted in her "summary disqualification". The Commissioner concluded that the company had discriminated against complainant on the basis of a disability unrelated to her ***employment*** in violation of the Human Rights Law. He ordered the company to offer her a position of systems consultant, or equivalent title, with back pay, and directed other remedial measures.

The Human Rights Appeal Board reversed and dismissed the complaint. The Board held that "being overweight without proof of any impairment" is not a disability covered by the statute. It also observed that since there was no evidence that complainant suffered from any other disorder "[her] overweight can only be attributed to a voluntarily induced condition unrelated to any glandular or organic deficiency." The Board concluded: "although Xerox's policy may appear to be discriminatory to overweight individuals it does not constitute unlawful ***discrimination*** under the Human Rights Law."

In this proceeding commenced pursuant to *Executive Law § 298*, the Appellate Division reversed the Board and reinstated the Commissioner's determination. The court noted that the Board's scope of review [****11] was limited to the standard applicable to judicial review of administrative determinations ( *State Off. of Drug Abuse Servs. v State Human Rights Appeal Bd., 48 NY2d 276, 283)*. It found that there was substantial evidence to support the Commissioner's determination that complainant suffered a disability, and that the Commissioner's conclusion that obesity itself can constitute an impairment was a reasonable, commonsense interpretation of the statute. The court observed that no reason was offered as to why the statute should be construed in such a way as to afford no protection to a person like complainant who suffers from obesity "but has no other demonstrable impairment", while "a person with the same degree of obesity accompanied by high blood pressure or diabetes" could not be denied ***employment*** under the statute if those conditions, like complainant's, were unrelated to job performance *(102 AD2d 543, 549)*.

Xerox urges that it did not deny complainant ***employment*** because of a present impairment but because of a statistical likelihood that her obese condition would produce impairments [*218] in the future. It urges that persons with such conditions are not disabled within [****12] the meaning of the statute and can be refused ***employment*** because of the adverse impact their ***employment*** may have on disability and life insurance programs.

Initially we note that if a person suffers an impairment, ***employment*** may not be denied because of any actual or perceived undesirable effect the ***person's employment*** may have on disability or life insurance programs. Under the statute in effect at the time this case arose, ***employment*** could only be refused if the condition [***109] was related to the performance of the duties of the position ( *Matter of State Div. of Human Rights v Averill Park Cent. School Dist., 59 AD2d 449, affd 46 NY2d 950*; *State Div. of Human Rights [Ghee] v County of Monroe, 48 NY2d 727*; *Matter of Westinghouse Elec. Corp. v State Div. of Human Rights, 49 NY2d 234*). [2] [**698] Since the Commissioner found, and it is not disputed, that there is no relationship between complainant's condition and her ability to perform the job she seeks, the company could not refuse to hire her because of the collateral effect her impairment, if it be that, might have on existing disability and life insurance programs.

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[2] The statute has since been amended to provide broader protection by requiring the employer to go further and show that the condition prevents the employee or prospective employee from performing in a reasonable manner (L 1979, ch 594, eff July 10, 1979; *see, Matter of Miller v Ravitch, 60 NY2d 527*). This amendment, however, is not retroactive and thus, the case now before us is governed by the statute in effect in 1974 when the complainant was refused ***employment*** ( *Matter of Westinghouse Elec. Corp. v State Div. of Human Rights, 49 NY2d 234, 237)*.

[****13] The only question then is whether the complainant suffered an impairment within the meaning of the statute. Although the Commissioner found that she did, the company urges that the determination is not supported by substantial evidence because there is no evidence that her condition presently places any restrictions on her physical or mental abilities. It urges that the Commissioner misinterpreted the statute in holding that her condition of obesity itself constitutes an impairment. These arguments might have some force under typical disability or handicap statutes narrowly defining the terms in the ordinary sense to include only physical or mental conditions which limit the ability to perform certain activities (*see, e.g.*, *29 USC § 706 [6]* [now 7], defining a "handicapped individual" as a person who "has a physical or mental impairment which substantially limits one or more of such ***person's*** major life activities"). However in New York, the term "disability" is more broadly defined. The statute provides that disabilities are not limited to physical or [*219] mental impairments, but may also include "medical" impairments. In addition, to qualify as a disability, [****14] the condition may manifest itself in one of two ways: (1) by preventing the exercise of a normal bodily function or (2) by being "demonstrable by medically accepted clinical or laboratory diagnostic techniques" (*Executive Law § 292 [20]* [now 21]).

Fairly read, the statute covers a range of conditions varying in degree from those involving the loss of a bodily function to those which are merely diagnosable medical anomalies which impair bodily integrity and thus may lead to more serious conditions in the future. Disabilities, particularly those resulting from disease, often develop gradually and, under the statutory definition, an employer cannot deny ***employment*** simply because the condition has been detected before it has actually begun to produce deleterious effects. Thus, the Commissioner could find that the complainant's obese condition itself, which was clinically diagnosed and found to render her medically unsuitable by the respondent's own physician, constituted an impairment and therefore a disability within the contemplation of the statute. [3]

[****15] The respondent also urges that, as a matter of policy, the statutes should only apply to immutable disabilities and not to those which are correctable. The argument is ***based on*** the fact that complainant does not appear to suffer from any other disorder causally related to overweight. This led respondent's physician to conclude at the hearing that her condition was probably [***110] due to bad dietary habits. However, the Commissioner expressly rejected that opinion as speculative under the circumstances. In any event, the statute protects all persons with disabilities and not just those with hopeless conditions. [4] Because [**699] the complainant is claiming the benefit of a statutory right, any policy decision limiting that right must come from the Legislature [*220] and not from the courts. We have found nothing in the statute or its legislative history indicating a legislative intent to permit employers to refuse to hire persons who are able to do the job simply because they have a possibly treatable condition of excessive ***weight***.

[****16] Accordingly, the order of the Appellate Division should be affirmed.

**Dissent by:** JASEN

## Dissent

Jasen, J. (dissenting). Since the Commissioner ignored governing internal guidelines of the State Division of Human Rights in rendering the determination that complainant's obesity constituted a "disability" within the meaning of *Executive Law § 292 (21)*, his decision was not based upon substantial evidence.

Chapter 988 of the Laws of 1974, popularly known as "The Flynn Act", was enacted to afford those who suffer from physical, mental or medical disabilities protection under the Human Rights Law against ***discrimination, in employment***, housing and places of public accommodation, resort or amusement (*see*, Memorandum of Approval, Governor Malcolm Wilson, Legislative Bill Jacket, L 1974, ch 988, at 82, 1974 McKinney's Session Laws of NY, at 2123). On July 10, 1974, the general counsel to the State Division of Human Rights promulgated "Flynn Act Guidelines" to clarify the responsibilities of the Division in the implementation of the antidiscrimination measure. (*See*, Memorandum of Law No. 576, Division of Human Rights.) The question whether

[3] In view of the fact that the Commissioner found complainant's condition constituted an actual impairment, there is no need to consider the effect of the 1983 amendment to *Executive Law § 292 (21)*, which expanded the definition of disability to include conditions which are "regarded by others as such an impairment" (L 1983, ch 902, § 1, eff Aug. 8, 1983).

[4] The "internal guidelines" relied upon by the dissenter are not relevant. They are nothing more than suggested approaches mentioned in a letter memorandum when the disability provision was first added to the Human Rights Law. They were not incorporated in binding regulations. Neither were they intended to express a fixed policy of the Executive Department since the letter expressly designates them as "tentative principles". At the time the hearing was held in this case the Commissioner's experience administering the law had prompted him to abandon these "tentative" guidelines, which he was free to do.

obesity constitutes a disability within the meaning [****17] of The Flynn Act was specifically addressed by the guidelines. Memorandum of Law No. 576, at pages 5-6, noted that "[a] second category of disability consists of external characteristics which may or may not be symptomatic of disease. An individual's ***weight*** problem, for example, may be the result of a glandular imbalance, which would seem to be a physiological condition preventing the exercise of a normal bodily function within the meaning of the statute. On the other hand, it may be due simply to a poor and uncontrolled diet. * * * In any case involving this type of disability, the regional office should try to ascertain the existence of an underlying condition bringing the disability within the statutory definition set forth in Human Rights Law *§ 292 (20)* [renum *§ 292 (21)*, by L 1976, ch 532, § 1]. Only if the condition comes within the statutory definition of 'disability' is the individual protected from ***discrimination*** based thereon. Of course, questions may arise in particular cases requiring resolution by a medical expert". Consequently, if complainant's obesity were caused by an improper diet, rather than a glandular [*221] disorder or similar uncontrollable [****18] condition, no disability within the meaning of the statute would exist.

The Flynn Act Guidelines, adopted by the Division of Human Rights pursuant to clear legislative authority (*Executive Law §§ 294, 295 [5]*), are legally controlling upon the instant proceeding. An administrative rule, regulation, or general order enacted by an agency in accord with the powers delegated to it has the full force and effect of law and governs the conduct of all persons subject to it. (*See, Matter of Weekes v O'Connell, 304 NY 259*; *Ford Motor Credit Co. v Milhollin, 444 U.S. 555, 565*; [***111] *2 Am Jur 2d, Administrative Law, §§ 291, 292*.) That the Flynn Act Guidelines have apparently not been filed with the Secretary of State does not vitiate their internal force as a governing Division of Human Rights policy. Among the acts of administrative agencies to which ***weight*** as statutory interpretations is attached are regulations, interpretations, interpretive bulletins, rulings and opinions, agency decisions, and even more informal [**700] statements of policy. (*2 Am Jur 2d, Administrative Law, § 245* [citations omitted].) The subject guidelines represent a contemporaneous construction [****19] of a broadly worded statute by the officials charged with the responsibility of setting its machinery in action, and should not be disregarded except for the most cogent reasons. (1 Cooper, State Administrative Law, at 266.)

There was not a shred of medical evidence introduced, at any level of the proceedings below, which focused upon the cause of complainant's obesity at the time she made application for ***employment***. This is conceded by all parties. Notwithstanding the instruction of Memorandum of Law No. 576, which advises the regional office of the Division of Human Rights to ascertain the existence of an underlying cause of obesity for the purposes of this Act, the Commissioner failed to inquire as to whether complainant had control over her ***weight*** problem. As explicitly recognized by the guidelines, mere observance of the external manifestations of obesity cannot resolve the critical, threshold question of whether complainant suffers from a cognizable disability. As the Commissioner neglected to determine the underlying cause of complainant's obesity, his determination must be vacated for lack of substantial evidence.

The Division of Human Rights disputes the applicability [****20] of The Flynn Act guidelines by asserting "[it] should be readily apparent from the following authority [General Counsel's Opn, Nov. 21, 1979 (re Methadone dependency and alcoholism); *Matter of Perez v New York State Human Rights Appeal Bd., 70 AD2d 558 (1st Dept 1979)]* that the 1974 Flynn Act Guidelines [*222] memorandum * * * has been subsequently modified and are no longer controlling on this point." (Brief for State Div of Human Rights, at 13, unnumbered n.) This argument is without merit. First, the authorities relied upon by the Division only concern the reclassification of "drug addiction" as a "disability" rather than as a "social problem". No mention of the classification of obesity was made, nor was there any intent to effect a wholesale repeal of the Flynn Act Guidelines. Second, even if the cited authorities represented a shift in policy by the Division, we are here concerned only with the policy in effect in 1974 when the complainant was refused ***employment*** (majority opn, at p 218, n 2). Since the authorities relied upon by the Division were decided subsequent to the 1974 refusal to hire, they have no application to the instant case.

The arguments advanced [****21] by the majority against application of the guidelines are unavailing. The guidelines were dated July 10, 1974, complainant was refused ***employment*** on September 3, 1974, and the Commissioner rendered his determination in favor of complainant on April 9, 1982. There can be little question that the guidelines apply to an allegedly discriminatory act occurring less than two months after their promulgation. While it is true that the guidelines were to be subject to amendment after the Division "has acquired a fund of experience in the course of its administration of the Flynn Act" (Division of Human Rights Memorandum of Law No. 576, at 2), it cannot seriously be suggested on this record that this "fund of experience" was earned during the two months intervening the date of promulgation and the date of the refusal to hire, so as to effect a *sub silentio* repeal of the guidelines. Despite the majority's unsupported assertion that the "Commissioner's experience

administering the law had prompted him to abandon" the guidelines, any shift in policy in 1982 reflecting the [***112] Commissioner's experience should not be accorded retroactive effect to events in 1974. (Majority opn, at [****22] p 218, n 2.) The majority's attempt to apply a purported 1982 policy to a 1974 occurrence is as inappropriate as applying a 1985 statutory scheme to the 1974 occurrence.

It has long been settled that a unit of the executive branch must recognize and obey its own regulations promulgated pursuant [**701] to and within valid statutory authority. (*See, People ex rel. Doscher v Sisson, 222 NY 387, 394.*) A policy decision to limit application of the Human Rights Law was made by the Division of Human Rights. Where obesity is at issue, the status of that condition as a disability can only be determined by inquiry as to [*223] the underlying cause of the obesity (Division of Human Rights Memorandum of Law No. 576). It is this policy which was abrogated by the Commissioner. To expand the scope of *Executive Law § 292 (21)* to render obesity a "disability per se", as has been done by the Commissioner and a majority of this court, is a manifest usurpation of an unequivocally stated executive branch policy. It is institutionally improper for this court to acquiesce in the Division's disregard of self-imposed rules. (*See*, Smolla, *The Erosion of the Principle That Government* [****23] *Must Follow Self-Imposed Rules, 52 Fordham L Rev 472.*) In this State, it should be assumed that one subject to an official charge of ***employment discrimination***, with a view toward substantial penalties, is legally entitled to insist upon the observance of policies duly promulgated by the Commissioner and operative at the time of the occurrence in question. (*See, United States ex rel. Bilokumsky v Tod, 263 U.S. 149, 155* [Brandeis, J.].) By upholding the determination of the Commissioner, the majority affixes its judicial imprimatur upon an unauthorized extension of the jurisdictional reach of the Human Rights Law. I cannot concur in this result.

Accordingly, I would reverse the order of the Appellate Division and remit to the Division of Human Rights for further proceedings.

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# *Wright v. Universal Mar. Serv. Corp.*

Supreme Court of the United States

October 7, 1998, Argued ; November 16, 1998, Decided

No. 97-889

**Reporter**

525 U.S. 70 *; 119 S. Ct. 391 **; 142 L. Ed. 2d 361 ***; 1998 U.S. LEXIS 7270 ****; 67 U.S.L.W. 4013; 98 Cal. Daily Op. Service 8421; 159 L.R.R.M. 2769; 98 Daily Journal DAR 11681; 8 Am. Disabilities Cas. (BNA) 1429; 1999 AMC 201; 1998 Colo. J. C.A.R. 5866

CEASAR WRIGHT, PETITIONER v. UNIVERSAL MARITIME SERVICE CORPORATION ET AL.

**Subsequent History:** [****1] As Amended October 21, 1999.

**Prior History:** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

**Disposition:** *121 F.3d 702*, vacated and remanded.

## Case Summary

**Procedural Posture**

Petitioner employee filed a writ of certiorari for review of the decision of the U.S. Court of Appeals for the Fourth Circuit, which in an action against respondents, stevedoring companies and the union, for violations of the Americans with Disabilities Act of 1990 (ADA), *42 U.S.C.S. § 12101 et seq.*, affirmed a finding that the employee had failed to pursue the grievance procedure provided by the collective-bargaining agreement.

**Overview**

In an action against the stevedoring companies and the union for violations of the ADA, *§ 12101 et seq.*, the employee sought review of the decision of the lower court that affirmed a finding that the employee had failed to pursue the grievance procedure provided by the collective-bargaining agreement (CBA). The Court granted certiorari and vacated the judgment. The Court found that the employee's statutory claim was not subject to a presumption of arbitrability. A union waiver of employee rights to a federal judicial forum for employment discrimination claims had to be clear and unmistakable, so that absent a clear waiver, it was not "appropriate," within the meaning of the provision of the ADA, to find an agreement to arbitrate. The Court held that the CBA did not contain a clear and unmistakable waiver of the covered employee's rights to a judicial forum for federal claims of employment discrimination. A general arbitration clause in a CBA did not require the employee to use the arbitration procedure for an alleged violation of ADA.

**Outcome**

The judgment of the lower court was vacated, and the case was remanded for further proceedings.

## Syllabus

Petitioner Wright, a longshoreman, was subject to a collective-bargaining agreement (CBA) and a Longshore Seniority Plan, both of which contained an arbitration clause. When respondents refused to employ him following his settlement of a claim for permanent disability benefits for job-related injuries, Wright filed this suit, alleging discrimination in violation of the Americans with Disabilities Act of 1990 (ADA). The District Court dismissed the case without prejudice because Wright had failed to pursue the arbitration procedure provided by the CBA. The Fourth Circuit affirmed.

*Held:* The CBA's general arbitration clause does not require Wright to use the arbitration [****2] procedure for alleged violation of the ADA. Pp. 4-11.

(a) The Fourth Circuit's conclusions that the CBA arbitration clause encompassed a statutory claim under the ADA and was enforceable bring into focus the tension between two lines of this Court's case law. Compare, *e.g.*, *Alexander v. Gardner-Denver Co., 415 U.S. 36, 49-51, 39 L. Ed. 2d 147, 94 S. Ct. 1011*, with, *e.g.*, *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26, 114 L. Ed. 2d 26, 111 S. Ct. 1647*. However, it is unnecessary to resolve the question of the validity of a union-negotiated waiver of employees' statutory rights to a federal forum, since it is apparent, on the facts and arguments presented here, that no such waiver has occurred. Pp. 4-6.

(b) Petitioner's ADA claim is not subject to the presumption of arbitrability this Court has found in § 301 of the Labor Management Relations Act, 1947. That presumption does not

extend beyond the reach of the principal rationale that justifies it, *i.e.*, that arbitrators are in a better position than courts to interpret the terms of a CBA. See, *e.g.*, *AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 650, 89 L. Ed. 2d 648, 106 S. Ct. 1415*. The dispute here ultimately concerns not the application or interpretation of any CBA, [****3] but the meaning of a federal statute, the ADA. Although ordinary textual analysis of a CBA may show that matters beyond the interpretation and application of contract terms are subject to arbitration, they will not be *presumed* to be so. Pp. 6-8.

(c) In order for a union to waive employees' rights to a federal judicial forum for statutory antidiscrimination claims, the agreement to arbitrate such claims must be clear and unmistakable. Cf., *e.g.*, *Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 708, 75 L. Ed. 2d 387, 103 S. Ct. 1467*. The CBA's arbitration clause is very general, providing only for arbitration of "matters under dispute," and the remainder of the contract contains no explicit incorporation of statutory antidiscrimination requirements. For similar reasons, there is no clear and unmistakable waiver in the Longshore Seniority Plan. This Court does not reach the question whether such a waiver would be enforceable. Pp. 9-11.

*121 F.3d 702*, vacated and remanded.

**Counsel:** Ray P. McClain argued the cause for petitioner.

Barbara D. Underwood argued the cause for the United States, as amicus curiae, by special leave of court.

Charles A. Edwards argued the cause for respondents.

**Judges:** SCALIA, J., delivered the opinion for a unanimous Court.

**Opinion by:** SCALIA

## Opinion

[*72] [***366] [**392] JUSTICE SCALIA delivered the opinion of the Court.

This case presents the question whether a general arbitration clause in a collective-bargaining [**393] agreement [****4] (CBA) requires an employee to use the arbitration procedure for an alleged violation of the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, *42 U.S.C. § 12101 et seq.*

*I*

In 1970, petitioner Ceasar Wright began working as a longshoreman in Charleston, South Carolina. He was a member of Local 1422 of the International Longshoremen's Association, AFL-CIO (Union), which uses a hiring hall to supply workers to several stevedore companies represented by the South Carolina Stevedores Association (SCSA). Clause 15(B) of the CBA between the Union and the SCSA provides in part as follows: "Matters under dispute which cannot be promptly settled between the Local and an individual Employer shall, no later than 48 hours after such discussion, be referred in writing covering the entire grievance to a Port Grievance Committee . . . ." App. 43a. If the Port Grievance Committee, which is evenly divided between representatives of labor and management, cannot reach an [*73] agreement within five days of receiving the complaint, then the dispute must be referred to a District Grievance Committee, which is also evenly divided between the two sides. The CBA provides that a majority [****5] decision of the District Grievance Committee "shall be final and binding." *Id., at 44*a. If the District Grievance Committee cannot reach a majority decision within 72 hours after meeting, then the committee must employ a professional arbitrator.

Clause 15(F) of the CBA provides as follows:

"The Union agrees that this Agreement is intended to cover all matters [***367] affecting wages, hours, and other terms and conditions of employment and that during the term of this Agreement the Employers will not be required to negotiate on any further matters affecting these or other subjects not specifically set forth in this Agreement. Anything not contained in this Agreement shall not be construed as being part of this Agreement. All past port practices being observed may be reduced to writing in each port." *Id. at 45*a-46a.

Finally, Clause 17 of the CBA states: "It is the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law." *Id. at 47*a.

Wright was also subject to the Longshore Seniority Plan, which contained its own grievance provision, reading as follows: "Any dispute concerning or arising out of the [****6] terms and/or conditions of this Agreement, or dispute involving the interpretation or application of this Agreement, or dispute arising out of any rule adopted for its implementation, shall be referred to the Seniority Board." *Id. at 48*a. The Seniority Board is equally divided between labor and management representatives. If the board reaches agreement by majority vote, then that determination is final and binding. If the board cannot resolve the dispute, then the Union and the [*74] SCSA each choose a person, and this "Committee of two" makes a final determination.

On February 18, 1992, while Wright was working for respondent Stevens Shipping and Terminal Company (Stevens), he injured his right heel and his back. He sought compensation from Stevens for permanent disability under the Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. § 901 et seq., and ultimately settled the claim for $ 250,000 and $ 10,000 in attorney's fees. Wright was also awarded Social Security disability benefits.

In January 1995 Wright returned to the Union hiring hall and asked to be referred for work. (At some point he obtained a written note from his doctor approving such [****7] activity.) Between January 2 and January 11, Wright worked for four stevedoring companies, none of which complained about his performance. When, however, the stevedoring companies realized that Wright had previously settled a claim for permanent disability, they informed the Union that they would not accept Wright for employment, because a person certified as permanently disabled (which they regarded Wright to be) is not qualified to perform longshore work under the CBA. The Union responded that the employers had misconstrued the CBA, suggested [**394] that the ADA entitled Wright to return to work if he could perform his duties, and asserted that refusing Wright employment would constitute a "lock-out" in violation of the CBA.

When Wright found out that the stevedoring companies would no longer accept him for employment, he contacted the Union to ask how he could get back to work. Wright claims that instead of suggesting the filing of a grievance, the Union told him to obtain counsel and file a claim under the ADA. Wright hired an attorney and eventually filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) and the South Carolina State Human Affairs Commission, [****8] alleging that the stevedoring [*75] companies and [***368] the SCSA had violated the ADA by refusing him work. In October 1995, Wright received a right-to-sue letter from the EEOC.

In January 1996, Wright filed a complaint against the SCSA and six individual stevedoring companies in the United States District Court for the District of South Carolina. Respondents' answer asserted various affirmative defenses, including Wright's failure to exhaust his remedies under the CBA and the Seniority Plan. After discovery, respondents moved for summary judgment and Wright moved for partial summary judgment with respect to some of respondents' defenses. A Magistrate Judge recommended that the District Court dismiss the case without prejudice because Wright had failed to pursue the grievance procedure provided by the CBA. The District Court adopted the report and recommendation and subsequently rejected Wright's motion for reconsideration. The United States Court of Appeals for the Fourth Circuit affirmed, see No. 96-2850 (July 29, 1997), judgt. order reported at 121 F.3d 702, relying upon its earlier decision in Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, cert. denied, 519 U.S. 980, 136 L. Ed. 2d 330, 117 S. Ct. 432 [****9] (1996), which in turn had relied upon our decision in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991). We granted certiorari, 522 U.S. 1146 (1998).

II

In this case, the Fourth Circuit concluded that the general arbitration provision in the CBA governing Wright's employment was sufficiently broad to encompass a statutory claim arising under the ADA, and that such a provision was enforceable. The latter conclusion brings into question two lines of our case law. The first is represented by Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 L. Ed. 2d 147, 94 S. Ct. 1011 (1974), which held that an employee does not forfeit his right to a judicial forum for claimed discriminatory discharge in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000 [*76] *et seq.*, if "he first pursues his grievance to final arbitration under the nondiscrimination clause of a collective-bargaining agreement." 415 U.S. at 49. In rejecting the argument that the doctrine of election of remedies barred the Title VII lawsuit, we reasoned that a grievance is designed to vindicate a "contractual right" under a CBA, while a lawsuit under Title VII asserts "independent statutory [****10] rights accorded by Congress." Id., at 49-50. The statutory cause of action was not waived by the union's agreement to the arbitration provision of the CBA, since "there can be no prospective waiver of an employee's rights under Title VII." Id., at 51. We have followed the holding of *Gardner-Denver* in deciding the effect of CBA arbitration upon employee claims under other statutes. See McDonald v. West Branch, 466 U.S. 284, 80 L. Ed. 2d 302, 104 S. Ct. 1799 (1984) (claim under Rev. Stat. s§s 1979, 42 U.S.C. § 1983); Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 67 L. Ed. 2d 641, 101 S. Ct. 1437 (1981) (claim under Fair Labor Standards Act of 1938, 29 U.S.C. § 201 et seq.).

The second line of cases implicated here is represented by Gilmer v. Interstate/Johnson Lane Corp., supra, [***369] which held that a claim brought under the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 et seq., could be subject to compulsory arbitration pursuant to an arbitration provision in a securities registration form. Relying upon the federal policy favoring arbitration embodied [**395] in the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., we said that "statutory claims may be the subject of an [****11] arbitration agreement, enforceable pursuant to the FAA." 500 U.S. at 26

(citing *Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 104 L. Ed. 2d 526, 109 S. Ct. 1917 (1989)*; *Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987)*; *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)*).

There is obviously some tension between these two lines of cases. Whereas *Gardner-Denver* stated that "an employee's [*77] rights under Title VII are not susceptible of prospective waiver," *415 U.S. at 51-52*, *Gilmer* held that the right to a federal judicial forum for an ADEA claim could be waived. Petitioner and the United States as *amicus* would have us reconcile the lines of authority by maintaining that federal forum rights cannot be waived in union-negotiated CBAs even if they can be waived in individually executed contracts -- a distinction that assuredly finds support in the text of *Gilmer*, see *500 U.S. at 26, 35*. Respondents and their *amici*, on the other hand, contend that the real difference between *Gardner-Denver* and *Gilmer* is the radical change, over two decades, in the Court's receptivity to arbitration, leading *Gilmer* to affirm [****12] that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration," *500 U.S. at 26* (internal quotation marks and citation omitted); *Gilmer*, they argue, has sufficiently undermined *Gardner-Denver* that a union *can* waive employees' rights to a judicial forum. Although, as will appear, we find *Gardner-Denver* and *Gilmer* relevant for various purposes to the case before us, we find it unnecessary to resolve the question of the validity of a union-negotiated waiver, since it is apparent to us, on the facts and arguments presented here, that no such waiver has occurred.

III

In asserting the existence of an agreement to arbitrate the ADA claim, respondents rely upon the presumption of arbitrability this Court has found in § 301 of the Labor Management Relations Act, 1947 (LMRA), 61 Stat. 156, *29 U.S.C. § 185*. [1] See generally *Steelworkers v. Enterprise [*78] Wheel & Car Corp., 363 U.S. 593, 4 L. Ed. 2d 1424, [***370] 80 S. Ct. 1358 (1960)*; *Steelworkers v. American Mfg. Co., 363 U.S. 564, 4 L. Ed. 2d 1403, 80 S. Ct. 1343 (1960)*; *Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 4 L. Ed. 2d 1409, 80 S. Ct. 1347 (1960)*. In collective bargaining agreements, we have said, "there is a presumption of arbitrability [****13] in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.'" *AT&T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 650, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986)* (quoting *Warrior & Gulf, 363 U.S. at 582-583*).

[****14] That presumption, however, does not extend beyond the reach of the principal rationale that justifies it, which is that arbitrators are in a better position than courts *to interpret the terms of a CBA*. See *AT&T Technologies, 475 U.S. at 650*; [**396] *Warrior & Gulf, 363 U.S. at 581-582*. This rationale finds support in the very text of the LMRA, which announces that "final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising *over the application or interpretation of an existing collective bargaining agreement*." *29 U.S.C. § 173(d)* (emphasis added). The dispute in the present case, however, ultimately concerns not the application or [*79] interpretation of any CBA, but the meaning of a federal statute. The cause of action Wright asserts arises not out of contract, but out of the ADA, and is distinct from any right conferred by the collective-bargaining agreement. See *Gilmer, 500 U.S. at 34*; *Barrentine, 450 U.S. at 737*; *Gardner-Denver, supra, 415 U.S. at 49-50*. To be sure, respondents argue that Wright is not qualified for his position as the CBA requires, but even if that were true he would [****15] *still* prevail if the refusal to hire violated the ADA.

Nor is the statutory (as opposed to contractual) focus of the claim altered by the fact that Clause 17 of the CBA recites it to be "the intention and purpose of all parties hereto that no provision or part of this Agreement shall be violative of any Federal or State Law." App. 47a. As we discuss below in Part IV, this does not incorporate the ADA by reference. Even if it did so, however -- thereby creating a contractual right that is coextensive with the federal statutory right -- the ultimate question for the arbitrator would be not what the parties have

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[1] *We have also discerned a presumption of arbitrability under the FAA, 9 U.S.C. § 1 et seq.* See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626, 87 L. Ed. 2d 444, 105 S. Ct. 3346 (1985)*. Petitioner argued that the FAA does not apply to this case, see Brief for Petitioner 43-44, and asserted that respondents "have not argued at any stage of this case that the F.A.A. applies," *id., at 43*. Respondents did not dispute the latter assertion, nor did they argue the applicability of the FAA before us; rather, they contended that it makes no difference whether the FAA applies, since the FAA presumption and the LMRA presumption are the same, see Brief for Respondents 12; Tr. of Oral Arg. 42-43. Finally, the Fourth Circuit, while it cited an FAA case, *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24-25, 74 L. Ed. 2d 765, 103 S. Ct. 927 (1983)*, did not explicitly rely upon the FAA -- presumably because it has held elsewhere that the FAA does not apply to CBAs, see *Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875, 879* (CA4), cert. denied, ***519 U.S. 980, 136 L. Ed. 2d 330, 117 S. Ct. 432 (1996)***. In these circumstances, we decline to consider the applicability of the FAA to the present case.

agreed to, but what federal law requires; and that is not a question which should be *presumed* to be included within the arbitration requirement. Application of that principle is unaffected by the fact that the CBA in this case, unlike the one in *Gardner-Denver*, does not expressly limit the arbitrator to interpreting and applying the contract. The *presumption* only extends that far, whether or not the text of the agreement is similarly limited. It may well be that ordinary textual [***371] analysis of a CBA will show that matters which go beyond the interpretation and application [****16] of contract terms are subject to arbitration; but they will not be *presumed* to be so.

IV

Not only is petitioner's statutory claim not subject to a presumption of arbitrability; we think any CBA requirement to arbitrate it must be particularly clear. In *Metropolitan Edison Co. v. NLRB, 460 U.S. 693, 75 L. Ed. 2d 387, 103 S. Ct. 1467 (1983)*, we stated that a [*80] union could waive its officers' statutory right under § 8(a)(3) of the National Labor Relations Act, *29 U.S.C. § 158(a)(3)*, to be free of antiunion discrimination, but we held that such a waiver must be clear and unmistakable. "We will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." *460 U.S. at 708*; see also *Livadas v. Bradshaw, 512 U.S. 107, 125, 129 L. Ed. 2d 93, 114 S. Ct. 2068 (1994)* (dictum); *Lingle v. Norge Div. of Magic Chef, Inc., 486 U.S. 399, 409, n. 9, 100 L. Ed. 2d 410, 108 S. Ct. 1877 (1988)* (dictum); cf. *Mastro Plastics Corp. v. NLRB, 350 U.S. 270, 283, 100 L. Ed. 309, 76 S. Ct. 349 (1956)*.

We think the same standard applicable to a union-negotiated waiver of employees' statutory right to a judicial forum for claims of employment discrimination. [****17] Although that is not a substantive right, see *Gilmer*, 500 U.S. at 26, and whether or not *Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*, *Gardner-Denver* at least stands for the proposition that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA. The CBA in this case does not meet that standard. Its arbitration clause is very general, providing for arbitration of "matters under dispute," App. 43a -- which could be understood to mean matters in dispute under the contract. And the remainder of the contract contains no explicit incorporation of statutory antidiscrimination requirements. (Indeed, it does not even contain, as did the CBAs in *Austin* and [**397] *Gardner-Denver*, its own specific antidiscrimination provision.) The Fourth Circuit relied upon the fact that the equivalently broad arbitration clause in *Gilmer* -- applying to "any dispute, claim or controversy" -- was held to embrace federal statutory claims. But *Gilmer* involved an individual's waiver of his own rights, rather than a union's waiver of the rights [****18] of represented employees [*81] -- and hence the "clear and unmistakable" standard was not applicable.

Respondents rely upon Clause 15(F) of the CBA, which states that "this Agreement is intended to cover all matters affecting wages, hours, and other terms and conditions of employment." App. 45a-46a. But even if this could, in isolation, be considered a clear and unmistakable incorporation of employment-discrimination laws (which is doubtful), it is surely deprived of that effect by the provision, later in the same paragraph, that "anything not contained in this Agreement shall not be construed as being part of this Agreement." *Id. at 46a*. Respondents also rely upon Clause 17 of the CBA, which states that "it is the intention and purpose of all parties hereto [***372] that no provision or part of this Agreement shall be violative of any Federal or State Law." *Id. at 47a*. They argue that this requires the arbitrator to "apply legal definitions derived from the ADA" in determining whether Wright is "qualified" for employment within the meaning of the CBA. Brief for Respondents 39. Perhaps so, but that is not the same as making compliance with the ADA a contractual commitment that would be subject to the [****19] arbitration clause. This becomes crystal clear when one contrasts Clause 17 with the provision of the CBA which states that "the requirements of the Occupations *[sic]* Safety and Health Administration shall be binding on both Parties." App. 46a. (Under respondents' interpretation of Clause 17, this OSHA provision would be superfluous.) Clause 17 seems to us nothing more than a recitation of the canon of construction which would in any event have been applied to the CBA -- that an agreement should be interpreted in such fashion as to preserve, rather than destroy, its validity (*ut res magis valeat quam pereat*).

Finally, we do not find a clear and unmistakable waiver in the Longshore Seniority Plan. Like the CBA itself, the Plan contains no antidiscrimination provision; and it specifically [*82] limits its grievance procedure to disputes related to the agreement. [2]

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[2] Respondents and some of their *amici* rely upon the provision in the ADA which states that "where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter." *42 U.S.C. § 12212*. They rely upon it principally in connection with the question whether, under *Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 114 L. Ed. 2d 26, 111 S. Ct. 1647 (1991)*, a predispute agreement in a CBA to arbitrate employment-discrimination claims is enforceable -- a question we do

[****20] * * *

We hold that the collective-bargaining agreement in this case does not contain a clear and unmistakable waiver of the covered employees' rights to a judicial forum for federal claims of employment discrimination. We do not reach the question whether such a waiver would be enforceable. The judgment of the Fourth Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

*It is so ordered.*

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not reach. Our conclusion that a union waiver of employee rights to a federal judicial forum for employment discrimination claims must be clear and unmistakable means that, absent a clear waiver, it is not "appropriate," within the meaning of this provision of the ADA, to find an agreement to arbitrate. We take no position, however, on the effect of this provision in cases where a CBA clearly encompasses employment discrimination claims, or in areas outside collective bargaining.