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**FROM THE CHAIR**

**By Peter Guattery**

A good crowd turned out for our Spring Dinner meeting on April 15th to hear the Honorable Magistrate Judge Paul Grimm and the Honorable Joseph Murphy, Judge, Maryland Court of Appeals, offer insight on the *Twombly* and *Iqbal* decisions and principles of good appellate practice, respectively. I would like to thank both Judges for interesting and informative presentations, as well as Darryl McCallum, Jim Hammerschmidt and Tom Gagliardo for putting the event together.

This past Monday heard oral argument before the Supreme Court in the case of *City of Ontario v. Quon*. The case raises the issue of whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policy-making lieutenant announced an informal policy of allowing some personal use of the pagers. Quon and other officers sent personal text messages on the pagers, some of which were sexually explicit. While reports on the argument tended to indicate that most of the justices appeared to place significance on the police department's written policy, Chief Justice Roberts raised the question of whether "it would be reasonable for (Quon) to assume that private messages were his business" given the department's policy of permitting some personal use of the pagers. This case has been closely watched, given its relevance to our increasingly wired workplace, and the resulting blurry line of privacy that has come about as a result. A decision is expected in June.

In other developments, the Governor recently signed into law a bill which includes overtime wages in the definition of wages under Maryland's Wage Payment and Collection Act. A federal district court decision had previously found such wages excluded from the remedies of the MWPCA. The law, which may well prove to alter the dynamic in overtime claims, by providing an alternate remedy to those provided

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**EDITOR'S CORNER**

**By Albert Palewicz**

Let me echo Peter's comments about the April 15 Section Dinner. It was well attended, and the presentations were excellent. The food and the view were quite good as well. Thanks to all who helped arrange it, and to the presenters especially, for their informative sharing of their thoughts.

For the first time in a long while there is news worth mentioning about the National Labor Relations Board. There are now four Board members sworn in and working. Craig Becker and Mark Pearce were sworn in as Members on April 5 and April 7, respectively. They join Chair Wilma Liebman and Member Peter Schaumber, to bring the Board almost to full strength for the first time in over a year. On a somewhat related issue, the NLRB is hoping for a decision from the Supreme Court in June about the legality of the Board's decisions issued when there were only two members serving. The result of the case, now not a continuing concern in the immediate future, will help guide those who bring cases before the Board in the future, I am sure.

On the General Counsel side, I note that Ron Meisburg's term expires in August, and that will leave the Board without authority to file certain of its cases in the federal courts. I have not even heard rumors about who might be the next General Counsel.

I would like to thank those who prepared the articles for this issue. Almost all of the articles are joint products from two or more attorneys at Hogan and Hartson LLP, coordinated by Gil Abramson of the firm's Baltimore office. The articles all contain very useful information about several areas of labor and employment law. Our thanks to all the authors.

The next issue will be prepared by attorneys from Miles and Stockbridge in Baltimore, with Steve Frenkil as Coordinator.

That next issue will publish and be distributed at the summer

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**FROM THE CHAIR (continued)**

under the FLSA, takes effect on October 1.

Finally, I would like to encourage everyone to attend the Section's program at the Annual Meeting on June 11th. This year's program will focus on employee leave issues under the ADA, the FMLA and other related statutes. Details will follow with your MSBA invitation.

**EDITOR'S CORNER (continued)**

meeting in Ocean City. The Section's program there is on a set of topics that are often mentioned by those practicing with employer clients or clients who have disputes with employers. That is, the tricky issues of FMLA, ADA, and other statutory arenas dealing with the rights of employees to be absent from work or to ask for special help in doing their jobs. Both the materials produced for the session, and the presentations themselves will be interesting and informative. See you in O.C.

**Second Notice of  
Section Council Elections**

Under the Section's By-Laws, members of the Section Council are elected at the MSBA Annual Meeting in Ocean City in June of all even-numbered years. This year there are three vacancies on the Council, for which candidates will be chosen by the appointed Nominating Committee. The By-Laws further provide that any member of the Section who wishes to be on the ballot for a place on the Section Council may be nominated by petition of at least fifteen Section members, filed with Recording Secretary Jonathan Krasnoff, no later than ten (10) days prior to the Annual Meeting. This year the Annual Meeting begins on June 9, so any such petition must be received by Mr. Krasnoff no later than May 30, 2010, or the last working day prior to that date.



This Maryland State Bar Association Newsletter is not intended to provide legal advice, but rather to provide information concerning recent developments in the field of labor and employment law. Questions concerning individual problems or claims should be addressed to legal counsel. Any opinions expressed herein are solely those of the authors, and are not those of the Maryland State Bar Association. Finally, the articles contained herein are copyrighted, all rights reserved by the respective authors and/or their law firms, companies or organizations.



# Navigating Social Media in the Business World<sup>1</sup>

By Valerie Brennan (Northern Virginia)

Much has been written lately about social media applications such as Facebook, MySpace, Twitter and LinkedIn and their intersection with the business world. Wikipedia defines social media as “online content created by people using highly accessible and scalable publishing technologies”<sup>2</sup>. Another term, Web 2.0, is used to describe the similar concept of the Internet’s evolution from a static environment focused on the one-way provision or receipt of information (Web 1.0), to an interactive community where users can communicate, share, post, blog and create content in real time.

According to statistics published on Facebook’s Press Room<sup>3</sup>, there are more than 400 million active users of Facebook worldwide and more than 120 million users log onto the site at least once each day. Although Facebook initially appealed to the young, now the fastest growing demographic is those at least 35 years old and the majority (more than two-thirds) of Facebook users are out of college. Most top brands have Facebook group and/or fan pages – those of Pringles, Coca-Cola, Starbucks, and Adidas, among others, have been recognized by some commentators as most effective<sup>4</sup>. Many other entities, and a large percentage of their employees, have embraced Web 2.0 and social media and are discovering the business and legal issues that arise from such use.

The legal issues created by the growing exploitation of social media are to some extent overlapping with the issues created by past uses of the internet – web sites, email, domain names – but also unique or applied in original ways. Social media hastens issues that were present in earlier web uses (such as email and static websites). Where an ill-advised email might have been forwarded from one person to another and to groups, and eventually picked up on a website or by a news outlet, now such an email could be sent as a Twitter Tweet to thousands instantly or posted to a blog for all to read. Companies seeking to avail themselves of the benefits of social media should do so only after carefully considering their goals, developing

a clear strategy, and having addressed the numerous legal issues involved.

In this article I outline, from the perspective of an entity, company or organization governed by U.S. law, the considerations that arise when social media is used by three different groups – the entity itself, the employees of that entity, and third parties in reference to the entity. I discuss the benefits of social media, as well as issues and risks, from each of these three angles. How a company should respond to or address these issues depends on many factors, not all of which are legal issues, and is beyond the scope of this advisory. Nor are we addressing uses by individuals separate from their relationship with the entity (such as the risk of identity theft increased by disclosure of personal information through social media, which is then used to make phishing appear legitimate). Rather, we provide a framework to enable a company to think through its use and how it wishes to address and respond to use of social media by its employees and by third parties unrelated to it.

## 1. Exploitation of Social Media by Entities

For each of the following goals that entities seek to achieve by using social media, there are identifiable risks and issues that can be mitigated through careful planning and implementation:

**Bolstering customer connection.** A product company’s Facebook profile can allow customers to connect with the company in a more direct manner than with a website, and to connect using an extension of a social media platform that the customers are already using. Entities can increase their customers’ sense of brand connection and create transparency, or at least a perception of transparency, by answering their questions on a public site, by enabling customers to comment via social media applications, and by communicating in real time via blogging to make the provider/customer connection stronger.

- Understand defamation and copyright laws, particularly if third parties are to be allowed to comment on a company site. Several defamation via Twitter suits have been brought recently, one related to postings implying involvement in a suspicious death<sup>5</sup> and another concerning moldy apartments<sup>6</sup>.
- Put in place policies to remove offensive content without jeopardizing protections available under the Digital Millennium Copyright Act’s safe harbor provisions<sup>7</sup> and the Communications Decency Act<sup>8</sup>.

**Replacing press releases with social media updates.** Public disclosures, which in the past might have been reviewed by a company’s legal department before being disclosed as a press release, now are made with little time for review.

- Apply to social media disclosures with regulatory implications (such as forward-looking financial statements or communications with competitive ramifications) the same level of care and consideration used before the proliferation of social media.
- Understand the terms of use for any social media applications used, particularly with respect to privacy and ownership<sup>9</sup>.

**Communicating consumer news quickly.** Companies can update their customers and followers quickly, as a replacement or addition to email announcements, on events such as sales. Such communications can be free advertising if others pass the content along.

- Consider whether such updates are desirable to the recipients, weighing downsides, costs, and legal restrictions, such as the Telecommunications Privacy Act, the CAN-SPAM Act, and the Children’s Online Privacy Protection Act<sup>10</sup>.

**Keeping tabs on competitors.** Companies also can investigate, follow and monitor their clients and competitors.

- Ensure that your company’s use of information gleaned through use of social media complies with its antitrust policy.

**Addressing public relations issues.** Companies also can respond to potential public relations issues (some arising from social media themselves) by blogging or sending out Twitter Tweets<sup>11</sup>.

- Use social media to respond to customer complaints and to correct misinformation about your product or company.

**Recruiting employees.** Employers can use social media tools to interact with prospective employees using a medium with which the employees are familiar and comfortable. Social media also enables companies to investigate prospective employees, such as by expanding background checks (to include review of the posts the individual has made to YouTube and public areas of an individual’s Facebook page). According to a recent study by Harris Interactive conducted for [CareerBuilder.com](http://CareerBuilder.com)<sup>12</sup>, about half of U.S. employers are using the Internet to verify resume details and responses to interview questions, determine whether an employee fits with the culture of an organization, and flush out inappropriate behavior. Human resource departments must consider whether and how they will exploit social media in hiring decisions. Multiple legal hazards exist for employers adopting pre-employment Internet screening, such as EEOC Guidance on Pre-Employment Screening, Federal and State anti-discrimination laws, invasion of privacy, state laws prohibitions on credit and criminal checks, and state “lifestyle discrimination” laws.

- Understand that information that would be inappropriate to make hiring decisions had it been obtained by other means is still inappropriate if gleaned from Internet searches.

**Monitoring behavior of employees.** Employers desiring to keep tabs on employees should clarify in their computer usage policies that privacy is not guaranteed even if password protected and that the employer retains the right to monitor use.

- Bear in mind that certain activities may be deemed protected as whistleblowing, political opinion, or free speech<sup>13</sup>; discharging employees based on these activities can be considered in violation of public policy.

**Improving internal communications.** Entities also are making internal uses of social media, such by using aggregation or collaboration tools to allow employees to communicate more efficiently with one another than email exchanges allow and to create collaborative documents with multiple contributors who may not be working from the same location. Such collaboration tools have been found to be most effective when they are incorporated into one’s daily workflow, merely an extension of existing applications, rather than a stand-alone tool that must be accessed separately<sup>14</sup>.

- Understand privacy and security protections (and any legal restrictions) on any applications your company uses, particularly if you use the applications for a purpose different than that intended by the application provider.

## 2. Use of Social Media by Employees (on behalf of or separate and apart from the employer)

Entities who have not yet adopted a social media policy need to realize that many of their employees are already using social media, possibly at work, and in ways that intersect with their professional life. Some companies have tried to rein in social media use. Others have accepted the inevitability of social media in the workplace and are guiding the interactions with carefully developed policies. Some entities will go further, encouraging certain employees to become Web 2.0 representatives of the company. It should always be clear to employees when they may identify themselves as representatives of the company. When participation is at the behest of the company, the employee must understand and learn to distinguish between communications that are the employee’s own and those that are official communications from the company. The employee then must clarify that distinction in public communications.

Certain social media activities of employees create risks that may be unforeseen by the employee, particularly if the employ-

ee wrongly perceives his behavior as private or wholly separate from his work identity:

**Discussing the company or company products.** References to an employee's company or company products should always be accurate and the speaker's role in the company be transparent and disclosed. The same rule applies to references to competitors.

- If the comments could be perceived as those of the company, consider limiting such discussions to certain well-trained employees, and teaching other employees why such public discussions put the company at risk.
- Multiple employees discussing the same product inconsistently can create confusion.
- Official comments are a new source of evidence in litigation.

**Disclosing confidential information inadvertently.** Confidential information of a company can be mistakenly, or intentionally, disclosed quickly, such as by multiple employees of a company noting travel to a new location and inadvertently tipping off a planned acquisition.

- Teach employees to recognize confidential information, including information whose disclosure might not have been troubling when disclosed via slower communication mechanisms.

**Incorporating works of others.** Intellectual property issues such as fair use are often overlooked and misunderstood as easy access to copyrighted works of others is wrongly interpreted as an implied license.

- Train employees on intellectual property basics.

**Complaining about one's job.** Companies also must plan for how they will respond to misuses of social media by employees, to ill-conceived information disclosures (such as abuses of sick leave policies), and to inappropriate statements (such as comments about another employee).

- Understand legal protections for individuals engaging in certain activities, such as whistleblowing, political opinion, or free speech<sup>15</sup>.
- Rights of privacy and other confidentiality obligations (such as those imposed on attorneys and medical providers) also apply in cyberspace.

**Criticizing the company post-employment.** Know how you will handle post-employment social media activities, such as whether individuals no longer employed will be removed from the Facebook network and what action you will take if the em-

ployee's public comments disparage the company or disclose confidential information.

- Consider possible causes of action for a tort, contract or statutory violation:
  - o Defamation
  - o State law privacy torts
  - o State law business torts
  - o Disclosure of trade secrets
  - o Violation of employment agreement

Companies must evaluate what types of uses their employees are making and create reasonable and realistic policies to minimize risk. Banning use of social media, for instance, might not be realistic. However, placing limitations on references to the company, its products or services, its competitors, and its customers might be reasonable, particularly if the employees are using social media in a way that is connected to their professional life, such as accessing social media applications while at work or from company computers, by joining the company Facebook network or friending the official company group site, or by identifying themselves as an employee on LinkedIn. Acceptance and adoption of a social media policy can be improved if the employer educates its employees as to the risks – to the employer and the employee -- inherent in social media use.

### 3. References to the Entity by Third Parties

Third party references to a company and misuses of a company's intellectual property were prevalent before the social media explosion. Companies generally had come to understand basic intellectual property issues, such as whether references to a company on a website, domain name registrations, keyword purchases on search engines, or links to company sites constituted trademark infringement. In the Web 2.0 world, these issues have been translated from domain name napping to unauthorized username registration on Facebook. Companies must monitor uses of their name and brands to know what others are saying and to be in a position to take action if necessary.

**Using a company's name or trademarks.** Responding to unauthorized trademark uses on the Internet can be overwhelming. Moreover, not all social media outlets have developed, or enforce their, intellectual property protection policies. This week, a trademark owner brought suit against Twitter for direct and contributory trademark infringement for allowing the alleged infringer to register its trademark as its Twitter user name, claiming that the alleged infringer was using the user name to masquerade as the trademark owner<sup>16</sup>. According to the complaint, Twitter had failed to reassign the user name when asked. (For undisclosed reasons, the day after filing, the trademark owner sought to dismiss Twitter without prejudice.)

- Develop clear policies as to the type of uses to which your company will object and those uses that you will ignore (such as uses protected by the first amendment, nominative references and parodies) so as to be better able to address uses of true concern.
- Protect rights proactively. Just as your company likely registered domain name variants to forestall name-napping, register social media usernames whenever possible.
- Understand the terms and conditions and intellectual property protection policy applicable to each social media outlet that your company or its customers or competitors is using, so as to be in a position to object when necessary.

**Blogging about a particular product.** Online bloggers sometimes review products or comment on companies; some are compensated for their activities. Blogging and Tweeting and the off-hand remarks that can sometimes be made in these seemingly free environments can give rise to claims of improper endorsement if the comments cannot be substantiated or if compensation is not disclosed.

- The Federal Trade Commission recently revised its advertising guidelines “Guides Concerning the Use of Endorsements and Testimonials in Advertising” to provide guidance on endorsement and testimonial ads, which Guides became effective December 1, 2009<sup>17</sup>.

♦♦♦

To develop an effective social media strategy and policy, you must understand what you wish to gain from social media, how you wish to use it, whether you will involve employees actively in the company’s social media use, how you want to guide and address employees’ use that touches on but that is not authorized by the company, and how to respond to and shape third party references to the company.

Because of the multiple areas of an organization touched by social media, the development of a comprehensive policy and strategy creates, and requires the involvement of, many stakeholders – public relations/communications, IT, customer service and relations, marketing, recruiting, human resources and legal. Launching that strategy requires continued involvement of these stakeholders as well as those tasked with training employees on the guidelines. Those companies who exploit social media successfully will find that the rewards far outweigh the risks.

**Footnotes:**

<sup>1</sup> This article was originally published in September 2009 as a Hogan & Hartson IP Update; reprinted with permission.  
<sup>2</sup> [http://en.wikipedia.org/wiki/Social\\_media](http://en.wikipedia.org/wiki/Social_media)

<sup>3</sup> <http://www.facebook.com/press/info.php?statistics> (February 24, 2010)

<sup>4</sup> “Killer Facebook Fan Pages: 5 Inspiring Case Studies”, by Callan Green, Mashable (June 16, 2009), <http://mashable.com/2009/06/16/killer-facebook-fan-pages/>

<sup>5</sup> *Neiditch v. Acar*, No. 09119783 (N.Y. Sup. Ct., July 28, 2009) (libel suit brought by administrators of a New York city apartment building against apartment residents and former employees who Tweeted that administrators were involved in the death of the building’s property manager; suit also named Twitter as defendant; Stipulation of Discontinuance filed January 6, 2010).

<sup>6</sup> *Horizon Group Management LLC v. Bonnen*, No. 09-8675 (Ill. Cir. Ct. July 20, 2009) (apartment management company brought libel/slander suit against former resident, who had been identified as participant in class action suit against landlord, who referred to her Horizon apartment as moldy in a Tweet to her 20 followers; subsequently Defendant’s Motion to Dismiss with Prejudice allowed January 20, 2010).

<sup>7</sup> 17 U.S.C. §512(c).

<sup>8</sup> 47 U.S.C. §230.

<sup>9</sup> Facebook amended its terms in early 2009 to take ownership of all uploaded content; Facebook reverted to its original policy shortly thereafter.

<sup>10</sup> Timberland reportedly settled a class action suit brought against it, claiming that its unsolicited text advertisements violated the Telecommunications Privacy Act, for \$7 million. *Weinstein v. Airt2me Inc.*, No. 1:06-cv-00484 (N.D. Ill. Sept 10, 2008) (13 ECLR 1283, 10/1/08).

<sup>11</sup> See “For Companies, a Tweet in Time Can Avert PR Mess,” *The Wall Street Journal*, August 3, 2009, for a description of effective uses of social media by Ford Motor Co., PepsiCo Inc. and Southwest Airlines Co. in response to consumer complaints and company news.

<sup>12</sup> Cited in “More Employers Use Social Networks to Check Out Applicants,” *NYTimes.com*, August 20, 2009 (<http://bits.blogs.nytimes.com/2009/08/20/more-employers-use-social-networks-to-check-out-applicants/>).

<sup>13</sup> *Yoder v. University of Louisville*, No. 09-205 (W.D. Ky. 8/03/2010) (blog posted by nursing student did not violate school confidentiality policy, where it did not identify an obstetric patient by name, but did disclose details of her labor; appeal filed August 24, 2009).

<sup>14</sup> “Six Ways to Make Web 2.0 Work,” *McKinsey Quarterly*, February 2009.

<sup>15</sup> See *fn. 12*.

<sup>16</sup> *Oneok Inc. v. Twitter Inc.*, Case Number 4:09-cv-00597 (N.D. Okl. 9/15/2009) (settled).

<sup>17</sup> In October 2009, the Federal Trade Commission published final guidelines “Guides Concerning the Use of Endorsements and Testimonials in Advertising”, 16 C.F.R. § 255 (2009), providing

that “advertisements that feature a consumer and convey his or her experience with a product or service as typical when that is not the case will be required to clearly disclose the results that consumers can generally expect. In contrast to the 1980 version of the Guides – which allowed advertisers to describe unusual results in a testimonial as long as they included a disclaimer such as “results not typical” – the revised Guides no longer contain this safe harbor.” FTC Press Release, “FTC Publishes Final Guides Governing Endorsements, Testimonials” (10/05/2009). The full Guides can be read at: <http://www.ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf>.

## New Rules About Title VII Retaliation Claims

*By Gil Abramson (Baltimore) and  
Emily Glendinning (Northern Virginia)*

The Supreme Court’s decision in Burlington Northern Santa Fe Railway, Co. v. White, (No. 05-259), handed down last week, clarifies what constitutes retaliation under Title VII of the Civil Rights Act of 1964. The Court held that Title VII’s anti-retaliation provision does not limit actionable retaliation to activity that is related to employment or occurs at the workplace. The Court also held that the anti-retaliation provision covers only those actions that are harmful to the point that a reasonable employee would be dissuaded from making or supporting a charge of discrimination. The Court’s decision resolves a split between the Circuit Courts over this definition. Retaliation claims now constitute thirty percent of Title VII claims, a number that is expected to increase in light of this ruling. Therefore, it is beneficial for all employers covered by Title VII to understand how retaliation claims can be made out by employees.

The Court held that the anti-retaliation provision in Title VII covers actions that are harmful to the extent that a reasonable person would be dissuaded from making or supporting a charge of discrimination. The Court also held that actionable retaliation is not limited to such things as termination or demotion, but rather to actions that are “material” to the employee, such as reassignment or other action that does not result in a loss of pay.

In 1997, Burlington Northern hired Shelia White to operate a forklift. A few months later, Ms. White complained that she was being sexually harassed by her immediate supervisor. Following a company investigation, Burlington Northern suspended the su-

pervisor for ten days and ordered him to attend a training session on sexual harassment. Shortly thereafter, Burlington Northern removed Ms. White from her forklift position and assigned her to a standard track laborer position, a more physically demanding and less desirable job. Ms. White filed a charge of discrimination and retaliation with the EEOC. While this charge was pending, Burlington Northern suspended Ms. White for 37 days without pay for alleged insubordination. Ms. White filed another charge of retaliation with the EEOC, and after an investigation, Burlington Northern reinstated Ms. White with full back pay.

At trial, the jury returned a verdict in favor of Ms. White on her retaliation claim and in favor of Burlington Northern on her discrimination claim. A Sixth Circuit Court of Appeals panel reversed the jury’s verdict in favor of Ms. White, holding that neither action taken against Ms. White was sufficiently adverse to state a retaliation claim under Title VII because she had not suffered a tangible job loss or any decrease in salary or benefits.

The Sixth Circuit reheard the case en banc and applied the same standard to Ms. White’s retaliation claim as they would to a substantive discrimination claim: the challenged action must “result in an adverse effect on the terms, conditions, or benefits of employment.” The Sixth Circuit held that under this standard Ms. White’s transfer to less desirable job duties and 37 day suspension were adverse employment actions and affirmed the jury’s verdict in favor of Ms. White. Burlington Northern appealed.

The Supreme Court reviewed the different standards used by the Circuit Courts to determine what constitutes unlawful retaliation. The majority of Circuits followed the Sixth Circuit. The Fifth and the Eighth Circuits followed the “ultimate employment decision” standard, which limits actionable retaliation to acts such as hiring, firing, promoting, and compensating. In contrast, the Seventh Circuit and the District of Columbia Circuit held that the alleged retaliation must be material to a reasonable employee and would likely dissuade a reasonable employee from making or supporting a charge of discrimination. The Ninth Circuit, following EEOC guidance, held that the employee merely must establish adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the employee or others from engaging in protected activity.

The Court adopted the standard applied by the Seventh Circuit and the District of Columbia Circuit. The Court first examined the language of Title VII’s substantive and anti-retaliation provisions. Whereas Title VII’s substantive provision prohibiting discrimination in the workplace is expressly limited by terms such as “hire,” “discharge,” and “compensation, terms, conditions, or privileges of employment,” no such limiting words appear in the anti-retaliation provision.

The Court held that the different purposes of the two provisions support what the difference in statutory language indicates. As the Court wrote, “the anti-discrimination provision seeks a workplace where individuals are not discriminated against because of their racial, ethnic, religious, or gender-based status.” In contrast, “the anti-retaliation provision seeks to secure that primary objective by preventing an employer from interfering (through retaliation) with an employee’s efforts to secure or advance enforcement of [Title VII’s] basic guarantees.” To prevent workplace discrimination, Congress need only have prohibited discriminatory conduct that related to the workplace. Preventing retaliation, the Court held, requires more than simply preventing actions that concern employment and the workplace. Because an employer can retaliate against an employee by taking actions not directly related to work or by taking actions outside the workplace, a provision limited to employment related actions would not deter all retaliation. The more limited construction of the Fifth and Eighth Circuits, therefore, does not fully accomplish the purpose of the statute.

#### **Reasonable Employee Standard**

The Court also held that the anti-retaliation provision covers only those acts that would be materially adverse to a reasonable employee, which in this context would dissuade a reasonable employee from making or supporting a claim of discrimination. The Court was careful to clarify that this is an objective standard that is both judicially administrable and separates significant from trivial harms. The Court reiterated that Title VII is not “a general civility code for the American workplace” and that an employee’s decision to report discriminatory acts cannot insulate that employee from the minor slights, trivial annoyances, and bad manners that all employees experience.

#### **Individualized Circumstances**

The Court also stated that it phrased this standard in general terms because whether or not an act constitutes retaliation will depend on the particular circumstances. The Court gave the example of a schedule change that might not affect one employee at all but might matter greatly to a parent with young children.

Applying these standards to Ms. White’s claims, the Court found that there was sufficient evidence to support the jury’s verdict in favor of Ms. White. The Court found that a jury could reasonably conclude that the reassignment to less desirable job duties would have been materially adverse to a reasonable employee. The Court also held that Ms. White’s later reinstatement with backpay did not allow Burlington Northern to avoid liability for her suspension without pay. As the Court explained, the prospect of 37 days without an income, even if the employee is later made whole, might very well deter a reasonable employee from engaging in protected activity.

The Court’s clarification of what constitutes actionable retaliation is important to all employers subject to Title VII. Employers now can be held liable for retaliatory actions that do not directly implicate the terms and conditions of employment, a change that most likely will result in a flood of new litigation against employers. In addition, although the Court has indicated that it will apply an objective standard, it appears that by directing lower courts to look to the particular circumstances of the case, the Court is suggesting a subjective component to the standard as well. Employers, therefore, could be held liable for actions that are retaliatory only as applied to that particular employee. In the wake of this decision, employers should take great care in treating any employee who has engaged in protected activity.



# DOL Says Mortgage Loan Officers Are Not Exempt From Overtime And Minimum Wages After All

By David Dunn (New York), Robin Samuel (Los Angeles), Emily Glendinning (Northern Virginia), Stuart Stein (New York)

The U.S. Department of Labor (DOL) has changed its position with respect to the exempt status of mortgage loan officers<sup>1</sup>. Since at least 2006, the DOL has taken the position that mortgage loan officers can qualify for the “administrative” exemption to the overtime and minimum wage requirements of the Fair Labor Standards Act (FLSA). However, on March 24, 2010, the DOL issued an Administrator’s Interpretation stating the opposite: that the typical mortgage loan officer does not qualify for the administrative exemption<sup>2</sup>. The Administrator’s Interpretation overrules and withdraws two opinion letters on the subject that DOL issued in 2006.

The March 24 Administrator’s Interpretation explains that the DOL is changing its stance on the issue because its own investigations and litigation over the exempt status of mortgage loan officers has revealed that employees who perform the “typical” job duties of a mortgage loan officer engage primarily in sales activities rather than administrative work. In deciding whether mortgage loan officers could qualify as administrative employees under Section 13(a)(1) of the FLSA, the DOL focused on whether mortgage loan officers’ “primary duty”<sup>3</sup> could be considered “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.” 29 C.F.R. § 541.200. To be directly related to the management or general business operations of an employer, the work must be directly related to the running or servicing of the business, as opposed to working on a production line or selling a product. See 29 C.F.R. § 541.201(a).

While recognizing that there is no absolute distinction between administrative and production / sales work, the DOL found that the primary duty of mortgage loan officers is to make sales, not to service the business itself, unlike the primary duties performed, for example, by employees in human resources or accounting departments. Specifically, the DOL found that the primary duty of the typical mortgage loan officer is to sell loan products to customers. While mortgage loan officers may contact potential customers, collect customer financial information, run credit reports, enter financial information into loan software programs, match customer needs to loan products, and compile documents

for loan processors or for closings, the DOL concluded that they perform these activities to “make sales.” The DOL based its conclusion on several factors, including that mortgage loan officers are trained in sales techniques, are evaluated on the basis of their sales results, and are often paid on a sales commission basis, that employers themselves often argue that mortgage loan officers are exempt under the FLSA’s outside sales exemption, and that courts repeatedly have found that the primary duty performed by mortgage loan officers is sales.

The DOL also concluded that mortgage loan officers do not primarily perform work that is directly related to the management or general business of their employer’s customers. Because most mortgage loan customers are individuals seeking mortgages for their homes, the typical mortgage loan officer’s work will not qualify for the administrative exemption based on the customer’s “business” because most customers do not have “management or general business operations” within the meaning of the regulations. The DOL acknowledged that it is possible that a mortgage loan officer providing advice to a business customer seeking a mortgage for a new plant or office space might qualify under the administrative exemption, but found that the typical mortgage loan officer’s primary duty will not be related to the management or general business operations of the employer’s customers.

Based on its analysis of the factors outlined above, the DOL Administrator concluded that mortgage loan officers who perform typical duties for the position have a primary duty of making sales for their employers and, therefore, do not qualify as bona fide administrative employees exempt under Section 13(a)(1) of the FLSA.

This Administrator’s Interpretation is an important development for employers who have relied on the administrative exemption



in classifying their mortgage loan officers in the past. In light of this new guidance, all employers in the mortgage and banking industry should carefully examine their exempt and non-exempt classifications, keeping in mind that it is the employee's primary duty, and not his or her title, that determines the appropriate classification. Questions concerning the proper application of overtime exemptions and issues regarding potential misclassifications should be directed to experienced employment counsel.

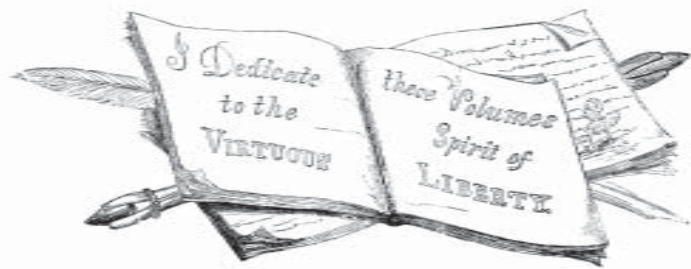
The Administrator's Interpretation can be viewed at: [http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FL-SAAI2010\\_1.pdf](http://www.dol.gov/WHD/opinion/adminIntrprtn/FLSA/2010/FL-SAAI2010_1.pdf).

**Footnotes:**

<sup>1</sup> The Administrator's Interpretation notes that the financial services industry assigns a variety of job titles to employees who perform the typical job duties of a mortgage loan officer, including mortgage loan representative, mortgage loan consultant, and mortgage loan originator. While the Interpretation only briefly touches upon the distinction between residential and commercial loan officers, and does not address positions such as construction loan officers, it is clear that the Interpretation is focused on employees who originate residential mortgages.

<sup>2</sup> In a departure from its previous practice of issuing fact-specific opinion letters, the DOL's Wage and Hour Division now will issue Administrator's Interpretations. The Interpretations will provide more general guidance on applicable laws and regulations and will be issued at the Administrator's discretion.

<sup>3</sup> An employee's primary duty is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 541.700(a).



## OFCCP Takes Aggressive Stance on Compliance Evaluations of Federal Government Contractors and Subcontractors

*By Patricia Ambrose (District of Columbia)  
and Emily Glendinning (Northern Virginia)*

The Office of Federal Contract Compliance Programs ("OFCCP") has articulated a renewed focus on ensuring that covered federal government contractors, including subcontractors, are in compliance with the equal employment opportunity and affirmative action requirements of Executive Order 11246, Section 503 of the Rehabilitation Act of 1973, and the Vietnam Veterans' Readjustment Assistance Act of 1974. The OFCCP's aggressive stance can be seen in its plans for increased compliance evaluations and enforcement actions in 2010, its expansive interpretation of what constitutes a covered government contract, and in its recent directive regarding compliance evaluations of contractors that receive funds pursuant to the American Recovery and Reinvestment Act of 2009 ("ARRA").

Covered federal government contractors can expect to see a marked increase in enforcement efforts by the OFCCP in the coming years. For fiscal year 2010, the OFCCP has requested an additional 25 million in funds to support an additional 213 full time employees to support enforcement and outreach efforts, a thirty-six percent increase in the number of full time employees at the agency. Hoping to mark its fifth consecutive year of record enforcement numbers, the OFCCP plans to increase the number of compliance evaluations by twenty percent in 2010 and to make it a priority to review compensation data for potential discrimination. The OFCCP's budget request also includes funds for a new case management system that it believes will help it better identify contractors for compliance evaluations and better manage the evaluation process. While final appropriations action on the budget is pending, it is apparent that the OFCCP will be increasing its compliance and enforcement efforts.

The OFCCP also recently has taken a more expansive view of who is a covered government subcontractor. For example, in *OFCCP v. Braddock*, the Department of Labor Administrative Review Board ("ARB") held that hospitals become federal subcontractors when they join a Health Maintenance Organization ("HMO") network that provides benefits to federal employees under an HMO's contract with the Office of Personnel Management. Prior to this ruling, health care providers participating

in HMO arrangements, like those participating in insured fee for service arrangements, were not regarded as covered federal subcontractors. Under Braddock, however, a hospital that enters into an HMO arrangement that covers federal employees is a federal subcontractor, even if it never agreed to any affirmative action plan requirements in its contract with the HMO. Accordingly, those hospitals must be in compliance with applicable equal employment opportunity and affirmative action plan requirements. A challenge to this ruling is pending in federal court, but the ARB's Braddock ruling currently has the force of law.

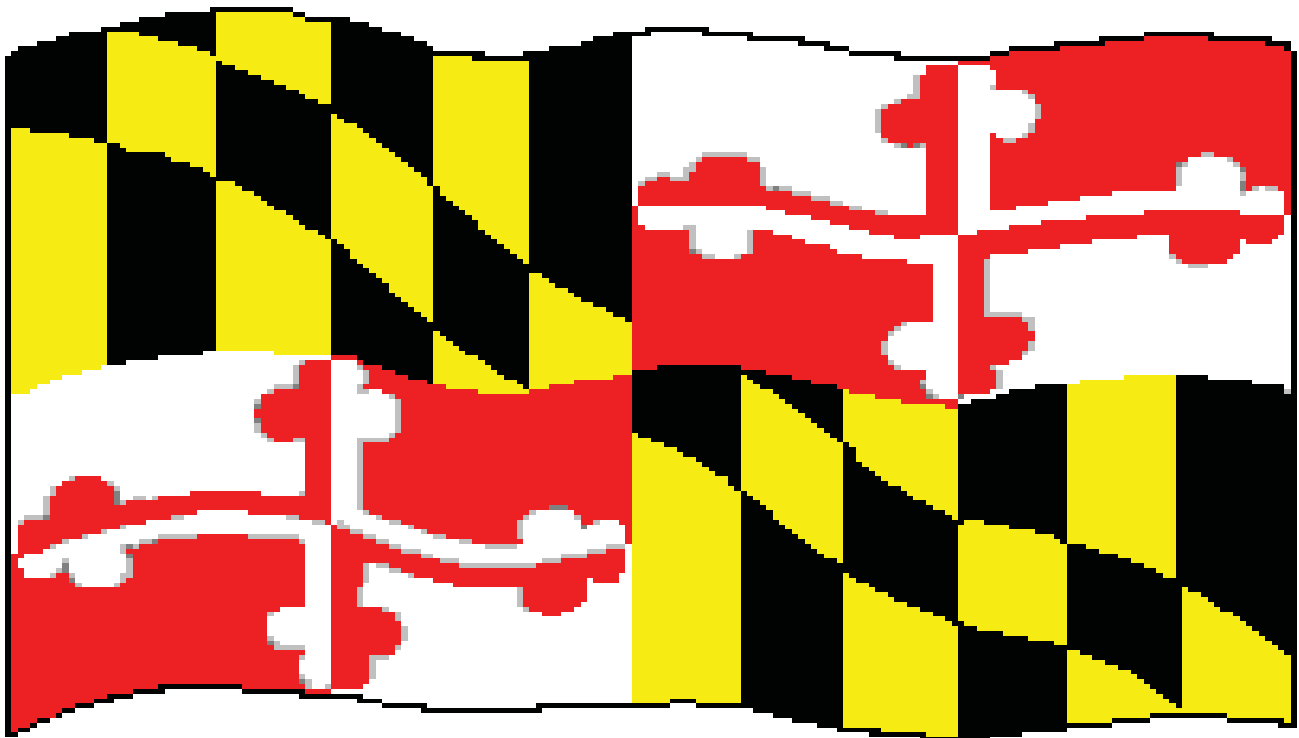
In addition, contractors or subcontractors who receive service and supply contracts under the American Recovery and Reinvestment Act of 2009 ("ARRA") can expect aggressive efforts by the OFCCP to ensure their compliance with applicable equal employment opportunity and affirmative action requirements.

ARRA compliance evaluations, unlike compliance evaluations for non-ARRA contractors, will consist of full desk audits and onsite reviews, even in the absence of indications of systemic discrimination. In addition, ARRA contractors may be audited more frequently, and there is no limit to the number of establishments within a company that may be audited. Further, a federal contractor who has been audited pursuant to the OFCCP's standard compliance evaluation procedures will be exempt from a

more rigorous ARRA compliance evaluation for only six months. Under the new directive, the OFCCP must conduct a pre-award clearance evaluation for companies that bid for federal contracts of over \$10 million unless the contractor already is listed on the National Pre-Award Registry.

The new directive places a particular focus on construction contractors, who are expected to receive the bulk of ARRA funds, but ARRA funds also are available to other industries including environmental and energy businesses. It is important to note that not all funds or opportunities awarded pursuant to ARRA constitute covered "service and supply" contracts. For example, institutions that receive government grants will not be considered federal government contractors on the basis of those funds, and therefore they will not be subject to OFCCP compliance evaluations. Accordingly, it is important to consult with experienced counsel to determine whether ARRA funds received qualify as a covered "service and supply" contract. Entities that may be receiving government funds for the first time should be particularly cognizant of these requirements.

In light of the OFCCP's renewed focus on compliance and enforcement efforts, all federal contractors and subcontractors should take action to examine whether their equal employment opportunity and affirmative action policies and procedures are compliant with federal requirements.



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