

# H.R. ALERT\*

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## The United States Department of Labor Proposes Key Changes to the Fair Labor Standards Act - "White-Collar" Exemption Rules to be Extensively Revised

In late March of this year, the United States Department of Labor (DOL) published a proposal to modernize through extensive revisions its existing regulations to the Fair Labor Standards Act (FLSA). These proposed regulations are set forth in the Federal Register, 29 CFR Part 541.

In the proposed regs, the DOL has changed dramatically the so-called "white-collar" employee exemptions for executive employees, administrative employees and professional employees. Succinctly stated, the DOL's proposed plan would generally require that executives, administrators, and professionals earn a minimum salary of at least \$425 per week or \$22,100 per year to be considered exempt. Additionally as part of the DOL's overhaul of these exemptions, the proposed rule would alter the so-called "duties" test of each of these classifications in order to qualify as exempt.

The DOL proposal contains several other significant changes. For example, the DOL has also proposed a new salary level for what it calls "highly compensated employees" who earn at least \$65,000 per year and who perform office or non-manual work. Those employees whose salaries reach this level would qualify as exempt executives, administrators, or professionals if they have

an identifiable executive, administrative or professional function as described in the new standard duties test. The DOL's proposed changes also include a clarification of computer employee exemptions and will now allow for deductions for full day absences for disciplinary suspensions. Hence, if an employer determines that an employee has violated workplace harassment policies, they could now suspend the employee for three days without pay.

As noted, the DOL's proposed regulations were issued in the Federal Register at the end of March of this year. You can access relevant information pertaining to these regulations by going to the DOL's Web site, which is as follows: [www.dol.gov](http://www.dol.gov). Additionally, copies of the proposed plan are also available by calling DOL at (202) 693-0023. NOTE: The DOL is strongly asking for public comments on the proposed rules. Comments should be submitted by the end of June, specifically June 30, 2003.

**Employer Practice Guide:** We are having executive briefings on the new proposed regulations to the FLSA at our New Orleans Executive Briefing on June 19<sup>th</sup> and at our Gulf Coast Executive Briefing on June 26<sup>th</sup>. Hope you can attend.

## The United States Supreme Court Decides Key Issue on Whether Directors/Shareholders of Corporations Should Be Counted as "Employees" in Determining Jurisdiction Under Federal Employment Statutes

Just last month, the United States Supreme Court rendered a key decision for employers in determining the requisite number of employees for jurisdictional purposes under the federal employment laws. As many of our readers know, most federal statutes do not apply to small businesses. Indeed, coverage under a statute such as Title VII and the American with Disabilities Act (ADA) does not apply to a "employer" unless the employer's workforce includes "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year." See ADA, 42 U.S.C. §12111(5). In the case of *Clackamas Gastroenterology v. Wells*, 123 S.Ct. 1673 (2003), the Court was faced with the issue of whether four physicians who were actively engaged in a medical practice as shareholders and directors of a professional corporation should be counted as "employees." The case came up to the Supreme Court for review from the Ninth Circuit Court of Appeals, which had determined that these physicians should be counted as employees. On review, the Court noted that there was a conflict among the circuit courts on this issue and that it was granting review to resolve the conflict.

In the course of its opinion, the Court reversed the Ninth Circuit and concluded that six factors are relevant to an inquiry as to whether a shareholder-director is an "employee" for purposes of the federal anti-discrimination statutes. The six factors are as follows:

1. whether the organization can hire or fire individuals or set rules and regulations of an individual's work;

2. whether, and if so, to what extent the organization supervises the individual's work;
3. whether the individual reports to someone higher in the organization;
4. whether and, if so, to what extent the individual is able to influence the organization;
5. whether the parties intended that individual to be an employee as expressed in written agreements or contracts; and
6. whether the individual shares in the profits, losses and liabilities of the organization.

The use of the six factors noted above was advocated by the Equal Employment Opportunity Commission (EEOC). As stated by the Court, they were persuaded by the EEOC's focus on the common law touchstone of "control." After reviewing the factors against the record evidence, the Court determined that a remand to the district court was appropriate to ascertain whether the evidence in the record supported the lower court's initial conclusion that the director-shareholder physicians were not employees.

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## Does the ADEA provide a cause of action for employees within the protected class who claim that their employer discriminates against them on the basis of age because of the employer's more favorable treatment of older employees - The United States Supreme Court agrees to address the issue.

On April 21, 2003, the United States Supreme Court agreed to grant certiorari review in the case of *General Dynamics Land Systems, Inc. v. Cline*, 123 S.Ct. 1786 (2003). The facts leading up to the controversy involved the present and former employees of General Dynamics between 40 and 50 years of age. They brought a claim against General Dynamics alleging age discrimination in favor of older employees based on the abrogation of retiree health insurance benefits programs for all workers below the age of 50. Although the district court had granted the employer's motion to dismiss, the Sixth Circuit Court of Appeals reversed, finding that the Age Discrimination in Employment Act (ADEA) provides a cause of action for those employees within the protected class who claim that their employer has discriminated against them on the basis of age because of the employer's more favorable treatment of older employees. This was a novel theory and the circuit court noted that the facts were "unusual."

The lawsuit was originally filed as a class action in which Dennis Cline, a named representative for the putative class, along with 195 other employees of General Dynamics, filed suit against their employer under the ADEA. The suit was filed after their labor union, United

Auto Workers, and General Dynamics entered into a new collective bargaining agreement. The new agreement took effect July 1, 1997. Prior to that date the parties had been bound by a collective bargaining agreement that obligated General Dynamics to provide full health benefits to retired workers who had accumulated 30 years of seniority. With one exception, the new agreement no longer required General Dynamics to provide full health benefits to retirees; the exception held that only employees 50 years of age or older on July 1, 1997 remained eligible to receive full benefits on retirement.

Prior to filing suit, the plaintiffs sought and obtained a determination from the EEOC that the collective bargaining agreement adversely affected General Dynamics' employees who were between the ages of 40 and 49 on July 1, 1997 in violation of the ADEA. As noted, the district court had granted the employer's motion to dismiss; the Sixth Circuit reversed, however, finding that the provisions of the ADEA specifically prohibited an employer from discriminating against any individual 40 years of age or older based upon that person's age. The circuit court recognized that while the facts of the case were unusual and fell outside the typical ADEA claim, the fact that some members within the protected class were beneficiaries of the discriminatory action while other members of the protected class were not, does not prohibit age discrimination claims from succeeding.

**Employer Practice Guide:** The United States Supreme Court has agreed to review this key case. We will keep our readers apprised of the Supreme Court's decision as it will substantially impact exit incentive programs, retirement programs and the like.

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Inquiries concerning topics addressed in the H.R. ALERT may be directed to Nan Alessandra, Jane Armstrong, or Kim Boyle. Your comments, questions, and suggestions are encouraged.

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### MARK YOUR CALENDARS

- BREAKFAST BRIEFINGS -

"Review of the U.S. Department of Labor's Proposed  
Amendments to the Fair Labor Standards Act"

Wednesday, June 18, 2003

Isle of Capri Casino Resort  
and

Thursday, June 19, 2003

Phelps Dunbar New Orleans Office

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