

December 2003

Editor: Christine P. O'Hearn,
Esquire

Labor & Employment News



BROWN & CONNERY, LLP

www.brownconnery.com

LABOR & EMPLOYMENT GROUP:

WILLIAM M. TAMBUSI, ESQUIRE

wtambuss@brownconnery.com

CHRISTINE P. O'HEARN, ESQUIRE

cohearn@brownconnery.com

SUSAN M. LEMING, ESQUIRE

sleming@brownconnery.com

LOUIS R. LESSIG, ESQUIRE

llessig@brownconnery.com

ILA BHATNAGAR, ESQUIRE

ibhatnagar@brownconnery.com

MICHAEL F. WALLACE, ESQUIRE

mwallace@brownconnery.com

MICHELLE A. CARTER, ESQUIRE

mcarter@brownconnery.com

JACQUELINE R. BARRETT, ESQUIRE

jbarrett@brownconnery.com

The Proposed Revisions to the Fair Labor Standards Act and How They May Effect Your Organization

By Louis R. Lessig, Esquire

Do you pay any of your employees overtime? Whether or not you presently pay overtime to employees, recently proposed revisions by the U.S. Department of Labor (DOL) to the Fair Labor Standards Act (FLSA) will likely affect your organization.

It has been almost twenty-three years since the DOL proposed changes related to the amount of salary below which an employee would be entitled to overtime. While the increase in the salary level is not surprising, the effect of such an increase will be to render many lower paid employees, formerly salaried employees, entitled to overtime wages. This was, in fact, one of the specifically stated goals of the DOL in drafting the proposed revisions. According to the DOL, it is estimated that an additional 1.3 million workers will be entitled to overtime wages as a result of the increase in the salary level. An independent organization has estimated that figure as high as 3.4 million workers.

If the proposed changes are implemented, every employer will have to review their present payroll and determine how the revised regulations will change their employee's entitlement to overtime wages and the resulting financial costs to the employer. The DOL estimates, for example, that state and local governments may be incur costs ranging from \$21 million to \$43.6 million dollars, including a one-time implementation cost which may range from \$14 million to \$19.7 million dollars, along with recurring payroll costs for overtime wages ranging from \$7 million to \$23.9 million dollars. However, the potential costs incurred by private sector employers will likely be greater. For example, it has been estimated that small businesses nationwide will incur costs ranging from \$502.4 million to \$835.9 million dollars, including a one-time implementation cost which may range from \$349.3 million to \$451.7 million dollars, along with recurring payroll costs for overtime wages between \$153.1 million to \$384.2 million dollars.

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Will Your Organization Pass the Gaines Test?

By Susan M. Leming, Esquire

An employer who has an anti-harassment policy is not necessarily protected from liability on claims of sexual harassment by employees under New Jersey law. Employers often believe that they are insulated from liability simply because they have an anti-harassment policy

in place. They are mistaken. Having a policy in place will no longer protect employers from liability in harassment or discrimination cases unless the employer can show the policy was effective, employees were trained, and other affirmative measures were taken to prevent harassment. The absence of measures to effectively prevent discrimination and harassment

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Supreme Court Addresses Punitive Damages and Public Employers

By Ila Bhatnagar, Esquire

Recently, the New Jersey Supreme Court decided Lockley v. State of New Jersey, 177 N.J. 413 (2003), delineating specific guidelines to be followed in reviewing jury awards of punitive damages against public sector employers. Specifically, the Court answered two questions: (1) the circumstances under which punitive damages may be awarded against a public entity and (2) the factors that must be considered when calculating an amount of punitive damages against a public entity.

Generally, punitive damages may be awarded when upper management actually participates in the unlawful discrimination or is willfully indifferent. The Court held that this standard is to be applied to private as well as public sector employers. Avoiding a punitive damages verdict will hinge not on an employee's job title but on whether they have enough power, discretion and influence to be considered "upper management," and if they engaged in actual participation of wrong-doing or were willfully indifferent to offensive conduct or to the complaints of an employee. The Court explained that "defining upper management requires a fact-specific inquiry that depends not on labels or titles but on whether an employee possesses 'significant power, discretion and influence'...capable of furthering the mission of the organization and of selecting courses of action from available alternatives." Furthermore, as detailed in the September 2003 Newsletter, because it is the victim's perceptions as to whether an employee has supervisory authority which will be dispositive, Entrot v. BASF Corp., 359 N.J. Super. 162 (App. Div. 2003), it is important for employers to clearly outline the chain of command and to carefully train and promote employees in positions of supervisory authority. As per the Lockley decision, when employment discrimination matters are eventually brought to a trial before a jury, the jury will be asked to "examine the duties, responsibilities, and powers of each of the [public employer's] employees whose conduct or willful indifference affected [the complaining employee], in order to determine whether they were a part of the [public employer's] upper management."

The importance of training employees on anti-discrimination policies and carefully selecting employees for positions of authority is emphasized by the Lockley decision because upper management employees will be required to take remedial action when an employee complains about discrimination or harassment. Failure by upper management employees to take remedial action to stop the offensive conduct may subject the employer to punitive damages. It is incumbent upon the employer to take specific measures aimed at not only preventing any of the various forms of discrimination, but also to specifically educate and train management employees what to do when an employee reports behavior which potentially violates state and/or federal anti-discrimination laws.

Secondly, Lockley specifically delineated the factors to be applied when calculating and assessing a punitive damages award against a public entity. Traditionally, evidence of a defendant's financial condition is admitted to show the ability of an employer to pay a punitive damages award. The financial condition of the defendant is also a measure by which courts analyze the reasonableness of an award of punitive damages. However, the Court recognized that, "Applying such traditional criteria as the defendant's financial profile in a given year, or the pecuniary impact of defendant's conduct on the 'corporate bottom line,' is simply unworkable when the defendant's financial status is governed by appropriation acts and tax levies rather than market forces." Therefore, unlike punitive damage claims against private employers, the financial status of the public employer is not relevant and should not be considered by a jury or court. The reasonableness of a punitive damages award against a public sector employer will be considered in terms of the egregiousness of the conduct and the deterrent effect upon future conduct, without any financial considerations. This will leave jurors, and the courts, largely unguided and without any objective criteria in assessing the amount of punitive damages to be awarded.

In summary, to avoid the risk of a punitive damage verdict, employers must carefully select those employees in positions of authority sufficient to constitute upper management and provide adequate training on anti-discrimination policies and procedures to ensure proper response to employee reports or claims by employees of discrimination.

A Whistleblower Need Not Be Correct In Belief that Employer Violated the Law

By Christine P. O'Hearn, Esquire

The New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 et seq. ("CEPA") protects an employee, the whistleblower, who discloses, refuses to participate and/or objects to activities of the employer which the employee reasonably believes violates the law or a clear mandate of public policy. A plaintiff who brings a CEPA cause of action must demonstrate that: (1) he or she reasonably believed that the employer's conduct was violating a law, rule or regulation promulgated pursuant to law or a clear mandate of public policy; (2) he or she performed a whistleblowing activity as described in the statute; (3) an adverse employment action was taken against them; and (4) a causal connection exists between the whistleblowing activity and the adverse employment action.

The New Jersey Supreme Court recently settled an issue of dispute among courts as to whether the whistleblower must be correct in their belief that the employer violated the law in order to prevail on a CEPA claim. In Dzwonar v. McDevitt, 177 N.J. 451 (2003), the Court held that a whistleblowing employee need not be correct in their belief that the employer's activities actually violated the law. Rather, the whistleblowing employee's complaints must only have a substantial nexus or close relationship to a law which might be violated.

Prior to the Court's decision this year, there had been several lower courts which held that in order to prevail in a CEPA claim, a plaintiff must identify a law, rule, regulation or public policy which would be violated if the facts alleged by the employee were true. The Court clearly rejected these lower court decisions and explained,

The goal of CEPA is not to make lawyers out of conscientious employees but rather to prevent retaliation against those employees who object to employer conduct that they reasonably believe to be unlawful or indisputably dan-

gerous to the public health, safety or welfare. Requiring the court to determine at the outset, whether the alleged wrongful activities, if true, would be unlawful appears antithetical to the language and intent of the statute. We therefore conclude that [CEPA] does not require a plaintiff to show that a law, rule, regulation or clear mandate of public policy actually would be violated if all the facts he or she alleges are true. Instead, a plaintiff must set forth facts that would support an objectively reasonable belief that a violation has occurred. In other words, when a defendant requests that the trial court determine as a matter of law that a plaintiff's belief was not objectively reasonable, the trial court must make a threshold determination that there is a substantial nexus between the complained-of-conduct and a law or public policy identified by the court or the plaintiff. If the trial court so finds, the jury then must determine whether the plaintiff actually held such a belief and, if so, whether the belief was objectively reasonable.

Therefore, the Dzwonar decision clarifies the burden of proof in a CEPA case and makes clear that so long as the plaintiff and/or the Court can identify a law or public policy which has a substantial nexus to the complained-of-activity, the plaintiff's claim should be submitted to a jury to determine whether the employee's belief was objectively reasonable and the motivating factor in adverse employment action. It is no longer a viable defense for the employer to argue that the activity cited by the employee is legal and/or not violative of any law or public policy.

Proposed Revisions to the Fair Labor Standards Act . . .

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Beyond small businesses, other private employers are anticipated to incur costs ranging from \$849.2 million to \$153.9 billion dollars. This estimate includes a one-time implementation cost ranging from \$521.4 million to \$660.3 million dollars, along with recurring payroll costs for overtime wages ranging from \$327.8 million to \$871.6 million dollars. The industries which the DOL estimates will incur the largest total financial costs involved include the health services industry, construction, business services, personal services and real estate.

However, an understanding of the specific proposed revisions is critical to realizing how these seemingly enormous financial costs may be incurred by employers. First, the DOL has proposed that the minimum salary be increased for those employees who are currently considered executive, administrative, learned professionals, creative professionals, computer professionals and outside sales employees. Presently the minimum salary requirement below which an employee would be entitled to overtime wages is as low as \$155 per week. Under the proposed revisions, the base salary would increase to \$425 per week for all of the above listed exempt categories.

In addition to the increase in the minimum salary, other proposed changes are intended to make the FLSA easier for employers to apply, particularly in light of the increase in litigation concerning entitlement to and calculation of overtime wages. The proposed revisions include eliminating what has been referred to as the "short test" and the "long test" for determining which employees are properly classified as exempt or salaried employees. Instead, the "standard test" would be implemented. Under the standard test, separate categories for executive, administrative, learned professionals, creative professionals, computer professionals and outside sales employees would remain intact, but the standard test includes changes related to the duties of such employees. For example, executives would still be required to primarily manage and direct the work of at least two individuals, but will also need the authority to hire or fire other employees or have a significant part in making recommendations for hiring, firing, promotion or other change of status for other employees. While the latter requirement is new, the former percentage requirement for the amount of time one can spend doing non-management work will be deleted from all exempt categories.

Further, administrative employees will no longer be required to exercise independent judgment and discretion. Under the proposed revisions, along with performing work primarily related to management or general business operations of the employer or the employer's customers, these employees will be required to hold a "position of responsibility" with the employer. In order to be considered an employee in a position of responsibility, an administrative employee must either be performing work of sub-

stantial importance or work requiring a high level of skill or training.

One of the most significant changes is for learned professional employees. Until now, individuals with advanced degrees in the area of science or learning have been exempt from overtime wages under this provision. However, the DOL has proposed a revision that would allow individuals to qualify under this exemption either by having an advanced degree or by alternative means such as an equivalent combination of intellectual instruction and work experience. This alteration may directly affect jobs such as teachers, nurses and other alternative track employees.

The DOL has proposed revisions to the salary basis test which is intended to allow employers to make certain deductions from salaried employees for disciplinary infractions. This is presently prohibited.

Finally, the DOL has proposed revisions to the safe harbor provisions to provide a mechanism for employers to correct violations without losing any exemptions under the FLSA.

These proposed revisions have not gone unnoticed by employers. The proposed revisions to the FLSA overtime regulations have generated an unprecedented 98,000 public comments. These comments are currently being reviewed by the DOL. Concurrently, while the House of Representatives did not make any effort to stop these measures from taking effect, the Senate passed a bill which precludes the DOL from using any appropriations in fiscal 2004 to fund the proposed revisions to the FLSA. This has now been rescinded. The DOL intends to publish and implement the final version of these proposed revisions in the first quarter of 2004. While the proposed changes have not yet become effective, it is important that employers begin to review how the proposed changes may affect their organization from both an administrative and financial perspective.

The Employer's Duty to Engage In the Interactive Process Under the Americans with Disabilities Act (ADA)

By Louis R. Lessig, Esquire

Many employers continue to struggle with complying with the ADA. More specifically, the employer's duty to engage in the interactive process once an employee or a job applicant requests a job accommodation due to a disability. The failure to engage in good faith, in the interactive process once the accommodation request is made may subject an employer to litigation and allegations of discrimination based upon disability and the failure to provide reasonable accommodations. In Stultz v. Reese Brothers, Inc., 2003 WL 22435630 (Pa. Super. Oct. 28, 2003) the Pennsylvania Appellate Court recently discussed the extent to which an employer must engage in an interactive process.

In Stultz, a male job applicant with permanent and progressive eye disease applied for a job as a telemarketer. The applicant was initially interviewed by a recruiter who knew the plaintiff and was aware of his impairment. After the interview, an offer of employment was made. However, he was unable to commence employment due to unrelated criminal charges and incarceration.

Approximately one year later, the applicant re-applied for the same position as a telemarketer. After this second application was submitted, he was interviewed by a different recruiter than the prior occasion. The individual who interviewed the applicant was obviously aware of his disability because she guided the applicant by hand to her office for the interview. During the interview, the recruiter asked the applicant about the severity of his visual disability and inquired as to whether he was aware of any visual aids which would assist him in performing the job of a telemarketer. While the applicant did not have such information during the interview, he subsequently contacted the Office of Blindness and Visual Services to obtain such information. Plaintiff obtained two catalogues containing visual aids for the workplace and forwarded the materials to the recruiter.

Upon receipt of the materials related to visual aids, the recruiter sent the materials to a branch office to determine if any of the aids could be used at their facility and for review by the information technology department to assess the feasibility of integrating the aids. The manager of Information Technology contacted the software vendor who advised that the visual aids were not compatible with the company's existing programs and if software related to the visual aids was loaded onto the company's system, all warranties would be voided. Based solely on this information, the company concluded that no reasonable accommodation could be made and the applicant was not hired.

The applicant filed a lawsuit against the company alleging that he was discriminated against because of his disability and that the company failed to provide a reasonable accommodation for his disability in violation of the ADA.

After finding the plaintiff was qualified for the position of a telemarketer, the Court determined that the plaintiff's visual ability was the only reason the plaintiff was not offered employment. The Court emphasized that the company was aware of the applicant's disability since two individuals had interviewed him for employment and his application specifically stated, "Need special equipment to see; Have hereditary blindness." As a result, the Court held that under the ADA, the company had an affirmative obligation to engage in the interactive process to determine if an accommodation could be made for the plaintiff. The Court explained that while both parties have a duty to determine if a suitable accommodation exists, the plaintiff had met his burden by providing the company with information related to potential visual aids.

While the employer did make some inquiry related to implementation of the visual aids, there was no inquiry made other than contacting the software vendor. The employer did not contact any other consultant and did not investigate whether any other aids may be available and/or compatible with their system. The Court held that this limited effort by the employer was inadequate under the ADA. According to the Court, the employer had an affirmative obligation to contact the plaintiff to discuss his specific limitations and needs and, after conducting their initial investigation, contact the plaintiff again to discuss their findings and make an attempt to determine if any alternative accommodations were available and feasible. Specifically, the Court noted that the employer made no effort to consider alternate accommodations such as screen magnifiers or large monitors. The Court held that the employer's minimal efforts did not constitute a sufficient interactive process because of the lack of interaction and discussion between the parties. The plaintiff was awarded monetary damages.

The Stultz case is consistent with other decisions of the Third Circuit, New Jersey, and Pennsylvania Courts. However, the facts of this case demonstrate that an employer must make more than a minimal effort to engage in the interactive process under the ADA when an employee or job applicant requests a job accommodation. Employers should not limit their review of requested job accommodations to consultation with its own employees or to the specific type of accommodation or aide suggested by the disabled individual. Rather, the employer should seek and consider all possible aides and accommodations which may be available from a variety of sources. Employers should discuss possible accommodations with outside consultants or agencies serving disabled individuals, if necessary. Finally, employers must communicate the information obtained and their decision regarding any accommodation to the employee or applicant. An employer's failure to do so will likely be deemed a failure to engage in the interactive process and a violation of the ADA's requirement that the employer provide reasonable accommodations to disabled persons.

Will Your Organization Pass the Gaines Test?

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presents strong evidence of an employer's negligence regardless of the existence of an anti-harassment policy. The employer is, therefore, not immune from vicarious liability for an employee's harassing conduct just because it has adopted a harassment/discrimination policy.

In *Gaines v. Bellino*, 173 N.J. 301 (2002), a female employee alleged that she was subjected to sexual harassment including a kiss by a co-worker; a comment made about her; and being blocked in a room by the alleged harasser. The incidents were informally reported by the employee to several of the employee's superiors. However, her complaints were not taken seriously and not addressed by management. The employee also reported a fear of retaliation from the alleged harasser and upper management. The employee sued the employer for sexual harassment and hostile work environment. The employer argued it should not be liable for the co-worker's harassment because it had an anti-harassment policy. The Court rejected the employer's argument that the mere adoption of an anti-harassment policy would preclude liability from being imposed. The absence of evidence that management was committed to enforcing the policy and that the policy was, in fact, effective demonstrates an employer's negligence. Although the employer had a policy, it never provided employee training related to the policy, the plaintiff's supervisors permitted a harassing atmosphere to continue and ridiculed the plaintiff when she did complain about the behavior to which she was being subjected. Thus, the Court found the policy was not effective in preventing harassment in the workplace and the employer failed to do anything to prevent harassment in the workplace other than adopting a policy.

The Court emphasized the importance of implementing an anti-harassment policy in the workplace that is practiced, effective, and reinforced by all management employees - up to the CEO/President. Employers should carefully review to see if they could meet this standard. Relevant considerations include the following:

- Does the Company have anti-harassment and anti-discrimination policies?
- Does the policy contain formal and informal complaint procedures so that each employee is clearly aware of how to file and who to report a complaint of harassment or discrimination?
- Are the policies posted in the workplace?
- Have the anti-harassment and anti-discrimination policies been circulated to all employees?
- Is documentation maintained to show all of the employ-

ees received a copy of the policies?

- Have all employees received training concerning harassment and discrimination?
- Is documentation maintained to show that employees attended training?
- Have all supervisors and managers received training?
- Has training been made available to all employees?
- Are there effective mechanisms in place to monitor the workplace?

While these requirements may seem burdensome, they can become part of an employer's regular personnel procedures. Establish a procedure by which the sexual harassment policy is re-circulated annually. Include a brief discussion of the policy and its importance on the agenda at board meetings, management meetings or other training sessions. Periodically survey employees, formally or informally, to determine if any problems exist in the workplace. These are some practical suggestions to implementing an effective policy.

Absent evidence of all, or at least some of the above affirmative measures, an employer is at risk of vicarious liability for the acts of its employees. It is evident from the Court's ruling that it is no longer sufficient to simply include an anti-harassment policy in an employee handbook. Rather, an organization must ensure that it is effective in practice.

If you would like further information related to employee training, please contact Christine O'Hearn or Susan Leming.

Overview of Record Retention Requirements

Statute	Records To Be Retained	Period of Retention
Title VII Civil Rights Act of 1964 ("Title VII"); Americans with Disabilities Act ("ADA")	<p>a. Any personnel or employment records made or kept, including but not limited to:</p> <ul style="list-style-type: none"> • application forms; records concerning hiring, promotion, demotion, transfer, layoff or termination; rates of pay or other terms of compensation; requests for reasonable accommodation; selection for training or apprenticeship <p>b. Records relating to any bias or discrimination charge, including but not limited to:</p> <ul style="list-style-type: none"> • appraisals, job descriptions, payrolls, and other records relating to charging party and all similarly situated employees <p>c. EEO-1 Forms (for employers with 100 or more employees)</p> <p>d. Records on the impact of hiring procedures on women and minorities</p>	<p>a. One year from date record was made or personnel action was taken, whichever is later</p> <p>b. Until final disposition or discharge of action</p> <p>c. A copy of the most recently filed report must be maintained</p> <p>d. Two years or period of apprenticeship (whichever is longer)</p>
Age Discrimination in Employment Act ("ADEA")	<p>a. Records on each employee containing name, address, date of birth, occupation, rate of pay, and compensation earned each week</p> <p>b. Personnel or employment records related to job applications, promotion, demotion, transfer, layoff, recall or discharge, job orders submitted to employment agencies or labor organizations for recruitment of personnel, test papers of employer-administered aptitude test, physical examination test results and advertisements</p> <p>c. Employee benefit plans, as well as copies of seniority systems and merit systems which are in writing, and if not in writing, a memorandum fully outlining the terms or such plan or system</p>	<p>a. Three years</p> <p>b. One year</p> <p>c. One year following termination of plan</p>
Fair Labor Standards Act ("FLSA") (includes Equal Pay Act of 1983)	<p>a. Basic records containing employee information, including but not limited to:</p> <ul style="list-style-type: none"> • payroll records; individual employment contracts or collective bargaining agreements; certificates and notices of Wage & Hour administrator; Sales and purchase records; written agreements or memoranda summarizing the terms of oral agreements or understandings <p>b. Supplementary records, including but not limited to:</p> <ul style="list-style-type: none"> • basic employment and earning records; wage rate tables; work schedules; records of additions or deductions from wages paid; order, shipping, and billing records; records of changes in compensation rates; documentation of basis for payment of any wage difference to employees of opposite sex <p>c. Certificates of age</p>	<p>a. Three years</p> <p>b. Two years</p> <p>c. Until termination of employment</p>
Family & Medical Leave Act of 1993 ("FMLA")	<p>Same records as FLSA. In addition, all records pertaining to FMLA leave, including, but not limited to:</p> <ul style="list-style-type: none"> • dates and hours of FMLA leave taken; copies of leave policies; records of disputes with employees over FMLA benefits; copies of notices of leave submitted by the employee; premium payments of employee benefits 	Three years
Immigration Reform and Control Act	INS Form I-9, Employment Eligibility Verification Form	Three years after date of hiring or one year after date of employee's termination, whichever is later
Employee Retirement Income Security Act ("ERISA")	<p>Records regarding employees' health and/or welfare benefit plans, including, but not limited to:</p> <ul style="list-style-type: none"> • benefit plans; summary plan descriptions 	Six years
Occupational Safety & Health Act ("OSHA")	<p>a. Log and summary of occupational injuries and illnesses (OSHA Form 300) and modified Form 300 and 300A with additional column M(5) hearing loss beginning 1/1/2004</p> <p>b. Employee medical records</p> <p>c. Employee exposure records</p> <p>d. Analyses using exposure or medical records</p>	<p>a. Five years</p> <p>b. Duration of employment plus thirty years</p> <p>c. Thirty years</p> <p>d. Thirty years</p>



BROWN & CONNERY, LLP

Our Web Address:

www.brownconnery.com

360 Haddon Avenue
P.O. Box 539
Westmont, NJ 08108
Phone: (856) 854-8900
Fax: (856) 858-4967

129 North Broadway
Suite 302
Camden, NJ 08102
Phone: (856) 365-5100
Fax: (856) 858-4967

6 North Broad Street
Woodbury, NJ 08096
Phone: (856) 812-8900
Fax: (856) 853-9933

1500 Market Street
12th Floor, East Tower
Centre Square
Philadelphia, PA 19102
Phone: (215) 592-4352
Fax: (856) 858-4967

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