

## NON-COMPETITION AGREEMENTS AND TRADE SECRETS

By Douglas J. Good



Douglas J. Good

Employers often seek to protect their business from competition by having employees execute restrictive covenants – non-compete, non-solicitation or confidentiality agreements. By those agreements, employees promise that they will not disclose information, solicit customers and/or suppliers, or compete at all with their employers for a stated period after the employment ends. Those agreements may be enforced in appropriate circumstances, if they are properly drafted and limited. But an employer may not use a restrictive covenant to keep a former employee from

using information that is readily available to others in the trade. A recent case illustrates this point.

Our clients were a salesman and his assistant who moved from one employer to another in the premium merchandise industry. (Premium merchandise describes low cost give-away items used as incentives to build customer loyalty. A ‘freebie’ for joining a book club is one example; look inside your latest credit card bills for free merchandise offerings to loyal customers, for another.) Their former employer sued to enforce restrictive covenants prohibiting competition and disclosure of supposed “trade secrets” – the identities of its customers, their preferences and the prices they were willing to pay, as well as the identities of suppliers. On behalf of our clients, we claimed that the restrictive covenants were non-binding and unenforceable because the information was all readily available to others in the industry; our clients counter-claimed for a judgment declaring that the information plaintiff sought to protect did not constitute protectable trade secrets.

After successfully fighting off a motion for a preliminary injunction (which could have effectively left our clients without jobs), each of the parties was deposed. Both sides then moved for summary judgment in advance of trial. The Supreme Court, Nassau County granted our clients’ motion for summary judgment and denied their former employer’s. The former employer appealed.

*continued on page 4*

## PROPOSED COBRA REGS: MORE IS LESS

On a similar timetable to the proposed FLSA regulations discussed elsewhere in this *Update*, the Department of Labor (DOL) has also published proposed new regulations governing COBRA Notices. Since the enactment of the Consolidated Omnibus Budget Reconciliation Act in 1985 we have all become familiar with the required COBRA notices regarding continuation of health insurance benefits. Now, DOL is proposing new notice requirements intended to be more meaningful, timely and user-friendly. *No substantive change in COBRA coverage is involved* – only procedural changes. And even better, the DOL is proposing standard formats for the two most common required notices.

The proposed regs, and a DOL “Fact Sheet,” can be accessed through the Department’s website, [www.dol.gov/ebsa](http://www.dol.gov/ebsa). A brief summary follows. Public comments must be made by July 28, 2003, after which final regulations are expected. They will be effective for plan years starting on or after January 1, 2004.

The proposed regulations address four different notices:

1. Notice to employees (and their spouses) when they become covered under a health insurance plan (to be provided within 90 days).
2. Notice to be given – *by employees* – in the case of a divorce or loss of status as a dependent (to be provided within 60 days).
3. Notice by the employer – *to the plan administrator* – of another “qualifying event” such as termination of employment, the employer’s bankruptcy, death of employee, etc. (to be given within 30 days).
4. An “election notice” to be given to an individual (e.g., a departing employee) who has the right to elect continued health plan coverage under COBRA (to be furnished within 14 days).

Additionally, plan administrators will be required to notify recipients in those circumstances where COBRA coverage is permitted to be discontinued (e.g., where health insurance plans for current employees are terminated), or when an individual gives notice of a “qualifying event” as per paragraph 3 above, but is otherwise ineligible for COBRA coverage.

Ruskin Moscou Faltischek’s Employment Group attorneys will continue to monitor DOL action on these proposed regulations, and we will notify you when the final regulations and forms are adopted. Meanwhile, we are available to assist you on COBRA-related issues, and the whole panoply of federal and state employment requirements.

### INSIDE UPDATE

New Overtime Regulations.....	2
Employment Law Seminar.....	2
Religious Accommodation.....	3

# NEW OVERTIME REGULATIONS PROPOSED: DRASTIC CHANGES AHEAD

By Jeffrey M. Schlossberg

In the most sweeping overhaul ever of Federal law governing the payment of overtime, the United States Department of Labor recently issued proposed regulations that would dramatically change the standards for determining which employees are exempt from the payment of overtime under the Fair Labor Standards Act.

Some of the most significant changes are:

- **Minimum salary level increased:** Currently, an employee earning as little as \$155/week may be classified as an “exempt” employee, not entitled to overtime. The proposed regulations raise this minimum salary to \$425/week, the largest increase since the Fair Labor Standards Act was passed in 1938. This may result in fewer employees being classified as exempt, increasing employers’ liability for ‘time-and-a-half.’
- **Administrative exemption test changed:** The proposed regulations replace the required “discretion and independent judgment” test that had been the subject of substantial confusion. The new test states that to qualify as exempt, an employee must hold a “position of responsibility” in the performance of office or non-manual work. A “position of responsibility” is defined in the proposed regulations as including “work of substantial importance” or requiring a “high level of competence.” This change, if adopted in the final regulations, would likely result in more employees being classified as exempt.
- **Professional exemption test changed:** The proposed regulations permit an employee to qualify as an exempt “professional” by recognizing that an employee can acquire advanced knowledge through work experience, not just formal training. Under the current system, only knowledge gained through formal training can qualify one as an exempt “professional.” Here, too, the proposed regulations would expand the number of exempt employees.
- **Super salary test:** The proposed regulations for the first time establish a bright-line test: an employee performing office or non-manual work and earning a “guaranteed total annual compensation” of at least \$65,000 is automatically exempt.
- **Permissible salary deductions clarified:** Over the years, one of the largest pitfalls for employers has been making improper deductions from exempt employees’ salaries, thereby resulting in the loss of their exemption. The proposed regulations include two employer-friendly changes to the rule that exempt employees must receive their full salary for any week in which they perform any work. The first change allows the employer to impose unpaid disciplinary suspensions of one full day or more without compromising the employee’s exempt status. The second change creates a new “safe harbor” provision to protect employers in the event they make improper deductions

(an employer that makes an improper deduction can lose the exemption not just for the individual involved, but for an entire class of employees). The Labor Department’s proposal would clarify that the exemption is lost only if there is a pattern and practice of improper deductions, and then only for employees in the same job classification who work for the manager who made the improper deduction. And, if the employer has a written policy prohibiting improper pay deductions, notifies employees of the policy and reimburses them for improper deductions, the employer will not lose the exemption unless it repeatedly and willfully violates its own policy.



Jeffrey M. Schlossberg

As a practical matter, employers must become familiar with the new regulations in order to understand how the new standards impact their workforce and to analyze the job duties of those employees previously classified as exempt. In addition, it will be imperative that employers implement an “improper pay deduction” policy to avoid the loss of employee exemptions. The effect of misclassifying employees and not properly paying overtime to non-exempt employees could be a claim by an aggrieved employee or by the U.S. Department of Labor for wages for up to three years plus double damages and attorneys’ fees. In addition, the New York State Department of Labor, which historically has applied the federal standards, can assert a claim for back wages for up to six years, 25% liquidated damages plus attorneys’ fees.

The Department of Labor expects to adopt final regulations in fall 2003, to become effective at the end of 2003. Ruskin Moscou’s Employment Law Group will keep you apprised of any changes in the proposed regulations as they are finalized and their effective date.

**Watch for Our Upcoming  
Employment Law Seminar  
On This Topic!**

Jeffrey M. Schlossberg is of counsel to the firm, where he is a member of the Employment Law Group. Mr. Schlossberg has extensive experience in handling all aspects of the employer-employee relationship from hiring to discharge. He can be contacted at 516-663-6554 or jschlossberg@rmfp.com.



# RELIGIOUS ACCOMMODATION: A PRIMER

By Joseph R. Harbeson

New York's Legislature recently amended the Human Rights Law (HRL), strengthening the requirement that an employer accommodate the religious observance of an employee or prospective employee.

Both federal law and the HRL prohibit an employer from basing employment and workplace decisions on an employee's or applicant's religion. The definition of "religion" under Federal Title VII includes "all aspects" of observance and practice, "unless an employer demonstrates that he is unable to reasonably accommodate" an employees' practice "without undue hardship on the conduct of the employer's business." The HRL contains similar, but stricter language, relieving an employer from the duty to accommodate an employee's religious practice only if it causes an "undue hardship."

Although an accommodation analysis must be done on a case-by-case basis, the following are general principles:

- An employer may not question an applicant about her religious affiliation, or if her religion prevents working at certain times or performing particular tasks. Based on the job requirements, the applicant then has the burden to tell the employer that her religious observance would affect the described duties.
- An employer is only obligated to accommodate a sincere belief and is entitled to information sufficient to show genuine religious observance. Accommodations are not required for non-theological preferences based on culture, heritage or politics.
- If requirements and the employee's religious observance conflict, the employer must make a "bona fide effort" to change work hours or other rules to reasonably accommodate the employee's needs without penalizing the employee.
- Once reasonable accommodations have been proposed (by either the employer or the employee), the question becomes whether any accommodation can be put into place without causing an undue burden on the business. Under federal law, an employer can avoid any accommodation that imposes more than minor cost or risk of workplace unrest. However, for New York employers, the bar has been raised. Under the amended HRL, an employer cannot avoid making an accommodation unless it results in "significant cost or difficulty", including "significant interference with the safe or efficient operation of the workplace or a violation of a bona fide seniority system." It is clear that in amending the HRL, the legislature intended that a New York employer is required to suffer some financial or operational pain in an effort to accommodate.

- Employers may not shift the task of finding or working out an accommodation to employees. For example, an employer may not tell an employee to work out, on his own, swapping shifts with co-workers. In a unionized workplace, where accommodating a religious need would violate collective bargaining rules, the employer cannot simply point to the bargaining agreement and deny the request; instead, the employer must make a good faith request to the union to waive such rules or permit shift swapping. (If the union refuses, the accommodation will then probably involve an undue hardship.)
- Unpaid leave can be a reasonable accommodation, unless paid leave is offered for all other purposes except religious ones. Under the HRL, refusal to permit an employee to use leave solely because the leave is for religious observance is *prima facie* discrimination.
- The recent HRL amendments also heighten an employer's duty to accommodate an employee's religious strictures on appearance and dress: only legitimate safety concerns will usually be found to amount to an undue hardship.
- Finally, an employer does not have to accept an employee's choice of accommodation, even if that option does not cause a hardship. The employer's duty is to offer a reasonable accommodation, and once it has done so, it has met its duty. Just as with other forms of discrimination, employers must insure that the workplace is free from harassment based upon religion. A pattern of insult or intimidation due to religious beliefs can be actionable if it could be reasonably perceived to create a hostile or abusive working environment. An effective policy encourages employees to report harassment to management and provides for prompt investigation and corrective action. That is the best protection against potentially expensive discrimination claims.



Joseph R. Harbeson

Mr. Harbeson is an associate at Ruskin Moscou Faltischek, where he is a member of the firm's Litigation Department and chair of the Construction Practice Group. Mr. Harbeson practices in the areas of civil and commercial litigation. He can be reached at 516-663-6545 or [jharbeson@rmfp.com](mailto:jharbeson@rmfp.com).

**NON-COMPETITION AGREEMENTS AND TRADE SECRETS**

*continued from cover*

In a unanimous decision, the Appellate Division affirmed the ruling below. The appellate court held that the restrictive covenants in this case were unenforceable because, as we had proved, the information the former employer tried to protect was readily available to others in the trade from sources outside plaintiff's business. Therefore, the court ruled, no trade secret protection was available. (*Archer v. Mansbach*, 734 N.Y.S.2d 869.)

Years earlier, we were successful convincing the same appellate court to grant trade secret protection to the customer information of our client, a local fuel oil company. In that case – *Gifford Oil Company v. Wild* (483 N.Y.S.2d 104) – the court enforced a restrictive covenant and enjoined a former sales manager from competing with his former employer.

These drastically different rulings in two cases that were in many respects similar illustrate how proper drafting of restrictive covenants, appropriate internal business practices and a well-crafted presentation to the court, properly supported by relevant factual material, can make all the difference between success and failure in this perilous legal arena.

Douglas J. Good is a partner at Ruskin Moscou Faltischek, where he is co-chair of the firm's Litigation Group and chair of the Employment Law Group. Mr. Good has extensive experience in trial and appellate advocacy in both the state and federal courts, as well as in alternate dispute resolution. He can be reached at 516-663-6630 or [dgood@rmfp.com](mailto:dgood@rmfp.com).



**ABOUT THE FIRM**

Founded in 1968, Ruskin Moscou Faltischek, P.C. has grown into one of the most respected and largest multi-practice law firms in the New York metropolitan area and is headquartered in Uniondale, New York. With over 60 attorneys in 18 practice areas, the firm offers innovative legal services, keeping focus on the client's goals, in the areas of corporate & securities, corporate governance, employment, energy, environmental, financial services, banking & bankruptcy, health law, intellectual property, life sciences, litigation, municipal & regulatory affairs, real estate, construction, seniors' housing, technology, trusts & estates, and white collar crime & investigations. Clients include large and mid-sized corporations, privately held businesses, institutions and individuals.

The *Employment Law Update* is published to provide clients, colleagues and friends of Ruskin Moscou Faltischek, P.C. with information about developments in employment law matters. It is not a substitute for legal advice and should not be construed as imparting legal advice generally or on specific matters.

Summer 2003 Vol. 3 No. 1

**RUSKIN MOSCOU FALTISCHEK, P.C.**

East Tower, 15th Floor  
 190 EAB Plaza  
 Uniondale, New York 11556-0190  
 (516) 663-6600  
[www.rmfp.com](http://www.rmfp.com)

**Employment Law**

Douglas J. Good, *Chair*  
 Jeffrey M. Schlossberg  
 Joseph R. Harbeson  
 Timothy DiResta  
 Kellie E. Lagitch

Copyright © 2003 Ruskin Moscou Faltischek, P.C.  
 All Rights Reserved.

**EXCELLENCE. PERIOD.**