

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

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**FROM THE CHAIR**

**By Peter Guattery**

After 56 years, the Kennedy seat in the U.S. Senate has shifted to Scott Brown, a Republican, bringing an end to the Democrats supermajority in the Senate. What impact this may have on the Obama labor agenda is already a matter of fierce debate among the politically committed. It seems likely, however, given the health care debate, that some of the more controversial proposals, such as the Employee Free Choice Act, may face a difficult road ahead, at least in the Senate. Whatever the result, it should prove to be an interesting debate for the membership.

On the Supreme Court front, the Court said in December that it would take up the issue of whether public employees have a right to privacy when they sent text messages on electronic devices supplied by their employers. The decision to grant certiorari follows on a Ninth Circuit Court of Appeals decision which found the police officers has a reasonable expectation of privacy in their text messages, some of which were sexually explicit, and that the police chief's decision to read the pager's text messages without a suspicion of wrongdoing violated the officer's 4th Amendment constitutional protections against unreasonable searches. The case is *City of Ontario v. Quon, No. 08-1332*, and more information can be found here: <http://www.supremecourt.us.gov/qp/08-01332qp.pdf>.

Plan are underway for our Spring Dinner Meeting which will take place on April 15, 2010, and feature two well known jurists from the local bench: U.S. Magistrate Judge Paul W. Grimm, of the U.S. District Court for the District of Maryland and Judge Joseph F. Murphy, Jr. of the Court of Appeals of Maryland. Details will follow in the mail, but please do your taxes early and join us for what should be an exceptional program.

It is with regret that we note the closing of MICPEL. The Section had planned to sponsor an Employment Law Institute

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**EDITOR'S CORNER**

**By Albert Palewicz**

Welcome to year fifteen of the Section of Labor and Employment Law Newsletter. That we have managed to last so long is itself a source of wonder. That we have managed consistently to produce a newsletter that is both of high quality and current interest, as well as of value to our members is even more a source a pride. Just in the last month I have encountered two groups that told me they keep copies of our newsletter for at least a year so they can always find accurate information on the most current issues in labor and employment law when they need to deal with them for their clients. Thanks to all those who have helped make the newsletter the useful document that it is.

I would like to call your attention to the March meeting of the Labor and Employment Relations Association in Baltimore on Wednesday, March 24. The speaker at this meeting will be Ronald Meisburg, the General Counsel of the National Labor Relations Board. Ron Meisburg has been General Counsel for almost 4 years now, and is nearing the end of his term. He will give us his perspective on what the NLRB has done during his time as General Counsel, and what he sees as the future for the Agency's work. The dinner is at Caesar's Den, and begins at 5:45 PM with a cash bar. There is a form at the end of the newsletter for those who would be interested in attending this event, with information about cost, and how to reserve a place.

This issue was written by attorneys at Venable, LLP, in Baltimore, with Maury Baskin as coordinator. You will agree, I am sure, that the articles in the edition are useful and current. The next issue will be handled by Hogan & Hartson, L.L.P., with Gil Abramson as coordinator.

I need to apologize to Maury Baskin and those at Venable who wrote articles for this issue. Due to the weather, complicated by a couple of staff changes, the publication of this issue is about a month late. The authors of these articles worked hard

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**FROM THE CHAIR (continued)**

this coming May. With the loss of MICPEL we will not be putting on this seminar, but plan instead to sponsor several brown bag lunches.

Finally, thank you as well to Venable for providing the articles for this edition of the Newsletter.



**EDITOR'S CORNER (continued)**

over the holiday season to get their material ready, and the reason it was not published promptly is entirely in the production stage, not in their work.

As always, I would like to invite any group that would be willing to undertake the drafting of the articles for an issue of the newsletter, to let me know. We are always looking for new points of view, and any new group will get the first available edition to handle. We have sponsors lined up already for the spring, summer, and fall issues, so the first available issue will be winter of 2010-2011. Plenty of time there for planning and writing of articles. Anyone interested can contact me at 410-962-2811.

I hope to see many of you at the April 15 program with Judges Murphy and Grimm.

**~ CORRECTION NOTE ~**

Please note that in the last issue of the Newsletter, the article concerning COBRA was written by Scott Moeves of Smith and Downey, but was incorrectly attributed to someone else in the newsletter. We apologize for the error. Al Palewicz, Editor



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.



# Labor Law Changes Will Affect Many Government Contractors In 2010

By *Maurice Baskin, Esq.*  
*Venable LLP*

During 2009 a number of significant changes in labor and employment law took place in the area of government-funded contracts, at both the federal and State of Maryland levels. These changes are particularly important to Maryland employers, because Maryland is in the top ten states for federal contracts awarded, according to figures released last October on Recovery.gov. The impact of most of the 2009 changes will be felt for the first time in 2010, due to delays in implementing the new executive orders and other rules changes.

## 1. ANTICIPATED IMPLEMENTATION OF THE 2009 PRESIDENTIAL EXECUTIVE ORDERS

Less than three weeks after his inauguration, President Obama issued four executive orders ("E.O.s") aimed at the labor policies of government contractors. None of these orders were implemented in 2009, but all of them are expected to be given effect via agency rulemaking in 2010.

### • Use Of Project Labor Agreements On Federal Construction Projects

Executive Order No. 13502 (February 6, 2009) directed all federal executive agencies to consider requiring the use of union-only project labor agreements on large-scale construction projects (costing more than \$25 million). Under the E.O., if the executive agency determines that the use of a project labor agreement would "advance the Federal Government's interest in achieving economy and efficiency in Federal procurement," the Government can require every contractor or subcontractor on the project to become a party to an agreement with one or more labor organizations.

Unlike President Bush's E.O. 13202 which it revoked, President Obama's Executive Order 13502 imposed no requirements or prohibitions on state and local governments receiv-

ing federal financial assistance. President Obama did direct the OMB to issue a report in August 2009 recommending whether the Executive Order should be extended to state and local recipients of federal financial assistance. No such report has issued yet, however.

Though the provisions of Executive Order 13502 went into effect immediately, Section 11 stated that federal agencies should implement PLAs only after a final regulation was published by the Federal Acquisition Regulation Council. The FAR Council issued a proposed rule on July 14, 2009. See 74 Fed. Reg. 33953 (July 14, 2009). Several thousand public comments were filed, most in opposition, during a comment period that closed on September 23, 2009. As of this writing, the final rule has not yet been issued, though it is believed to be imminent.

Without waiting for the final rule, two federal agencies attempted to mandate PLAs on federal construction projects in late 2009. Venable LLP filed pre-award bid protests against both agencies, as a result of which one of the agencies withdrew its PLA mandate, while the second bid protest remains pending. It is likely that a court challenge will be made against further efforts to implement Executive Order 13502 in 2010.

### • Notification Of Employee Rights Under Federal Labor Laws

Executive Order No. 13496 was issued on January 30, 2009. This E.O. reversed another executive order issued by the Bush administration, and required that "all Government contracting departments and agencies" shall include a provision in every Government contract, other than purchases under the simplified acquisition threshold and other exempted contracts, that requires contractors to post a notice, in a form yet to be determined, that informs workers of their rights under Federal labor laws. If a contractor fails to comply with this requirement, the Government has the ability to cancel, terminate or suspend the contract or, even worse, declare the contractor ineligible for additional Government contracts. The E.O. requires contractors to include the above referenced notice requirements in every subcontract entered into relating to the covered contract.

On August 3, 2009, the Secretary of Labor published a Notice of Proposed Rulemaking to enforce E.O. 13496. The proposed rule includes definitions, prescribes requirements for the size, form and content of the notice, exceptions for certain types of contracts, and exemptions. Regarding the substance of the notice, instead of copying the language on employee rights that appears in Section 7 of the NLRA, the proposed notice contains "greater detail of NLRA rights, derived from Board or court decisions, implementing such rights – which

will more effectively convey such rights to employees.” In addition, the proposed notice provides National Labor Relations Board (NLRB) contact information, instructions on how to file a charge with that agency, and points out the 6-month statute of limitations for lodging a complaint. A number of comments were filed in response to the proposed rule, and no final rule has yet been published; but final implementation of this E.O. is again expected in early 2010.

• **Nondisplacement Of Qualified Workers Under Service Contracts**

Executive Order No. 13495 established a new requirement that federal contractors afford a “right of first refusal” to employees under a predecessor service contract whose employment would otherwise be terminated as a result of the award of a successor contract “in positions for which they are qualified.” This E.O. requires the contractor to make an express offer of employment to incumbents that the employees must accept within a defined time period of not less than ten days. Notwithstanding the requirement to offer employment to the incumbent employees, the E.O. also provides that contractors and subcontractors:

- o may employ employees who have been with the company for at least 3 months immediately preceding this contract and who would otherwise be laid-off;
- o are not required to offer a right of first refusal to predecessor contractor employees who are not service employees under the Service Contract Act; and,
- o are not required to offer a right of first refusal to any predecessor employee whom the contractor or subcontract reasonably believes has failed to perform suitably on the job.

Debarment is threatened for any contractor who fails to comply with the new requirements. However, the EO applies only to those federal contracts issued after regulations implementing the EO become final. No proposed rule was issued in 2009 to implement EO 13495. Therefore, no final rule is considered imminent under this Executive Order, but implementation is expected to take place in 2010.

• **Economy In Government Contracting**

No proposed rule has yet been published to implement Executive Order 13494, which changed the rules on what would be deemed “allowable” costs that can be charged by contractors to the government. Pursuant to this E.O., the costs of any activities to persuade employees –whether employees of the re-

ipient of the Federal disbursements or of any other entity - to exercise, not to exercise or the manner of exercising the right to organize as well as collectively bargain with their employer are per se unallowable. As such, contractors must exclude these costs from any billing, claim or proposal or disbursement applicable to their government contracts.

According to the E.O., specific examples of unallowable costs undertaken to persuade employees regarding their rights to organize and collectively bargain include:

- o the preparation and distribution of materials;
- o hiring or consulting with legal counsel or consultants;
- o holding meetings; and
- o planning or conducting activities by managers, supervisors, or union representatives during work hours.

The new Executive Order bears similarities to a California statute, AB 1889, which was struck down in *Chamber of Commerce v. Brown*, 514 U.S. \_\_\_ (2008). There the Supreme Court held that efforts to restrict the use of government funds in response to union organizing campaigns violated the National Labor Relations Act, which favors “uninhibited, robust and wide-open debate in labor disputes” and provides employees the “right to receive information opposing unionization.” Based upon this precedent, a court challenge is expected against the new Executive Order upon its implementation.

**2. THE NEW E-VERIFY MANDATE FOR FEDERAL CONTRACTORS**

On September 8, 2009, regulations went into effect implementing an order of the Department of Homeland Security (DHS), requiring federal government contractors to use the government’s E-Verify Program to verify the employment eligibility of certain employees. See 76 Fed. Reg. 67704. E-Verify is a previously voluntary electronic Internet-based system. It provides an automated link to federal databases to help employers determine the eligibility of new hires and the validity of Social Security numbers once employees have completed a Form I-9 for the employer.

A coalition of business groups filed suit against an earlier DHS proposed start date for the E-Verify mandate. The U.S. District Court for the District of Maryland ultimately rejected the suit, allowing the new rule to go into effect in September. See *Chamber of Commerce v. Napolitano*, C.A. No. AW-08-3444 (D. Md. Aug. 26, 2009), motion for stay denied pending appeal (4th Cir. Sept. 2009). The new rule requires all con-

tractors on federal projects entered after September 8, 2009 to electronically verify the social security numbers of all new hires, regardless of whether the new hires work on a covered federal contract. The rule also requires for the first time that existing employees also be verified, if such employees are “assigned” to the federal contract.

Meanwhile, during the second half of 2009, U.S. Immigration and Customs Enforcement (ICE) and DHS launched a series of new enforcement initiatives targeting employers, including issuance of notices to hundreds of businesses nationwide alerting them that ICE will be inspecting their hiring records to determine whether or not they are complying with employment eligibility verification (I-9) laws and regulations. ICE has indeed stepped up its enforcement and inspection efforts around the country, including in Maryland, and has imposed significant penalties on a number of employers as a result of violations uncovered during I-9 audits.

### **3. INCREASED ENFORCEMENT OF PREVAILING WAGE AND AFFIRMATIVE ACTION REQUIREMENTS.**

The stimulus bill of 2009, known as the American Resource Recovery Act, significantly expanded the scope of federal “prevailing wage” laws. Under Section 1606 of the Act, the Davis-Bacon Act and/or the Service Contract Act applies for the first time to any federal, state or local project receiving ARRA funding assistance. Subsequently, Secretary of Labor Solis announced plans to hire several hundred new investigators with the goal of greatly increased enforcement of the prevailing wage laws. Again, the full impact of these new hires and toughened enforcement is most likely to be felt in 2010.

In addition, the Office of Federal Contract Compliance Programs (OFCCP) issued a directive in July 2009 announcing new procedures for the auditing and enforcement of affirmative action compliance against government contractors who obtain stimulus funds. The new procedures substantially increase the risk that an investigation by the OFCCP will result in a full desk audit and on-site review.

### **4. CHANGES TO MARYLAND LAWS AFFECTING GOVERNMENT CONTRACTORS.**

Maryland’s Division of Labor, Licensing and Regulation (DLLR), like its federal counterpart the U.S. Department of Labor, has hired additional investigators to enforce the state’s prevailing wage laws. In addition, under the state’s Living Wage law, minimum wages paid by state contractors on projects over \$100,000 increased to \$12.25 per hour in Tier 1 areas and \$9.21 in Tier 2 areas, effective September 28, 2009.

Maryland also passed a new law compelling government contractors in the construction industry to contribute to a newly created State Apprenticeship Fund for the benefit of state apprenticeship programs. Contractors can comply with the new law, effective October 1, 2009, by participating in a state-approved apprenticeship training program or by contributing to such a program. As of this writing, final regulations implementing this new law had not yet been issued.

## **Maryland Employment Law Changes For 2010**

*By Thomas Strong, Esq.  
Venable LLP*

The 2009 General Assembly session brought several changes to Maryland employment law that affect many employers in the state who are not just government contractors. These changes include alteration of the impact of severance upon unemployment compensation eligibility, a new law targeting misclassification of independent contractors in the construction and landscaping industries, and clarification to the Flexible Leave Law.

### **Severance Pay and Unemployment**

Previously in Maryland an individual who became unemployed due to the abolishment of his or her position would be disqualified from receiving unemployment benefits only if she or he received severance payments consisting of “the same wage amount and employee benefits package that the individual received while employed.” Given that certain employment benefits such as contributions to a deferred compensation plan can not be paid to former employees, few severance packages provided the exact same wage and employee benefits package as an individual received while employed. Thus, employees who received substantial severance packages which did not exactly duplicate the wage and benefit packages they received while employed were often still found to be eligible for unemployment benefits.

In contrast, employees who lost their jobs other than as a result of a position elimination were disqualified from receiving unemployment benefits for any week in which their severance benefit exceeded the amount they were eligible to receive in unemployment benefits. Individuals who received a lump sum had the

lump sum amount allocated to a number of weeks equal to the number of weeks of wages received in the lump sum.

Apparently recognizing the lack of equity in applying different eligibility standards based solely upon the reason for a job loss, the General Assembly eliminated the differing treatment. Under the new law, SB 123 (eff. June 1, 2009), the impact of severance payments upon an employee's eligibility for unemployment benefits is now the same regardless of whether the employee lost their job as a result of the elimination of their position or otherwise—claimants are disqualified from receiving unemployment benefits in any week in which they receive severance pay at least equal to their weekly benefit amount.

### **Workplace Fraud Act**

The Workplace Fraud Act of 2009, effective October 1, 2009, establishes a rebuttable presumption that individuals working in the construction services and landscaping industries are employees unless one of three exceptions are met. The three exceptions to the presumption of the employer/employee relationship are: (1) Business Entity Exception; (2) Exempt Person Exception; and (3) ABC Exception. The burden is on the employer to establish the exception.

**Business Entity Exception:** The Business Entity Exception allows an employer to engage another business to perform the same type of work the employer performs, at the same location where the employer is working, without establishing an employer/employee relationship between the two contracting entities. This is the exception under which most construction subcontractors likely will fall.

**Exempt Person Exception:** An Exempt Person is an individual: (1) who performs services free from the direction and control of other parties; (2) furnishes the tools and equipment necessary to provide the service; (3) operates a business that is considered inseparable from the individual for profits and liabilities (or is the sole owner of a corporate entity to which sole unlimited personal liability does not apply); (4) exercises complete control over the operation of the business; (5) has the right and opportunity to perform services for multiple entities at the individual's discretion; and (6) employs no individuals other than the individual's spouse, children or parents.

**ABC Exception:** To establish the ABC Exception an employer must demonstrate that: (1) the individual who performs the work is free from control and direction over its performance both in fact and under the contract; (2) the individual customarily is engaged in an independent business or occupation of the same nature as that involved in the work; and (3) the work is outside the usual course of business of the person for whom the work is

performed or performed outside of any place of business of the person for whom the work is performed.

Penalties for a first time violation for knowingly improperly classifying an individual are up to \$5,000 for each misclassified employee. Employers who take steps outlined in the statute are much less likely to be found guilty of knowingly improperly classifying an employee. These steps include seeking evidence that the individual is an exempt person. For independent contractors other than exempt persons, this includes seeking evidence that the independent contractor withholds, reports and remits payroll taxes; pays unemployment insurance; and maintains workers compensation insurance for all individuals working for the independent contractor.

The Act also imposes notice and recordkeeping requirements upon employers. At the time an employer retains an independent contractor, the employer must provide a written notice that includes an explanation of the implications of the individuals classification as an independent contractor or exempt person. The employer must use the notice to independent contractors provided by the Commissioner of Labor and Industry. COMAR 09.12.40.01B. Required records include, but are not limited to, copies of contracts; acknowledgement forms for the notices provided to the independent contractors; licenses provided to the employer by the independent contractors; the name, address, occupation and classification of each employee or independent contractor; pay records for independent contractors and employees; hour worked each day and workweek by each employee and independent contractor; and evidence that each individual is an exempt person or independent contractor. COMAR 09.12.40.02. These records must be maintained for a minimum of three years. Compliance with the recordkeeping regulations will assist in avoiding any knowing violations under the Act.

The Department of Labor Licensing and Regulation recently published several examples of the application of the Act in various common situations in the landscaping and construction industries.<sup>1</sup> Employers with questions as to the DLLR's interpretation of the Workplace Fraud Act should consult these examples. They provide useful insight into the manner in which the DLLR will enforce the Workplace Fraud Act. The examples generally make clear that the DLLR does not believe that a single factor is determinative. Rather, it is an overall analysis of the relationship between the employer and the independent contractor (or employee).

### **Maryland Flexible Leave Act**

First enacted in 2008, but amended in 2009, the Flexible Leave Act requires any employer with 15 or more employees to allow an employee to use "leave with pay" for the illness of the em-

ployee's "immediate family." SB 562 (May 19, 2009). The original act left several key terms undefined which left employees and employers unsure of their respective rights and responsibilities under the Act. The General Assembly addressed many of those concerns during the 2009 legislative session by defining key terms including what "leave with pay" is usable by employees for the illness of a family member. Leave with pay includes sick leave, vacation time, paid time off and compensatory time. Immediate family was clearly defined to include only a child, spouse or parent (each of which has its own definition). It is important to remember that the Act does not mandate that employers provide sick leave or any other form of leave to their employees. Instead, it merely requires employees be allowed to use previously granted leave for the illness of a family member.

**Footnote:**

<sup>1</sup> These were issued as proposed regulations on December 18, 2009, with a short time table for finalization as COMAR 09.12.40.05-.06.



# The ADA's Changing Legal Landscape In 2010

*By Lesley Pate Marlin, Esq.  
Venable LLP*

The Americans with Disabilities Act ("ADA") has changed dramatically due to recent amendments to the ADA and proposed revised regulations from the Equal Employment Opportunity Commission ("EEOC"). As a result, employers face new compliance challenges in 2010. To minimize the risk of enforcement actions and/or litigation, employers must adapt how they address disability-related issues and accommodation requests.

**Overview of the ADA**

The ADA applies to employers with 15 or more employees. It prohibits discrimination against qualified employees or applicants with a disability because of the disability and requires employers to provide reasonable accommodations to such individuals to assist them in carrying out the essential functions of their jobs unless doing so would cause an undue hardship to the operations of the employer's business. See 42 U.S.C. §§ 12112(a)-(b). "Disability" is defined as:

1. A physical or mental impairment that substantially limits one or more of the major life activities of the individual;
2. A record of such impairment; or
3. Being regarded as having such an impairment.

Id. at § 12102(2).

**The ADA Amendments Act of 2008**

The ADA Amendments Act of 2008 ("ADAAA"), which became effective on January 1, 2009, overturned a series of court decisions that had effectively narrowed the scope of the ADA by limiting the conditions that qualified as disabilities. The ADAAA seeks to ensure that individuals with disabilities are, in fact, afforded the protections allegedly intended by Congress when it originally enacted the ADA.

To that end, the ADAAA maintains the three-prong definition of "disability" but has changed the analysis and interpretation of the statutory terms. Perhaps most significantly, employers can no longer consider the ameliorative effects of mitigating measures, with the exception of common eyeglasses or contact lenses, in determining whether an individual has a disability within the meaning of the statute. The ADAAA rejected the definition of "substantially limits" established by the Supreme Court and the EEOC as too strict and then directed the EEOC to issue revised

regulations consistent with Congress' intent to provide broad protection for disabled employees. The amendments expanded the definition of "major life activities" through an illustrative, non-exhaustive list of activities and major bodily functions that qualify. The Act clarified that an impairment that is episodic or in remission, such as epilepsy or cancer, constitutes a disability if it would substantially limit a major life activity when active. The ADAAA also clarified that "regarded as" means that an individual has been subjected to prohibited action based on actual or perceived physical or mental impairment. An individual is no longer required to show that the employer believed the impairment was substantially limiting to meet the "regarded as" prong. Employees who are "regarded as" disabled are not, however, entitled to reasonable accommodation.

### **EEOC's Proposed Revisions to the ADA Regulations**

On September 23, 2009, the EEOC published a Notice of Proposed Rulemaking to revise the existing ADA regulations and interpretive guidance in light of the ADAAA. The proposed regulations incorporate and expand upon the changes made by the ADAAA. Following Congress' directive, the proposed regulations provide that an impairment does not need to prevent or significantly or severely restrict the individual from performing a major life activity. The substantial limitation determination is made by comparing the individual's ability to perform a major life activity with most people in the general population. The proposed regulations expand the non-exhaustive list of major life activities set forth in the ADAAA to include sitting, reaching, and interacting with others, as well as the major bodily functions of the hemic, lymphatic, musculoskeletal, special sense organs and skin, genitourinary, and cardiovascular systems.

In a somewhat controversial move, the proposed regulations contain the following non-exhaustive list of impairments that will consistently meet the definition of disability: deafness, blindness, intellectual disability, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral palsy, diabetes, epilepsy, HIV or AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia. Other impairments, such as back pain, leg pain, asthma, and learning disabilities may be disabilities for some individuals but not others. The proposed regulations also provide that an individual will be substantially limited in the major life activity of working if the impairment substantially limits the individual's ability to perform or meet the qualifications for a "type of work." The EEOC believes that the "type of work" concept is preferable to the prior concepts of "class" or "broad range" of jobs. The public comment period has now passed, and the revised regulations are in the process of being finalized.

### **Judicial Interpretation of the ADAAA**

By and large, courts have not yet addressed the impact of the ADAAA except on the issue of retroactivity. In a case handled by Venable LLP, the D.C. Circuit recently held that the ADAAA did not apply retroactively to a claim for damages for conduct occurring prior to the enactment of the statute. See *Lytes v. District of Columbia Water & Sewer Auth.*, 572 F.3d 936, 941 (D.C. Cir. 2009). Other circuit courts have reached similar conclusions. See *Becerril v. Pima County Assessor's Office*, 587 F.3d 1162, 1164 (9th Cir. 2009); *EEOC v. Agro Distrib., LLC*, 555 F.3d 462, 469 n.8 (5th Cir. 2009); *Fikes v. Wal-Mart, Inc.*, 322 Fed. Appx. 882, 883 n.1 (11th Cir. 2009); *Kiesewetter v. Caterpillar Inc.*, 295 Fed.Appx. 850, 851 (7th Cir. 2008); *Verhoff v. Time Warner Cable, Inc.*, 299 Fed. Appx. 488, 492 n.2 (6th Cir. 2008); but see *Jenkins v. National Bd. of Med. Exam'rs*, No. 08-5371, 2009 WL 331638, at \*\*1-2 (6th Cir. Feb. 11, 2009) (ADAAA applied where medical student sought accommodation of extra time to take exams because the case involved prospective injunctive relief and was pending when the ADAAA became effective).

### **Impact of the ADA Changes**

By expanding the definition of disability, the ADAAA has extended the reach of the ADA to cover more employees than ever before. As a result, employers in 2010 are likely to encounter more accommodation requests. Employers should train supervisors on how to recognize and respond to requests for accommodations or other situations where accommodations may be appropriate. Employers should now be focusing on the interactive process and the provision of reasonable accommodations, instead of the threshold issue of whether the employee has a qualifying disability. Although the definitions of "reasonable accommodation" and "undue hardship" have not changed, see 42 U.S.C. §§ 12111(9)-(10), reasonable accommodation issues are expected to become more complicated. Employers should take extra caution to ensure legal compliance and should document the interactive process. Specifically, employers should document any accommodation requested by an employee, the reason for the request, other potential accommodations, all discussions with the employee regarding accommodation, any accommodation made, the reason for the accommodation, and any length or limitations on the accommodation. The EEOC has published policy guidance on the reasonable accommodation process, and additional guidance and assistance is available from the Job Accommodation Network ("JAN"). JAN provides employers with free individualized worksite accommodation consultation and training.

The recent changes to the ADA are also expected to substantially increase the number of disability discrimination charges and lawsuits. The EEOC, for example, estimates in the introduction to the NRPM that its workload related to disability claims will increase annually by ten percent (10%). The elements of dis-

ability discrimination claims remain the same. To prevail on a failure to accommodate claim, an employee must show: (1) he is qualified individual with a disability; (2) the employer had notice of his disability; (3) there was some reasonable accommodation denied to him; and (4) such accommodation would have enabled him to perform the essential functions of his job. To prevail on a disparate treatment claim, an employee must show: (1) he had a disability within the meaning of the ADA; (2) he was qualified for the position with or without a reasonable accommodation; and (3) he suffered an adverse employment action because of his disability.

Litigation of disability discrimination claims prior to the enactment of the ADAAA typically focused on the threshold issue of disability. Issues such as reasonable accommodation, undue hardship, direct threats, qualifications standards, medical inquiries and examinations, which have thus far been under-developed in the case law, are now likely to become the focus of most litigation. Only time will tell whether more and more ADA cases will proceed to trial instead of being dismissed at summary judgment. What is clear, however, is that the law under the ADA will continue to change and develop in 2010.

## Maryland Appellate Court Update

By *Todd Horn, Esq.*  
*Venable LLP*

### **No Immunity For School Board Against ADEA Claim**

In Bd. of Educ. of Baltimore County v. Zimmer-Rubert, \_\_\_ Md. \_\_\_ (June 11, 2009), Zimmer-Rubert, who was 55 years old, applied for a job to teach foreign languages in Baltimore County High Schools. After learning that younger applicants were hired to fill the positions she sought, Zimmer-Rubert filed a charge of age discrimination with the Equal Employment Opportunity Commission. After receiving her right to sue letter, Zimmer-Rubert filed a complaint against the Baltimore County Board of Education in the Circuit Court for Baltimore County alleging discrimination under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et. seq.* (“ADEA”), and seeking \$100,000 in compensatory damages. The trial court granted the Board’s motion to dismiss, finding that Zimmer-Rubert’s ADEA claim was barred by the Board’s Eleventh Amendment immunity. The Court of Special Appeals reversed, holding that the Board’s Eleventh Amendment immunity had been waived.

The Board appealed to the Court of Appeals, which affirmed. At the outset, the Court held that the Board clearly is a state agency that is entitled to assert sovereign and Eleventh Amendment immunity. As a result, according to the Court, the dispositive question is whether the State of Maryland enacted a valid waiver of the Board’s Eleventh Amendment immunity through Section 5-518(c) of the Court’s and Judicial Proceedings Article of the Maryland Annotated Code, which provides: “[a] county board of education may not raise the defense of sovereign immunity to any claim of \$100,000 or less.”

The Board argued that Section 5-518(c) only constituted a general waiver of sovereign immunity that was insufficient to specifically waive its Eleventh Amendment immunity. The Court decided that the determination as to whether Section 5-518(c) waived the Board’s immunity required a two-part analysis. The first question is whether the statute constituted a waiver of the Board’s general sovereign immunity as to Zimmer-Rubert’s ADEA suit. If such a waiver were found, the second inquiry is whether the statute waived the Board’s Eleventh Amendment immunity. Turning to the first question, the Court found that Section 5-518(c)’s language waiving the defense of sovereign immunity “to *any claim* of \$100,000 or less” was broad, unambiguous and did not preserve the defense of sovereign immunity as to ADEA claims for \$100,000 or less.

Turning to the second question, the Court similarly held that the language of the statute effectuated a waiver of the Board’s Eleventh Amendment immunity. The Court reasoned that a State waives its Eleventh Amendment immunity by specifying its intention to subject itself to suit in federal court. The words “any claim” in Section 5-518(c), the Court continued, encompass a claim brought in either state or federal court. The Court therefore concluded that Section 5-518(c) waived the Board’s governmental immunity, including its Eleventh immunity, for all claims in the amount of \$100,000 or less.

### **Award Of Attorneys’ Fees In Wage Payment Claim Reversed**

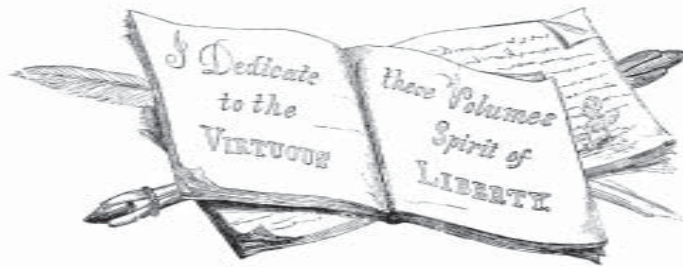
In Programmers’ Consortium, Inc. v. Clark, \_\_\_ Md. \_\_\_ (July 21, 2009), Karl Clark filed a lawsuit claiming that his former employer, Programmer’s Consortium, Inc., violated the Maryland Wage Payment and Collection Act, Md. Ann. Lab & Empl. Code § 3-501 *et. seq.* (“WPA”), because it did not pay him all the compensation he had earned before his separation. Clark also alleged that because his employer’s failure to pay him was “not as a result of a bona fide dispute,” he was entitled to an additional award of liquidated damages plus counsel fees and costs pursuant to WPA § 3-507.1.

The jury found, in its responses on a special verdict sheet, that the employer violated the WPA and awarded Clark \$80,000.01. The

jury, however, answered “No” to the specific question “Were the wages to Mr. Clark withheld in violation of the law and not as a result of a bona fide dispute between the parties.” The jury also found that the employer breached a contract to pay Clark wages and awarded him \$1.00 in damages “plus reasonable counsel fees.” The trial court granted Clark’s motion for attorneys’ fees, rejecting the employer’s argument that attorneys’ fees were not available to Clark on his breach of contract claim. The trial court also decided the jury’s finding that the nonpayment of wages under the WPA was the result of a bona fide dispute did not preclude an award of attorneys’ fees under the WPA.

On appeal, Clark did not contest the employer’s argument that he could not receive attorneys’ fees on his breach of contract claim. The Court of Special Appeals, however, held that the decision whether to award attorneys’ fees under the WPA lies in the exclusive domain of the trial judge, and such an award is not precluded by the jury’s finding that the withholding of wages was the result of a bona fide dispute. That issue went to the Maryland Court of Appeals.

Reiterating the longstanding principle that judges cannot reach conclusions that are inconsistent with findings that a jury expresses through special verdict forms, the Court of Appeals reversed. Although the decision whether to award attorneys’ fees under the WPA is for the judge, the Court explained, it cannot decide that issue in a way that conflicts with the jury’s special findings. Because the jury answered “No” to the specific question of whether the employer’s withholding of wages were not as the result of a bona fide dispute, the trial court was bound by that determination and could not award attorney’s fees to Clark under the WPA.



### **Section 301 Preempts Discrimination And Retaliation Claims**

In *Giant of Maryland, LLC v. Taylor*, \_\_\_ Md. \_\_\_ (Sept. 20, 2009), Julia Taylor worked as a truck driver for the grocery chain, Giant of Maryland. Taylor was a member of the Teamsters Union, which had a collective bargaining agreement (“CBA”) with Giant. In connection with Taylor’s request for intermittent leave under the Family and Medical Leave Act, Giant learned that she had a gynecological condition which resulted in heavy and unpredictable bleeding during menstruation. Giant became concerned that Taylor’s condition could pose a safety risk because she could experience a sudden hemorrhage and become incapacitated while driving a truck. Citing its rights under the

CBA, Giant required Taylor to submit to an independent medical examination (“IME”) to demonstrate that it was safe for her to drive. Taylor was placed on light duty in the interim, but did not attend the scheduled IME.

On February 3, 2003, Taylor filed a charge of race and gender discrimination with the P.G. County Human Relations Commission based on Giant’s requirement that she undergo an IME. Later that month, Taylor attended a meeting with personnel from Giant’s human resources department and was told that she would be taken off work until the IME was performed. Taylor felt that, based on what transpired at this meeting, she had been fired and stopped going to work. On March 6, 2003, Taylor filed a charge alleging that she was terminated in retaliation for filing her gender and race discrimination charge a month earlier.

The case went to trial, and the jury found for Giant on Taylor’s race discrimination claim. The jury, however, found that Giant discriminated against Taylor on the basis of her gender by requiring that she submit to an IME, and that it retaliated against her for filing her February 3, 2003 charge. The jury awarded Taylor almost \$650,000 in damages.

On appeal to the Court of Special Appeals, Giant argued that it was entitled to judgment on Taylor’s discrimination and retaliation claims because they were preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). The court remarked that if a claim requires the interpretation of a collective bargaining agreement in order to be resolved, it is preempted by Section 301. According to the court, Taylor’s discrimination and retaliation claims required an interpretation of the CBA’s provisions that require employees to submit to “physical, mental or other examinations” if requested by Giant. The court held that because the interpretation of the CBA’s terms concerning IMEs was central to Taylor’s case, her state law discrimination and retaliation claims were preempted.

The court alternatively held that Taylor’s gender discrimination claim failed because there was no evidence that Giant’s requirement that she undergo the IME prior to February 3, 2003 (the date of her first charge) resulted in any adverse employment action against her. The court added that Taylor’s fear that she would be disciplined if she failed to undergo the IME was not an adverse employment action. The court also found that judgment should have been entered against Taylor’s retaliation claim because she had no evidence that the decision makers in her termination on

February 28, 2003 knew that she had filed her February 3, 2003 discrimination charge when the decision was made. “One person cannot retaliate against another for certain conduct if the person does not know about the other’s conduct,” the court reasoned.

## Fourth Circuit Update

By *Luisa Lopez, Esq.*  
*Venable LLP*

### FOURTH CIRCUIT UPHOLDS TWO-MEMBER QUORUM AT NLRB – HIGH COURT TO RESOLVE CIRCUIT SPLIT

The National Labor Relations Board has been operating with only two members since December, 2007 on the advice of the Justice Department’s Office of Legal Counsel. During this time, Chairman Wilma Liebman (Democrat) and Member Peter Schaumber (Republican) have issued approximately 500 decisions. Dozens of Board decisions have been appealed to the federal courts of appeal on the issue of the two-member quorum, disputing the Justice Department’s interpretation of § 3(b) of the National Labor Relations Act, 29 U.S.C. § 153(b). Under § 3 of the Act, the Board consists of five members, who serve staggered, five-year terms. Section 3(b) provides that:

[t]he Board is authorized to delegate to any group of *three or more members* any and all of the powers which it may itself exercise. . . . A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof.”

Id. at § 153(b).

In Narricot Indus., L.P. v. NLRB, 587 F.3d 654 (4th Cir. 2009), the Fourth Circuit followed an earlier ruling by the Seventh Circuit in finding that the Act permitted the NLRB’s delegation of authority to a two-member quorum. See New Process v. NLRB, 564 F.3d 840, 846 (7th Cir. 2009). The First and Second Circuits reached the same conclusion. See Ne. Lands Servs., Ltd. v. NLRB, 560 F.3d 36, 41 (1st Cir. 2009); Snell Island SNF, LLC v. NLRB, 568 F.3d 410, 420 (2d Cir. 2009).

The District of Columbia Circuit, however, in Laurel Baye Healthcare v. NLRB, 564 F.3d 469, 472-73 (D.C. Cir. 2009), reached a

contrary result, declaring the Board’s two-member decisions to be invalid under § 3(b)’s requirement that the Board delegate its authority to three-member panels. In light of the circuit split, on November 2, 2009, the Supreme Court granted certiorari in New Process Steel v. NLRB., consolidating Laurel Baye and several other petitions filed on rulings on this issue. The issue presented to the Supreme Court is as follows:

“Does the National Labor Relations Board have authority to decide cases with only two sitting members, where 29 U.S.C. § 153(b) provides that ‘three members of the Board shall, at all times, constitute a quorum of the Board’?”

The Supreme Court’s decision will clarify and bring finality to this important issue.<sup>1</sup>

### TIME SPENT BY EMPLOYEES “DONNING AND DOFFING” PROTECTIVE GEAR MAY NOT BE COMPENSABLE UNDER FLSA IF EXCLUDED BY COLLECTIVE BARGAINING AGREEMENT

In Sepulveda v. Allen Family Foods, Inc., \_\_\_ F.3d \_\_\_, No. 08-2256, 2009 WL 5125769 (4th Cir Dec. 29, 2009), the Fourth Circuit upheld the U.S. District Court for the District of Maryland’s decision that FLSA Section 203(o) allows employers and unions to agree through collective bargaining to exclude “any time spent in changing clothes . . . at the beginning or end of each workday” from compensable work time.

In this case, donning and doffing was the subject of collective bargaining between Allen Family Foods, Inc. and the United Food and Commercial Workers Local 27. Over 250 individual employees sued their employer, Allen Family Foods, Inc., in the district court claiming the poultry company violated the Fair Labor Standards Act (FLSA) by not compensating them for time spent “donning and doffing” their protective gear, including safety, steel-toe shoes, a USDA required smock, a USDA required plastic apron, safety glasses, ear plugs, a bump cap, a hair net, USDA required rubber gloves, sleeves, and arms shields.

The Fourth Circuit upheld the district court’s ruling that employers and unions are free to determine how much compensable time should be allocated for “changing clothes.” It ruled that “[t]his sort of fact-intensive determination has classically been grist for the mill of collective bargaining, and Congress ensured that employers and unions could keep it that way by enacting Section 203(o).” The Fourth Circuit rejected the employees’ arguments that the items at issue were not “clothes” and that the act of donning and doffing did not constitute “changing” as an overly narrow reading of the FLSA. Referencing the explicit language of Section 203(o), the Fourth Circuit stated that it “encompasses precisely the *sort of clothes* that people wear to, *at*, or from work,

which are often quite different from the sort that people wear on their own time.” (emphasis added). Moreover, the Court held that “[n]othing in the statute’s language suggests that its application turns on whether one must fully disrobe to exchange one shirt, for example, for another.”

#### **Fourth Circuit Rules That SOX Whistleblowers May Have Right To Bring De Novo Action In Federal Court**

In *Stone v. Instrumentation Lab. Co.*, No. 08-1970 (4th Cir. Dec. 31, 2009), a significant case of first impression decided on December 31, 2009, the Fourth Circuit held that a Sarbanes-Oxley (SOX) whistleblower-plaintiff may seek *de novo* review in federal court *after losing* in an administrative hearing because a final administrative decision was not issued within 180 days, contrary to statutory requirements. *See* 18 U.S.C. §1514A(b)(1)(B).

There, the plaintiff-whistleblower filed a retaliation claim against his employer, Instrumentation Laboratory Company (“ILC”) with the federal Occupational Safety and Health Administration (“OSHA”) in accordance with the SOX Act. OSHA issued its preliminary findings more than 180 days after plaintiff’s complaint was filed. Plaintiff filed a timely objection to OSHA’s findings and requested a hearing before an administrative law judge (“ALJ”). On March 1, 2007, ILC filed a motion for summary decision before the ALJ, which was granted on September 6, 2007. Plaintiff then petitioned the Administrative Review Board (“ARB”) for review of the ALJ’s order. Before the ARB could consider the matter, however, plaintiff filed a notice stating his intent to file his case *de novo* in federal court.

The federal district court dismissed the action, finding that the ALJ’s dismissal of plaintiff’s administrative complaint constituted a “final judgment on the merits” for purposes of collateral estoppel, and that allowing plaintiff to pursue relief in federal court would be “wasteful.” Plaintiff appealed the district court’s dismissal to the Fourth Circuit, and the appeals court reversed the district court’s decision, concluding that the express language of the SOX Act entitled him to *de novo* review in federal court.

Specifically, the Fourth Circuit pointed to the “plain and unambiguous” language of the SOX Act, which states that an aggrieved individual may bring “an action at law or equity for *de novo* review in the appropriate district court” if the Secretary of Labor has not issued a final decision within 180 days after the filing of the administrative complaint. *See* 18 U.S.C. §1514A(b)(1)(B). The Court held that “[t]he text of the statute is clear- if the DOL has not reached a final decision within the time period established by Congress, a complainant has the *statutory right* not merely to undefined relief in another forum, but to ‘*de novo* review’ in federal district court.” A “plaintiff’s right to pursue such relief is not circumscribed in any manner by the statute[,]” the Court held.

#### **Fourth Circuit Finds Alleged Epithets And Other Workplace Behavior Sufficiently "Severe Or Pervasive" To Constitute Actionable Harassment Based On Race And Gender.**

In *EEOC v. Central Wholesalers, Inc.*, No. 08-1181 (4th Cir. July 21, 2009), the Equal Employment Opportunity Commission (“EEOC”) sued the employer, Central Wholesalers, Inc. on behalf of an African American female employee, asserting claims that the employee was subjected to a hostile work environment on the basis of race and gender. The trial court granted summary judgment in favor of the employer. On appeal, the Fourth Circuit reversed the trial court’s grant of summary judgment and remanded for further proceedings, concluding that the EEOC produced sufficient evidence to survive summary judgment. With respect to the race-based harassment claim, the Court noted that the employee’s co-workers used “the n-word” “pretty much every day” and referred to women as “b\*\*\*hes” on a daily basis. In addition to other derogatory terms, the Court noted that plaintiff’s co-workers kept blue-colored mop-head dolls in their offices which they had hanging by nooses tied around the dolls’ neck. Based on such alleged conduct, the Court found that the EEOC created a triable issue on whether the race-based harassment was sufficiently “severe or pervasive.”

Moreover, the Court noted that in addition to regularly referring to women as “b\*\*\*hes,” the fact that plaintiff’s co-worker kept Playboy magazines in his cubicle, hung a Playboy poster on his wall, watched pornography on his computer in plaintiff’s presence, used a pornographic screensaver depicting partially naked women, and placed a screwdriver in a Halloween decoration in a sexual manner more than once was “certainly sufficient” to create a triable issue on whether the gender-based harassment was objectively severe and pervasive.

#### **Footnote:**

<sup>1</sup> As of this writing, President Obama’s nominations to fill the three vacant seats on the NLRB remain unconfirmed by the U.S. Senate.

# The Impact of Recent Federal Rule Changes On Employment Litigators

By Marina Burton Blickley, Esq.  
Venable LLP

Several amendments to the Federal Rules of Civil Procedure became effective on December 1, 2009. Because a significant share of federal court litigation is employment related, employment litigators should take note of these changes. Amendments to the time computation rules in particular may dramatically change federal employment litigation practice. These and other significant changes are summarized below.

## Time Computation

In general, the amended rules provide for a “days-are-days” approach to computing all time periods. Previously, whether a weekend or holiday was counted when computing a deadline was dependant on the length of the time period. If the time period was less than eleven days, holidays and weekends were omitted. For longer periods these days were included. Now there is generally a uniform approach – every day counts.

Under the amended rules, if a deadline is stated in days (no matter the number) in order to compute the deadline: (1) “exclude the day of the event that triggers the event;” (2) “count every day, including [weekends and holidays];” and (3) “include the last day of the period.” Fed. R. Civ. P. 6(a)(1). If the deadline falls on a Saturday, Sunday, or holiday, the deadline is extended until the end of the next non-holiday and non-weekend day.

If a deadline is stated in hours, begin computing the deadline “immediately on the occurrence of the event that triggers the period” and “count every hour” (including intermediate holidays and weekends). If the deadline falls on a legal holiday or weekend then extend the deadline until the next day at the same time. Fed. R. Civ. P. 6(a)(2).

Because holidays and weekends were not previously counted if the time period was less than eleven days, applying the new “days-are-days” approach would have lead to a shorter deadline for certain actions. To prevent this outcome, the length of most periods of less than thirty days were amended to multiples of seven days (e.g. seven, fourteen, twenty one, or twenty eight days). In summary the following time periods have been adjusted:

- The Rule 6(c)(2) one-day period is now seven days.
- The Rule 54(d) one-day period is now fourteen days.
- The Rule 55 three-day period is now seven days.
- The Rules 32, 54, and 81 five-day periods are now seven days.
- The Rule 6(c)(1) five-day period is now fourteen days.
- The Rules 12, 14, 15, 23, 38, 59(c), 62, 65, 68, 72, 81, and Supplemental Rule C ten-day periods are now fourteen days.
- The Rules 50, 52, and 59(b), (d), and (e) ten-day periods are now twenty-eight days.
- The Rule 32 less than eleven-day period is now fourteen days.
- The Rules 12, 15, 27, 53, 71.1, 81, Forms 3, 4, and 60, and Supplemental Rules B, C and G twenty-day periods are now twenty-one days.
- Certain provisions for extending time frames have been eliminated. Specifically, the amendments eliminate both the reference in Rule 6(b) to extending the times set in provisions within Rules 50, 52, 59, and 60 as allowed by those Rules, and the reference to a twenty-day extension in Rule 59(c).

## The Last Day of Filing Deadlines

Recognizing the prevalence of electronic filing, the amended rules also provide needed guidance on determining electronic filing deadlines. For an electronic filing the last day of a time period ends “at midnight in the court’s time zone” (unless a statute, local rule, or court order provides otherwise). Fed. R. Civ. P. 6(a)(4). Conversely, for a paper filing the last day of a time period ends when the court’s clerk’s office is scheduled to close. *See* Fed. R. Civ. P. 6(a)(4).

## Extension of Filing Deadlines Where Clerk’s Office is Inaccessible

The amended rules provide for extended deadlines when the



clerk's office is "inaccessible." Unless otherwise ordered by the court, if the clerk's office is "inaccessible" the filing deadline is extended to the next accessible day (that is not a weekend or holiday) at the same time. See Fed. R. Civ. P. 6(a)(3). In addition, the amended rules allow the court to adjust deadlines where inaccessibility has triggered an extension. Thus, a court may determine that a full twenty-four hour extension is not warranted under certain circumstances and could specify a briefer extension.

In addition the reference to "weather or other conditions" as causing inaccessibility has been deleted. The Civil Rules Advisory Committee explained in its Note to this change that "inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system." However, the meaning of inaccessibility is not defined within the Rule or the Committee Notes. Thus, the meaning of "inaccessibility" should be determined by looking to local rules and case law.

#### **Amended Pleadings**

There have been three important changes to Rule 15(a) and the time period allowed for making one amendment to pleadings as a matter of course. Under the old rules, the right to amend a pleading once as a matter of course automatically terminated upon service of a responsive pleading or within twenty days after serving a pleading. Fed. R. Civ. P. 15(a). However, a motion

attacking a pleading (e.g. a Rule 12 motion) did not terminate the right to amend. Thus, a party could amend their pleading even after a Rule 12(b)(6) motion to dismiss had been granted (provided the court had not precluded amendment in its order).

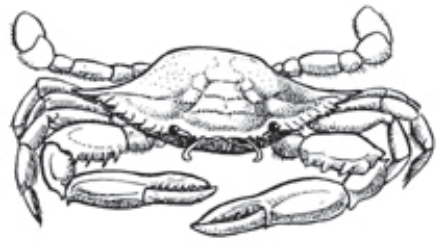
The first change under the amended rules extends the time period for making one amendment to pleadings as a matter of course where no responsive pleading is required to twenty-one days (from twenty days). Second, service of a responsive pleading no longer eliminates the right to amend, and a party has twenty-one days after being served to amend. Third, a party has twenty-one days after being served a motion under 12(b), (e) or (f) to amend a pleading. Therefore, under the amended rules, regardless of the means used to challenge the pleadings, a party can amend once as a matter of course within twenty-one days of being served with either a responsive pleading or a motion under 12(b), (e) or (f). Fed. R. Civ. P. 15(a). However, the Civil Rules Advisory Committee Note to Rule 15 makes clear that the twenty-one-day period for amending after either a responsive pleading or one of the enumerate motions is not cumulative. Thus, for example, if a 12(b) motion is filed and then later a responsive pleading is filed, the twenty-one day period does not begin to run again. After the initial twenty-one-day period a party may file an amended pleading only with leave of court.

In addition, Rule 13 was amended to delete the subdivision per-



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mitting a party to amend pleadings to add a counterclaim. *See* Fed. R. Civ. P. 13(f). This subdivision was superfluous in light of the general standards for amending pleadings found in Rule 15.

**Other Notable Changes**

**Summary Judgment**

Under the amended rules, a party may file a summary judgment motion at any time, including as early as the commencement of the action. *See* Fed. R. Civ. P. 56. In addition, the amended rules recognize that time periods for filing a motion, response, or reply may be set by local rule or court order. However, in the absence of such rule or order, the amended rule provides for default time periods.

**Polling Jurors**

Drawing from Criminal Rules of Procedure, the amended rules provide that after a verdict is returned, upon request from a party or the court, the court can poll the jury to ensure unanimity. *See* Fed. R. Civ. P. 48; Fed. Crim. P. 31.

**Effect on Local Rules**

The Local Rules of the U.S. District Court for the District Maryland were also amended effective December 1, 2009. In general, the amendments conform the local rules to the timing changes of the federal amendments. In addition, Appendix A, the Discovery Guidelines Manual, and the Stipulated Order Regarding Confidentiality of Discovery Material, have been substantially rewritten.

**MARYLAND CHAPTER, LABOR & EMPLOYMENT RELATIONS ASSOCIATION**

WEDNESDAY – March 24, 2010

CAESAR'S DEN RESTAURANT

223 South High Street - Little Italy - Baltimore, Maryland 21202

RECEPTION: 5:45 P.M. to 6:30 P.M. (CASH BAR)

SPEAKER: Ronald Meisburg, General Counsel, National Labor Relations Board

DINNER: 7:15 P.M.

PLEASE CALL TO RESERVE YOUR PLACE for the March 24, 2010, DINNER by Monday, March 22, 2010 -- call Julie Loth at (410) 321-0990 or Vickie Hedian, or e-mail either at [jloth@abato.com](mailto:jloth@abato.com) or [vhedian@abato.com](mailto:vhedian@abato.com).

Please complete and return to: Vickie Hedian  
c/o Abato, Rubenstein and Abato, P.A  
809 Gleneagles Court, Ste. 320  
Baltimore, MD 21286

I will attend the March 24, 2010, meeting of the LERA. Enclosed is a check for \_\_\_\_\_ reservations for a total of \$\_\_\_\_\_ at \$35.00 per reservation (non-members \$42.00).

NAME \_\_\_\_\_  
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