

# P.R. DEPARTMENT OF LABOR AND HUMAN RESOURCES PROPOSES AMENDMENTS TO EXEMPTION REGULATION NO. 13

by: José A. B. Nolla-Mayoral

On January 13, 2005, the Secretary of the Puerto Rico Department of Labor and Human Resources ("PRDOL") issued a notice to the public on a proposal to amend its regulations covering the exemption requirements applicable to several local employment laws.

Among the exemptions that would be affected by the proposed amendments are those applicable to laws covering minimum wage, vacation and sick leave pay, overtime, meal period and other premium pay, the closing law, the law regulating the form and frequency of salary payments, permitted salary deductions and the Social Security for Chauffeurs.

On January 21, 2005, at least one local newspaper published PRDOL's notice inviting the public to submit written or oral comments at a public hearing on March 23, 2005. Otherwise, the public was invited to submit comments by e-mail or mail. McConnell Valdés first reported this development through a Memorandum to Clients & Friends on January 24, 2005.

PRDOL has not said when it expects to implement the regulations after the

public comment period, nor when the public comment period ends.

The proposed amended regulation states that its intent is to conform PRDOL Regulation No. 13 to the federal white collar exemption regulations found at 29 C.F.R. Part 541, as required by local law.

Similar to the recent changes to the federal exemption regulations, the proposal would also streamline the current regulations by eliminating the "short" and "long" tests, instead creating a single test.

In general, the proposal retains the current "short test" reliance on an employee's primary duty and would eliminate "long test" rules restricting exempt employees from devoting more than 20% of time in a workweek to non-exempt duties.

Likewise the proposal would raise the salary threshold for workers to qualify to be exempt. The wage threshold below which workers are classified as non-exempt would rise to \$455 a week (administrators and professionals) and \$445 (for executives), in most cases from \$295 a week.

The proposed regulations incorporate significant changes in the duties tests. Some of the proposed standard duties tests:

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**Executive Employees** - Primary duty of management of the enterprise or of a recognized department or subdivision; customarily and regularly directs the work of two or more full-time employees, or their equivalent; authority to hire or fire other employees or particular attention is given to the recommendations as to hiring, firing, promotion or other changes of status of other employees.

**Administrative Employees** - Primary duty of performing office or non-manual work directly related to the management or general business operations of the employer or the employer's customers, customarily and regularly requiring the use of discretion and independent judgment as to matters of significance.

**Learned Professional Employees** - Primary duty of performing work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction.

**Creative Professional Employees** - Primary duty of performing original and creative work in a recognized field of artistic endeavor, rather than work with general ability and training in intellectual and manual crafts.

The proposal further incorporates the Family and Medical Leave Act (FMLA) rule (which was incorporated into the FLSA exemption regulations at 29 C.F.R. Part 541) allowing salary deductions for unpaid leave under the FMLA, without affecting the employee's salary basis and his/her exempt status.

Other than stating that PRDOL intends to conform the local regulations to the federal ones, absent from the PRDOL announcement, or any other public discussion, is additional supporting data or basis for the revision of the minimum

salary basis thresholds for exemption to the proposed new levels. At this juncture, we must question why did PRDOL fail to follow the model established in Act No. 180 of 1998, as to the minimum wage of 70% of the FLSA minimum wage for employers not covered by the FLSA in Puerto Rico? Should the PRDOL have followed that formula, it would have yielded a minimum exemption salary basis of approximately \$318 instead of the proposed \$455. Precisely, when the legislature enacted Act No. 180, it worried that local businesses would not be able to withstand the adverse economic effect of having to suddenly pay the full FLSA minimum wage.

Also, absent from the PRDOL proposal is any mention as to computer professionals, outside salespersons, and other exempt employees under the FLSA.

Some specific issues raised by the proposal are the following: How many additional employees will now qualify to be considered exempt under the new rules because of the higher salary basis; how many employees will lose their exempt status either because of changes to the salary basis or to the duties tests; what will be the economic impact for those employers who will now have to pay daily and weekly overtime, meal period penalties, seventh day of work premium pay, social security for chauffeurs insurance, and what, if any, will be the impact on the public and on the 1,000 new local businesses that the local government wants to create?

In view of the potential effects of the proposal, we recommend that you review it carefully to evaluate its possible impact on your operations, and take the opportunity to submit comments before it goes into effect. Please feel free to contact members of our Labor and Employment Law Department to assist you. ■

# U.S. SUPREME COURT ALLOWS DISPARATE IMPACT CLAIMS UNDER ADEA *by: Anita Montaner Sevillano*

On March 30, 2005 the U.S. Supreme Court issued an opinion in Azel P. Smith et al v. City of Jackson, MI clarifying that older workers may recover under the Age Discrimination in Employment Act ("ADEA") upon showing that their employer's implementation of a given plan or policy had the consequence of adversely affecting them vis a vis the younger workers. This theory of recovery is known as a **disparate impact** claim. To establish an actionable claim under this theory the employee is not required to show the employer's intent or motivation to discriminate against older workers. Rather, this claim focuses on an objective showing that the older workers as a group were adversely impacted as a consequence of a policy or work plan.

Before the Azel P. Smith case, the Circuit Courts had been divided on whether the disparate impact theory of recovery was available under the ADEA. Many courts had interpreted the Title VII 1993 U.S. Supreme court opinion in Hazen Paper v. Biggins as disallowing disparate impact claims under ADEA. In fact, prior to the Azel P. Smith case, the U.S. Court of Appeals for the First Circuit, which includes the U.S. District Court of Puerto Rico, had ruled that disparate impact claims were unavailable under the ADEA, although available under Title VII. The Azel P. Smith opinion now opens the door for these claims to proceed, although in its opinion the US Supreme Court also clarified that coverage of disparate impact claims under the ADEA is more restricted than under Title VII.

The facts in Azel P. Smith are as follows. The claimants were a group of older police officers. They contested the City's adoption of a pay plan that granted pay raises to all City employees, but resulted in proportionately lower raises to those employees who had more seniority (more than five years) and were older. The claimants alleged that the pay plan resulted in a disparate impact against older police officers and it was therefore discriminatory under the ADEA. The lower courts had dismissed the action by ruling that disparate impact claims are categorically unavailable under the ADEA.

In allowing the ADEA disparate impact claim, the U.S. Supreme Court in Azel P. Smith also ruled that the ADEA disparate impact provision is significantly narrower in coverage than its Title VII counterpart because it allows an otherwise prohibited action by the employer where the

differentiation is based on reasonable factors other than age.

Upon analyzing the Azel P. Smith case, the U.S. Supreme Court found that the City had presented a reasonable factor to implement that pay plan. A purpose of the city's pay plan, as presented to the Court, was to bring the starting salaries of police officers up to the regional average. The employer also argued that wages and increases granted to police officers were based on a survey of comparable communities, all of which was intended to make the City police officers more competitive with comparable positions in the market. The Court held that although this objective and the resulting pay plan could result in a disparate impact on older workers as a group, it was reasonable. Therefore, the U.S. Supreme Court affirmed the dismissal of the ADEA action on these other grounds.

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The Azel P. Smith decision is important in that it now clearly allows an additional theory of recovery to older workers as well as a reasonable factor exception under an ADEA claim of disparate impact. Employers are thus encouraged to analyze their practices, policies and plans and evaluate whether their implementation does not result in an adverse impact on older workers as a group and, if it does, whether they can show there was a reasonable objective for implementing the same. Please contact our attorneys if you feel further analysis of your employment policies and plans is advisable in this regard.■

# THE ADA IS NOT A MEDICAL LEAVE ACT WHERE, DURATION ASIDE, THE EMPLOYEE'S CONDITION DOES NOT IMPINGE SUFFICIENTLY ON A "MAJOR LIFE ACTIVITY"

by: José Iván Ayala Santana

The U.S. Court of Appeals for the First Circuit ("the First Circuit" or "the Court"), which includes the U.S. District Court of Puerto Rico, recently held that the Americans With Disabilities Act ("ADA") does not require an accommodation for common conditions that are short-term or that can be promptly remedied. The Court also held that the plaintiff in this case was not significantly restricted in performing a broad range of jobs in various classes by her ovarian cysts condition. Thus, she was not "disabled" under the ADA.

In Guzmán-Rosario v United Parcel Service (Opinion issued on February 3, 2005 1st Cir), the plaintiff suffered pain in her left side. Her condition was later diagnosed as being caused by ovarian cysts. This condition is characterized by sometimes disappearing in a few months without surgery. Eventually, Guzmán-Rosario's cysts did not disappear; they had to be surgically removed, which restored the employee's health.

The employee advised several supervisors about her condition; she was told by at least one of them that "she had to resolve her condition because her absences and her sitting down while working were adversely affecting the company."

During the time in question, the employee received two warning letters

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*Under the ADA, an individual with a disability is a person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment. A qualified employee with a disability is one who, with or without reasonable accommodation, can perform the essential functions of the job in question*

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for lateness and absences. However, the first letter was removed as untimely under a governing collective bargaining agreement. Approximately nine months after the condition first manifested itself, the employee was dismissed for making excessive and unauthorized phone calls on company time; this was treated by the company as theft of time.<sup>1</sup>

The employee filed suit against the company alleging a failure to accommodate her alleged disability and retaliation against her for seeking an accommodation. The District Court entered summary judgment in favor of the employer, after finding that the employee was not disabled, had not requested an accommodation, and had not been subject to retaliation. The First Circuit affirmed on all grounds.

Generally, the ADA prohibits private employers from discriminating against qualified individuals with disabilities. Under the ADA, an individual with a disability is a person who has a physical or mental impairment that substantially limits one or more major life activities; has a record of such an impairment; or is regarded as having such an impairment. A qualified employee with a disability is one who, with or without reasonable accommodation, can perform the essential functions of the job in question.

The ADA also prohibits retaliation against an employee for having requested a reasonable accommodation pursuant to the ADA. To that end, it is unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or on account of his or her having exercised any right granted or protected by the ADA.

In affirming the District Court's summary judgment in favor of the employer, the First Circuit considered: 1) "whether the ovarian cysts were sufficiently long-lasting a condition to qualify as a 'disability' rather than a temporary affliction"; and, 2) whether, duration aside, the employee's "condition impinged sufficiently on a 'major life activity' to be treated as disabling." In regards to the plaintiff's retaliation claim, the Court considered whether

the employee indeed requested an accommodation.

Regarding the first issue, temporality, the First Circuit opined that the ADA is not a medical leave act nor a requirement of accommodation for common conditions that are short-term or can be promptly remedied. Relying on existing precedent, the Court reasoned that in order to be "substantially limiting" an impairment must be "permanent or long term", not brief or foreseeably temporary. The First Circuit noted that circuit case law suggests that shorter durations are tolerated only for more severe impairments, which, in its opinion, the employee did not have. Although, this was not the basis for the Court's formal holding in the case, the First Circuit's temporality discussion seems to be a clear sign of the way it will eventually decide this issue, which it is, at the very least, encouraging for employers.

The First Circuit's formal holding, however, rests on the second issue: is the employee substantially limited in a major life activity? An individual is "disabled" even if he or she can still work, if he or she is significantly restricted in, or precluded from, performing either a "class"<sup>2</sup> of jobs or a "broad range" of jobs in various classes.<sup>3</sup> The employee must show that he/she is precluded from more than the performance of a particular job.

In the plaintiff's case, the First Circuit concluded that an occasional need to sit down and an occasional inability to come to work due to dizziness and pain show at most a difficulty in performing her particular job; this does not show that she is restricted from a "broad range" of jobs. Thus, the plaintiff was not a disabled individual pursuant to the ADA.

The Court next addressed the plaintiff's retaliation claim. The Court

reasoned that it is doubtful that an accommodation request is implicit by simply notifying her condition to her supervisors. An accommodation request must be express and must be linked to a disability. A reasonable accommodation requirement for a qualified individual usually does not arise unless triggered by an express request. In the First Circuit's opinion, this request did not occur.

This decision can be read as a warning to potential plaintiffs against bringing frivolous ADA claims. If an employee has a temporary, short-term condition; or does not have a substantial limitation to a major life activity, he or she is not disabled under the ADA. The solution for short term or temporary conditions that do not significantly impinge a daily life activity is found in the local sick leave statutes and/or short term disability leave, as well as other similar leaves and programs. The ADA is not a cure for all work-affecting medical difficulties; there are other remedies for that.

However, this decision strengthens the proposition that a short-term or temporary condition usually will not qualify as a disability under the ADA. If that is the case, then the health condition will not provoke the ADA's reasonable accommodation requirements. ■

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1. Thirteen months after her dismissal the employee was reinstated by an arbitrator, but before being reinstated the employee filed suit against the company.

2. A set of jobs utilizing similar skills, knowledge, and training to his or her prior job.

3. A large set of jobs that vary in what skills are required.

# EMPLOYER ALERT: U.S. SUPREME COURT TO DECIDE COMPENSABILITY OF "WALKING TIME" UNDER FAIR LABOR STANDARDS ACT

by: Pedro J. Torres-Díaz

In a much anticipated turn of events, the U. S. Supreme Court has decided to review a split within Appellate Circuit Courts. The issue is whether the time employees spend walking to and from their workstations, before and after donning and doffing safety equipment, is compensable work under the Fair Labor Standards Act ("FLSA"), as amended by the Portal to Portal Act. The Supreme Court's ruling on this issue, not expected for a few more months, could very well alter, in no small fashion, the way some employers now keep track of their employees' working time.

As had been reported in Labor Perspectives 2004 Summer edition, the U.S. Court of Appeals for the First Circuit ("the Circuit Court"), to which the U.S. District Court of Puerto Rico belongs, had ruled in Abdela Tum et al. v. Barber Foods, Inc., 360 F.3d 274 (2004), that such time was not considered work for FLSA purposes, and was therefore not compensable. The U.S. Court of Appeals for the Tenth Circuit ("the Tenth Circuit") had previously reached a similar conclusion in Reich v. IBP Foods, 38 F.3d 1123 (1994). However, the U.S. Court of Appeals for the Ninth Circuit ("the Ninth Circuit") had previously reached a contrary conclusion in Alvarez v. IBP Foods, Inc., 339 F.3d 894 (2003). In reaching its conclusion, the Ninth Court reasoned that, after finding that the donning and doffing of safety gear was compensable work under the FLSA, it would be absurd to exclude from compensation the time spent walking during those activities.

In both Barber Foods and Alvarez, the losing parties asked the Supreme Court to review the decisions of the appeal courts. More specifically, the employer in Alvarez asked the High Court to reverse the Ninth Circuit's finding that the donning and doffing of safety gear was compensable work, and that the walking time associated with it was also compensable; the plaintiff workers in Barber Foods asked the Supreme Court to reverse the First Circuit's finding that walking time associated with donning and doffing safety gear was a preliminary activity not compensable under the FLSA.

Faced with a split between two Circuit Courts, the Supreme Court has agreed to review the lower courts' decisions, but only on the very narrow question regarding the compensability of walking time to and from their workstations after donning and doffing safety gear. In other words, the Supreme Court has now let stand the lower courts' common finding that, under the facts of those cases, the time that the employees dedicate to donning and doffing of required safety gear must be considered as "working time" under the FLSA. In doing so, the Supreme Court also let stand the First Circuit's conclusion that, under the facts of the Barber Foods case, the time spent on that activity was de minimis and therefore not compensable.

This result does not mean, however, that all time spent by employees in donning and doffing gear before and after their workday will always be considered working time. The First Circuit in Barber

Foods was clear that its holding was limited to the circumstances before it in that particular case. Furthermore, the First Circuit did confirm the applicability of the de minimis doctrine, adopted over 50 years ago. In other words, an activity may be of such nature as to be considered work, but it still may be excluded from compensation if the time spent on that activity is too trivial.

The Supreme Court's decision on this issue, if adverse to the employer's position, could carry with it very serious and costly consequences. For example, should the Supreme Court side with the plaintiffs in Alvarez, employers in similar situations may have to re-evaluate many aspects of their operations, including the location of work clocks and even manufacturing floor layouts, in order to reduce the time spent by employees walking from one place to the other. Furthermore, employers who require their employees to don and doff safety gear, would now have to evaluate, first, if that activity could be considered work under the holding in Barber Foods, and second, whether the time spent in that activity could be considered de minimis and therefore not compensable. Employers would thus be wise to stay apprised of the Supreme Court's decision in this matter. ■

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1. As we will mention later, the First Circuit in Barber Foods also found that although the time an employee spends donning and doffing of safety gear can be considered "working time" under the FLSA, it was not compensable in that particular case because the time was de minimis.

2. The employer in Barber Foods also filed its own petition for certiorari, asking the Court to reverse the First Circuit Court's conclusion that the donning and doffing of gear constituted work under the FLSA.

# WHISTLEBLOWERS UNDER THE SARBANES-OXLEY ACT MAY NOW FILE COMPLAINTS BEFORE THE LOCAL OSHA OFFICE

by: José A. B. Nolla-Mayoral

The Occupational Safety and Health Administration's ("OSHA") local office has regulatory and compliance jurisdiction over safety and health issues. These include certain activities occurring on federal properties, in maritime port facilities, and over federal agencies in Puerto Rico. The local OSHA office also has jurisdiction over 14 federal laws which contain anti-discrimination, retaliation, and/or whistleblower provisions.

OSHA recently published a final rule establishing procedures for the handling of whistleblower complaints under the Corporate and Criminal Fraud Accountability Act of 2002. This law is also known as the Sarbanes-Oxley Act. This rule is now in full force and effect; it is administered locally by OSHA.

The Sarbanes-Oxley Act protects employees, contractors, subcontractors, and agents of publicly traded companies from retaliation. Its protection extends to such persons who provide information to federal regulators, law enforcement authority, a member of Congress, to certain persons with supervisory authority, or at certain related proceedings. This mantle of protection includes actions that an employee believed to be in violation of a Securities and Exchange Commission rule, or federal law, generally relating to new corporate governance standards, financial reporting and auditing, auditor independence, compliance provisions, and fraud prevention against shareholders. (See Labor Perspectives,

Fall 2002, on "Employment Provisions of the Sarbanes-Oxley Act of 2002: A New Landscape for Public Accounting Firms.")

The rule is applicable to employees, contractors, subcontractors, and agents of companies with a class of securities registered under Section 12 of the Securities Exchange Act, or which are required to file reports under Section 15(d) of that Act.

The final rule establishes procedures for the handling of discrimination complaints. Included in the rule are procedures for investigations and the issuance of findings and preliminary orders. The rule details litigation procedures, how to object to the findings, and how to request a hearing. The final section of the rule discusses

miscellaneous provisions including withdrawals of complaints, settlements, and judicial review and enforcement.

A complaint must be filed with OSHA within 90 days of the alleged violation. Based on a complaint, OSHA will investigate and issue findings and an order on a complaint that will become the final order of the Secretary of the U. S. Department of Labor if it is not appealed. After OSHA issues its findings and order, either party may request a full hearing before an administrative law judge of the U. S. Department of Labor. An administrative law judge's decision and order may be reviewed by the Department's Administrative Review Board. If a final agency order is not issued within 180 days from the date a complaint is filed for reasons not attributable to the complainant, then a lawsuit may be filed before a U. S. District Court.

Under Section 806 of the Sarbanes-Oxley Act, covered employees may obtain redress stemming from a complaint charging discrimination and/or retaliation including the following:

- Reinstatement with the same seniority status.
- Back pay with interest.
- Special damages, reasonable attorneys' fees, expert witness fees, and costs.

On the other hand, if a complaint is found to be frivolous or brought in bad faith, the complainant may be liable for attorneys' fees up to \$1,000.■

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