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## LABOR UPDATE

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*Recent Developments in Labor and Employment Law*

### **“GET READY... GET SET ...” NEW FEDERAL OVERTIME REGULATIONS ARE ARRIVING**

The U. S. Department of Labor has released new federal regulations for the “white collar” overtime pay exemptions under the Fair Labor Standards Act (FLSA). The Department of Labor has estimated that the changes will cost American business \$375 million in payroll cost increases, and an additional \$720 million to implement the regulations. The new rules go into effect August 23, 2004.

To be exempt from the FLSA’s minimum wage and overtime pay requirements, “white collar” employees must: (1) be compensated above a specified minimum “salary level”; (2) be paid on a “salary basis”; and (3) perform certain primary job duties involving managerial, administrative, or professional skills. These requirements were last updated 30 years ago and, consequently, have lost touch with the realities of the modern workplace.

The new FLSA regulations dramatically increase the minimum salary level for the “white collar” overtime exemption from \$155 to \$455 per week. Therefore, if an employee is paid less than \$455 per week (\$23,660 per year), the employee will not be exempt, no matter what duties the employee may perform.

The regulations also simplify the “duties” tests. The new regulations eliminate the “long test” / “short test” criteria for executive, administrative and professional exemptions and now focus on a “primary duty” test for each “white collar” employee classification. The “primary duty” test does not *require* that employees spend more than 50% of their time performing exempt work. However, employees who spend more than 50% of their time performing exempt work generally will satisfy the “primary duty” requirement. Thus, an assistant manager in a retail store making a salary of at least \$455 per week whose primary duty is managing may be considered exempt, even though much of the assistant manager’s time is spent operating a cash register.

A number of states, including Illinois, have complicated the new federal regulations by “decoupling” the state wage and hour law from federal law. In Illinois, the new Democratic administration successfully passed a bill on April 2, 2004 that provides under Illinois overtime law, the exemption tests will remain unchanged, notwithstanding the revisions to the federal overtime regulations. As a result, Illinois employers face complying with *different* overtime exemption standards when dealing with the United States Department of Labor and the Illinois Department of Labor.

The attorneys at Peters & Lyons, Ltd. are available to consult with you concerning the new federal regulations, discuss how they may affect your business, and assist you in taking steps to reduce your exposure to potential wage and overtime claims.

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## **CHRONICALLY ABSENT DIABETIC EMPLOYEE LAWFULLY DENIED DISABILITY ACCOMMODATION AND FMLA LEAVE**

Claims by a diabetic pharmacist who was terminated after he missed work due to a hypoglycemic episode were properly dismissed against his former employer, according to a U.S. Court of Appeals. The pharmacist, Lee Brenneman, had sued MedCentral Health System, his employer of 27 years, alleging disability discrimination under the Americans with Disabilities Act (ADA) and a violation of the Family and Medical Leave Act (FMLA).

Brenneman’s diabetic condition was well known to MedCentral. However, Brenneman experienced substantial attendance deficiencies during his employment, most of which were related to medical problems other than his diabetes. During his last five years of employment, Brenneman was absent 193 times and arrived late or left early on 34 occasions. He received progressive discipline for his attendance problems throughout his employment, and although MedCentral afforded its employees the right to respond to disciplinary action, Brenneman never protested the imposition of any discipline or mentioned his diabetes.

One day, Brenneman informed MedCentral that he “wasn’t doing well and ... wouldn’t be in”. He did not state that his absence was in any way connected to his diabetic condition. Under MedCentral’s point-based attendance policy, Brenneman’s absence that day placed him at an accumulated point level warranting suspension. Because that suspension would have been Brenneman’s third attendance-related suspension within five years, it also triggered his discharge, under the terms of the company’s attendance policy

Shortly thereafter, Brenneman’s supervisors met with him to discuss his attendance deficiencies and advise him of his discharge. Brenneman did not mention his diabetes as the reason for his most recent absence during that meeting.

Two days later, Brenneman requested and received an exit interview with the human resources department. During that interview, for the first time, Brenneman cited his diabetes as the reason for his last absence. Brenneman produced a note from his doctor verifying that the absence was due to an extended episode of diabetes-related hypoglycemia. MedCentral did not reverse its discharge decision and Brenneman sued.

Brenneman's ADA claim alleged, in part, that MedCentral failed to reasonably accommodate his diabetes by granting him needed time off. His FMLA claim charged that the company unlawfully counted his diabetes-related, FMLA qualifying absences toward his discharge.

Rejecting Brenneman's claim that MedCentral had failed to provide him with a reasonable accommodation, the court held that the ADA afforded Brenneman no legal protection. To establish a valid ADA claim, an employee must show that he is disabled, but otherwise qualified for his job with or without reasonable accommodation. Finding that regular attendance was an essential function of Brenneman's pharmacy position, the court observed that even apart from his alleged diabetes-related absences, Brenneman had missed too much work to be considered a "qualified" individual under the ADA.

The court disposed of Brenneman's FMLA claim by finding that he failed to give his employer adequate notice that he needed FMLA leave. The court specifically found both the substance and timing of Brenneman's "notice" deficient. Substantively sufficient notice must adequately apprise the employer of a request to take leave for a serious health condition that renders the employee unable to perform his job. The notice also must be given within the requisite time frame. When an eligible employee's need for leave is foreseeable based upon planned medical treatment, he must provide the employer with at least 30 days notice, before the date the leave is to begin. When the approximate time of the leave is unforeseeable, generally the employee should give the employer notice within one or two working days of learning of the need for leave.

Although the court stressed that substantively adequate notice need not use precise terms or even mention the FMLA, the court found that Brenneman's simple report that he "wasn't doing well" was, in light of his long and varied history of absences, too generic to have apprised MedCentral that he needed time off for an FMLA qualifying reason. Also, although Brenneman eventually notified the company that his absence was diabetes related, he failed to do so within one or two working days of learning of his need for leave, as required by FMLA regulations.

Although decisions whether to grant disability accommodations and FMLA leaves of absence must be made on a case-by-case basis, this case illustrates that, in certain limited circumstances, employers can avoid liability for denying both, even to an employee who is known to have a long-standing affliction. *Brenneman v. MedCentral Health System*, 366 F.3d 412 (6<sup>th</sup> Cir. 2004).

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## IRS EMPLOYEE'S REVERSE DISCRIMINATION CLAIM FAILS UNDER DAYLIGHT... OR "MOON" LIGHT

IRS probationary special agent Douglas Katerinos' supervisors determined that his work performance fell short of their expectations and gave him the choice to resign or be fired. Katerinos chose to resign, and sued, alleging that his employer, the Department of Treasury, discriminated against him as a white male in violation of Title VII of the Civil Rights Act of 1964. The federal district court granted summary judgment in favor of the Department on Katerinos' reverse discrimination claim.

On appeal, the Seventh Circuit Court observed that Katerinos faced a major hurdle in establishing reverse discrimination and must show "background circumstances" that demonstrate that his employer has reason or inclination to discriminate against whites or men, or evidence that there is something "fishy" about the facts at hand.

To support his allegations, Katerinos pointed to a sole incident where at a training exercise, two female employees climbed onto a government vehicle, danced on top of it, and "mooned" the audience, yet were not disciplined. The Court affirmed summary judgment in the Department's favor, finding this alleged "cheeky" incident alone insufficient to show that Katerinos' employer favored women or minorities in its employment practices. *Katerinos v. U.S. Department of Treasury*, 368 F.3d 733 (7<sup>th</sup> Cir. 2004).

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## BITS & PIECES

Tom Smith, a former Caterpillar, Inc. employee, was fired because he was unable to give a urine sample for a drug test despite having drunk 40 ounces of water and being given three hours to complete the task. He sued Caterpillar under the Americans with Disabilities Act, claiming that he suffered from "shy bladder syndrome." Smith contended that the company violated the ADA and should have offered alternate drug testing methods, such as hair or blood tests. Smith is not alone. After 29 years in the Merchant Marines, Long Islander, Captain Joseph Kinneary, was discharged because he was unable to urinate on demand at work. Kinneary, who also allegedly suffers from "shy bladder syndrome", has filed discrimination lawsuits against the State of New York and the U.S. Coast Guard.

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## QUOTABLE

*"Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of the facts and the evidence."*

John Adams.

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Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of our firm. Written entirely by Peters & Lyons attorneys, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed or as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.