



# UPDATE

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## California Legislature Passes Overtime Bill

Since January 1, 1998, many California employers have been relieved of the obligation to pay overtime compensation unless employees work more than 40 hours in a workweek. On July 8, 1999, the California Legislature passed legislation reinstating many of the overtime requirements that existed before January 1, 1998 and imposing additional requirements on California employers.

### Overtime Requirements:

Assembly Bill 60, the "Eight-Hour-Day Restoration and Workplace Flexibility Act of 1999," requires employers to do the following:

- Pay 1-1/2 times the regular rate of pay for hours worked in excess of 8 hours in a workday, or 40 hours in a workweek, and for the first 8 hours worked on the 7th day of work in any workweek.
- Pay 2 times the regular rate of pay for hours worked in excess of 12 hours in a workday and in excess of 8 hours on the 7th day of work in any workweek.

### Alternative Schedules

A.B. 60 provides that employers and employees may adopt alternative work schedules providing for workdays of up to 10 hours per day within a 40-hour workweek without payment of overtime. The alternative work schedule may be a single alternate schedule or a menu of alternative schedules from which the employee may choose. Such schedules would have to be approved by at least two-thirds of the affected employees in a secret ballot election. Alternative schedules that allow for workdays longer than 10 hours per day without the payment of overtime compensation are not permitted. The bill requires employers to make a "reasonable effort" to find a work schedule not to exceed 8 hours in a workday for employees who are unable to work the elected alternative schedule.

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### Make Up Time:

A.B. 60 relieves employers of the obligation to pay overtime for “make-up” time. Where an employee asks in writing to make up time lost as a result of the employee’s personal obligations, make-up hours performed during the same workweek as the employee’s lost time need not be counted towards the total number of hours worked for purposes of overtime, unless the make-up hours exceed 11 hours in a workday or 40 hours in a workweek.

### Additional Civil Penalties:

The bill creates penalties in addition to those already established in the Labor Code, providing that any employer, or any person acting on behalf of an employer, who violates overtime provisions will be subject to a penalty of \$50.00 per employee per pay period plus an amount sufficient to recover underpaid wages for initial violations. For subsequent violations, the penalty increases to \$100.00 per employee per pay period.

### Industrial Welfare Commission Public Hearing:

The bill requires the Industrial Welfare Commission to hold public hearings no later than July 1, 2000 to address the executive, administrative and professional exemptions; the outside salesperson exemption, procedures for alternative workweek elections and various other issues concerning the health care, ski, commercial fishing, and horse racing industries.

Governor Davis is expected to sign A.B. 60 into law in the near future. Once signed, the bill will become effective January 1, 2000. A copy of the bill can be obtained at [www.leginfo.ca.gov](http://www.leginfo.ca.gov). ■

## United States Supreme Court Deepens Controversy over the Definition of Disability.

**I**n a trio of decisions issued on June 22, 1999, the United States Supreme Court gave guidance to employers and courts dealing with the issue of when an individual has a disability under the Americans with Disabilities Act. The ADA gives “disability” three distinct definitions:

- (A) a physical or mental impairment that substantially limits a person in one or more of the major life activities;
- (B) a record of such an impairment; or

(C) being regarded by the employer as having such an impairment.

In three separate decisions, the Supreme Court explored the first prong of the definition, holding that mitigating measures such as glasses, prostheses and medications, must be taken into account when determining whether an individual is substantially limited in performing major life activities.

In *Sutton v. United Air Lines*, the Court examined whether twin sisters with severe myopia, but 20/20 vision with corrective lenses, had a disability under the ADA. Rejecting the EEOC's Interpretive Guidance and contrary decisions of many Courts of Appeal, the Court held that the effects of mitigating measures must be considered. The Court relied on the language of the ADA stating that a disability exists where an impairment "substantially limits" a major life activity, "not where it 'might,' 'could,' or 'would' be substantially limiting if mitigating measures were not taken." The Court found further support for its holding in the ADA's mandate that disabilities be evaluated on a case by case basis "with respect to an individual." The Court explained that examining an individual without considering mitigating measures would require speculation about the person's condition based on general information about how uncorrected impairments "usually [affect] individuals, rather than on the individual's actual condition." Because the twin sisters, with their glasses, were not substantially limited in the major life activity of seeing or working, the Court held that they could not state a claim under the ADA. Therefore, the Airline did not violate the ADA by rejecting their applications for the position of pilot.

The Court applied this same logic in *Albertson's, Inc. v. Kirkingburg*, holding that a truck driver with uncorrectable poor vision in one eye was not substantially limited in the major life activity of seeing because his brain and body had developed mechanisms for coping with and compensating for his monocular vision. In the third case, *Murphy v. United Parcel Service*, the Court upheld the employer's termination of a truck driver whose medicated blood pressure exceeded the requirements of the Department of Transportation based on the fact that when medicated, his high blood pressure did not substantially limit him in any major life activity.

The Court also provided guidance on the third definition of disability – "regarded as" having a disability. The Court stated that an employer would run afoul of this definition where, based on stereotypical assumptions, it believed that an employee had a substantially limiting impairment that the employee did not have, or where it believed that an employee had a substantially limiting impairment when, in fact, the impairment was not so limiting.

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However, where an employer discriminates against an employee because it believes the employee has an impairment that does not substantially limit the employee in a major life activity, no violation would occur. The Court stated in *Sutton v. United Airlines*:

By its terms, the ADA allows employers to prefer some physical attributes over others and to establish physical criteria. An employer runs afoul of the ADA when it makes an employment decision based on a physical or mental impairment, real or imagined, that is regarded as substantially limiting a major life activity. Accordingly, an employer is free to decide that physical characteristics or medical conditions that do not rise to the level of an impairment – such as one’s height, build, or singing voice – are preferable to others, just as it is free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job. (*Sutton* at 6282).

Critics point out that the Court’s decisions lead to a result that could not have been intended by Congress. Under these decisions, an employer may not discriminate against an otherwise qualified one legged man without a prosthesis whose ability to walk is substantially impaired. The same employer may, however, discriminate freely against a one legged man with a prosthesis who walks smoothly. Critics also question the Court’s interpretation that only “present” or “actual” conditions that are substantially limiting are protected disabilities. If this were the case, there would be no reason to include the middle definition of disability – individuals with a record of a disability. Critics speculate over whether the Legislature will let these decisions stand or will enact legislation to clarify or overturn them.

California employers must be mindful of the fact that the definition of “physical disability” and “mental disability” under the Fair Employment and Housing Act differs significantly from the ADA definitions. For example, FEHA uses the term “limits” rather than “substantially limits” and defines disability to include “having had a . . . health impairment that has no present disabling effect, but may become a physical disability.” Given the apparently broader scope of California law and the uncertain permanence of the Supreme Court’s decisions, employers dealing with determinations of disability are advised to proceed with great caution.

We will be monitoring these developments closely and will keep our clients advised as developments occur. ■

*Sutton v. United Airlines, Inc.*, No. 97-1943, 1999 WL 407488; 1999 Daily Journal D.A.R. 6277  
*Albertsons, Inc. v. Kirkingburg*, No. 98-591, 1999 WL 407456; 1999 Daily Journal D.A.R. 6243  
*Murphy v. United Parcel Service, Inc.*, No. 97-1992, 1999 WL 407472; 1999 Daily Journal D.A.R. 6259

## Internal Revenue Service Issues Final and Proposed COBRA Regulations

**O**n February 3, 1999, the Internal Revenue Service ("IRS") issued final regulations governing administration of continuation health coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"). Under COBRA, health plans maintained by employers with at least 20 employees must offer qualified beneficiaries who would otherwise lose coverage an opportunity to elect continuation coverage within a specified period. The final regulations, which apply to qualifying events that occur in plan years beginning on or after January 1, 2000, provide the following:

- An employer need not give a qualified beneficiary an option to elect only core coverage where a plan offers multiple benefits (e.g., medical and dental). If an employer offers more than one type of benefit under one plan, the employer may require the qualified beneficiary to elect (and pay for) COBRA coverage which includes all of the benefits provided by that plan.
- Termination of COBRA continuation coverage may not occur where it is found that the qualified beneficiary had other coverage prior to electing COBRA continuation coverage. Election is deemed to have been made on the date the election is sent to the plan administrator.
- Although the premium for COBRA coverage generally cannot exceed 102% of the applicable premium, where a disabled beneficiary is covered during a period of disability extension, the premium for COBRA coverage may be increased to an amount not exceed to 150% of the applicable non-COBRA premium for months 19 through 29.
- Where disability extensions of COBRA coverage apply, they apply independently to each qualified beneficiary entitled to coverage because of the same qualifying event, even if the disabled qualified beneficiary has not elected COBRA coverage.
- If a family unit elects COBRA coverage, only the expenses incurred prior to the qualifying event by family members who elect COBRA coverage need be considered in determining the amount of remaining deductible applicable to the COBRA coverage period.

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- If a qualified beneficiary moves to an area where the current health plan is not available, the employer must make available coverage that it offers to similarly situated non-COBRA beneficiaries or to other employees in that area.

New proposed regulations were issued in conjunction with the final regulations. The IRS will seek public comments on the proposed regulations before they become final. The highlights of the proposed regulations are:

- In determining whether an employer has fewer than 20 employees, and is therefore excluded from COBRA requirements, each part-time employee counts as a fraction of an employee based on the number of hours the part-time employee works. (This is in contrast to prior guidance stating that each employee, whether part-time or full-time, must be counted as one employee.)
- For purposes of determining whether the employer is sponsoring one plan with different benefits or separate plans, the plan documents and insurance contracts provide the answer. This gives employers and employee organizations more flexibility in structuring their group health plans.
- Timely payments that are not significantly less than the amount due are deemed to satisfy the plan's requirement for payment, unless the plan notifies the qualified beneficiary of the deficiency and grants a reasonable time (30 days) for payment. The new proposed regulations do not define what is considered "significantly less."
- Guidelines for determining the COBRA liabilities of buyers and sellers of corporate stock and corporate assets permit them to reallocate these liabilities by agreement.

Taxpayers may submit their comments on the proposed regulations via the Internet by selecting the "Tax Regs" option on the IRS Home Page ([www.irs.gov](http://www.irs.gov)). ■

The final regulations can be found at: T.D. 8812, REG-121865-98; 26 CFR Parts 54 and 602.

## Federal Trade Commission Issues Opinion Letter Applying Fair Credit Reporting Act Requirements to Sexual Harassment Investigations

**A**n opinion letter issued by a staff attorney of the Federal Trade Commission concludes that outside investigators, including attorneys, hired to investigate complaints of workplace harassment are “consumer reporting agencies” subject to the disclosure and reporting requirements of the federal Fair Credit Reporting Act (FCRA).

The FTC’s April 5, 1999 letter responded to a question raised by an employment lawyer as to whether the FCRA applies to workplace investigations that are limited to review of company documents and interviews with company employees. According to the FTC, regardless of the scope of the information reviewed, once an employer turns to an outside person or entity for assistance in investigating harassment claims, the assisting entity is a “consumer reporting agency” because it furnishes a “consumer report” to a “third party,” namely, the employer that retained the investigator’s services.

The opinion was based on the FTC attorney’s interpretation of statutory terms. A “consumer reporting agency” is defined in the FCRA as any person who charges a fee to assemble or evaluate credit or other information on consumers for the purpose of furnishing a “consumer report” to third parties. A “consumer report” is defined as a report containing information bearing upon an individual’s “character, general reputation, personal characteristics, or mode of living” that is used as a factor in determining the eligibility of the consumer (here, the employee accused of harassment) for, among other things, continued employment. According to the FTC, employers who use such reports are obligated under the FCRA to notify employees and/or supply a copy of the report to the employee. And, redacting information from the report – such as the names of witnesses – before it is given to the consumer is prohibited.

Although the FCRA does not apply to investigations done by in-house personnel, employers frequently hire attorneys and other consultants to investigate a variety of workplace problems, including claims of sexual harassment. Public response to the FTC opinion letter has been mixed, although commentators seem to agree that the FCRA was never intended to address investigation of

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The *Update* is written and edited by the attorneys of Crosby, Heafey, Roach & May. Because facts affect the analysis, the *Update* should not be considered legal advice.

#### Editors

Denise M. DeRose  
David G. Freedman

#### Employment and Labor Group Directors

#### Oakland

1999 Harrison Street  
26th Floor  
Oakland, CA 94612  
(510) 763-2000  
Boyd E. Burnison  
Denise M. DeRose  
Ian P. Fellerman  
Sharon J. Grodin  
Howard A. Janssen  
William L. Kasley  
Judith Droz Keyes  
Darren P. Roach  
Mary Maloney Roberts  
Jonathan C. Rolnick  
Ember Lee Shinn

#### San Francisco

Four Embarcadero Center  
Suite 1900  
San Francisco, CA 94111  
(415) 543-8700  
Lynn A. Bersch  
Tim J. Emert  
John Siamas

#### Los Angeles

700 South Flower Street  
Suite 2200  
Los Angeles, CA 90017  
(213) 896-8000  
David G. Freedman

#### Century City

2049 Century Park East  
Suite 3870  
Los Angeles, CA 90067  
(310) 734-5200  
Mallory J. Garner

www.chrm.com

complaints of workplace harassment that are required by law. While it is highly questionable whether a court would agree with the FTC's broad reading of the FCRA, employers should be aware of this potential issue when considering how best to investigate workplace complaints. A copy of the FTC's opinion letter may be obtained at [www.ftc.gov](http://www.ftc.gov). Once at the website click on "Consumer Protection," then click on "Credit," then click on "FCRA Staff Opinion Letters" and find Section 603(e) and click on "Vail (04-05-99)." ■

## "100% Healed" Policy is a Per Se Violation of the ADA

**W**ith its recent decision in *McGregor v. National Passenger Railroad Corporation*, the Ninth Circuit followed the Seventh Circuit and several district courts in concluding that enforcement of a "100% healed" or "fully cured" policy is a per se violation of the Americans with Disabilities Act. A "100% healed" policy provides that no light duty or modified work will be made available to employees who are on Workers' Compensation leave, and that employees will be allowed to return to work or bid for an open position when they are "100% healed".

The Court commented that "100% healed" policies unlawfully preclude an individualized assessment of whether the employee can perform the essential functions of his or her job with or without a reasonable accommodation as is required by the ADA. Although employers have believed that they had the right to determine as a matter of policy whether light duty jobs would be available to workers recovering from work-related illness or injuries, the *McGregor* decision provides another opportunity for employers to examine the implications of their Workers' Compensation policies in the context of their obligations to provide reasonable accommodation to otherwise qualified individuals with disabilities. ■

*McGregor v. National Passenger Railroad Corp.*, No. 97-35868, 1999 WL 366567; 1999 Daily Journal D.A.R. 5633.