Wimberly Lawson
Wright Daves & Jones, PLLC
Attorneys & Counselors at Law

Briefly

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"With the extensive list of potential losses – both tangible and intangible – employers should take action to protect themselves well in advance of a claim or lawsuit. How though, can employers do this?"

WHAT EMPLOYERS SHOULD KNOW ABOUT GENERAL LIABILITY CLAIMS

Effectively running a business requires employers to reflect on the past, deal in the present, and prepare for the future. Preparation for the future requires being ready to handle a wide range of potential issues – issues that could harm the employers, their employees, and/or their business. It is indispensable for businesses to have policies and procedures in place so that if the worst does happen, they are ready.

One of the most detrimental issues that an employer could face is a lawsuit. Lawsuits are time-consuming, expensive, and interrupt the flow of business. There are many different areas of law that are pertinent to employers, but in this article, we will discuss just one of them: General Liability.

General Liability, though superficially vague, is a complex area of law. It covers a myriad of different issues – including car accidents, property damage, slips and falls, product liability, advertising injury, defamation, and various other types of personal injury. Because of the breadth of the potential angles of attack, employers should make sure they are ready for any one of these.

The damages that accompany a general liability action provide an even greater incentive for employers to be ready. Employers could find themselves liable for medical bills, future medical expenses, pain and suffering, emotional distress, lost wages, and legal fees/defense costs. In addition to these already mounting potential costs, there are consequences that businesses may not even realize – such as the interruption of the flow of their business, including time and energy of their employees and executives – and damage to their business reputation, such as damage to brand-name, and loss of good will.

With the extensive list of potential losses – both tangible and intangible – employers should take action to protect themselves well in advance of a claim or lawsuit. How though, can employers do this?

There are several preemptive actions that employers should take to prepare themselves. Firstly, they should have a policy and plan in place for reporting and investigating incidents and claims; secondly, they should have a data preservation and retention policy - including one for electronically stored information (ESI); and thirdly, they should make sure all employees are trained on policies and procedures for incident reporting and data/evidence retention policies.

In the event that an incident does occur, employers should follow their incident/claims investigation procedure, including – and especially – documentation of the facts of the incident at the time of the occurrence. Employers should take action to record the personal data – and personal statement – about what happened, they should identify the witnesses, and they should get witness statements. The collection of this information could be indispensable in defending a suit for a general liability action.

Regardless of the type of the incident, another immensely valuable action that employers can do is *take pictures and videos*. A picture is worth 1000 words. To the greatest extent possible, employers should ensure that photographs and videos are taken of the scene of the incident – including the damages (if possible), and the injuries (if possible). This data should be saved and secured with multiple copies made. Primarily, and as soon as possible, employers (or

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Our Firm Wimberly Lawson Wright Daves & Jones, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Cookeville, and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., in Atlanta GA; and M. Lee Daniels Jr., P.C., in Greeneville SC.

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their agents) should endeavor to discover and document (1) *what* occurred; (2) *who* was involved; (3) *when/where* the incident occurred; and (4) *when, where, and by whom* any and all photos/videos were taken.

In addition to collection and retention of the data on the incident, employers should also have in place an Evidence Preservation Plan for ESI and hard evidence. Data that should be preserved – in addition to the above – include emails, texts, incident reports, and any and all other related documents/information. This is a very important step for employers to take, as it will be pertinent for defending an action. Although this likely includes a great deal of information, and sounds complex, that is exactly why it is so important to have an Evidence Preservation Plan in place. It will be far easier to tackle this task if there is already a policy and procedure in place that employees are trained to execute.

Usefulness of data evidence at trial is not the only incentive that employers should have when it comes to ensuring that their evidence is preserved. If a court discovers that a party destroys evidence, or simply fails to adequately keep and protect critical evidence, they have the power to assess penalties against that party. This is possible regardless of whether the damage or destruction was intentional. In addition to the penalties assessed, courts can also impose sanctions on those parties who lose or destroy evidence, and the failure to adequately protect and store evidence could lead to that evidence being stricken or excluded entirely – including testimony about such evidence. This failure to properly act could also lead to an adverse inference of negligence or improper actions, special (and harmful) jury instructions, or dismissal and/or default judgment.

Each one of those penalties and sanctions are completely within the court's discretion, and are determined on a case-by-case basis, usually by the trial judge. Although that is the case in the majority of the situations, it is also possible for these issues to go to a jury for determination. In either case, these problems can be avoided if employers have adequate policies and procedures in place.

Apart from preparing for future issues, employers should learn from previous ones. In the event an incident arises, employers should review that happened – with all those involved – immediately after the incident occurs. They should also use those incidents as teaching opportunities, and learn how to prevent – and handle – similar incidents in the future, as well as take action regarding those people involved. Beyond making policy and procedural changes, employers need to discipline those employees whose actions or inactions caused (or contributed to) the incident, and, if necessary, make changes to personnel. Although the thought of punishing employees may seem daunting to some, it is necessary to establish and keep a strong, and positive going concern for the business.

Let's recap. Effectively running a business requires employers to reflect on the past, deal in the present, and prepare for the future. Preparation for the future requires being ready to handle a wide range of potential issues, including lawsuits. General liability claims include a wide range of actions – any of which could be detrimental to a business. Employers should be prepared with effective data/evidence collection and retention policies for both ESI and hard evidence, and their employees should be trained to effectively execute those procedures. It is of paramount importance that employers take steps to prepare, not only because this data could be indispensable at trial, but also because courts can (and will) impose penalties and sanctions on parties who fail to act/prepare (regardless of whether their shortcoming was intentional). Employers must learn from the past, teach and discipline their employees, and adjust their procedures to make sure they continue to be prepared. Ultimately, having policies and procedures in place to prepare for lawsuits allows employers to be ready for anything, and continue to confidently move forward in a positive direction – ready to face whatever challenge comes next.

USCIS PUBLISHES REVISED FORM I-9

Jerome D. Pinn

"The Federal Register document provides an alternative for certain employers to remotely examine Form I-9 documents, instead of the current requirement to examine documents in-person."

On August 1, 2023, U.S. Citizenship and Immigration Services (USCIS) published a revised version of Form I-9, Employment Eligibility Verification. Among the improvements to the form is a checkbox that employers enrolled in E-Verify can use to indicate they remotely examined identity and employment authorization documents under an alternative procedure authorized by the Department of Homeland Security (DHS) described below.

On July 21, 2023, DHS announced a final rule in the Federal Register that recognized the end of temporary COVID-19 flexibilities as of July 31 and provided DHS the authority to authorize optional alternatives for employers to examine Form I-9 documentation. At the same time, DHS published an accompanying document in the Federal Register describing and authorizing employers enrolled in E-Verify the option to remotely examine their employees' identity and employment authorization documents under an alternative procedure.

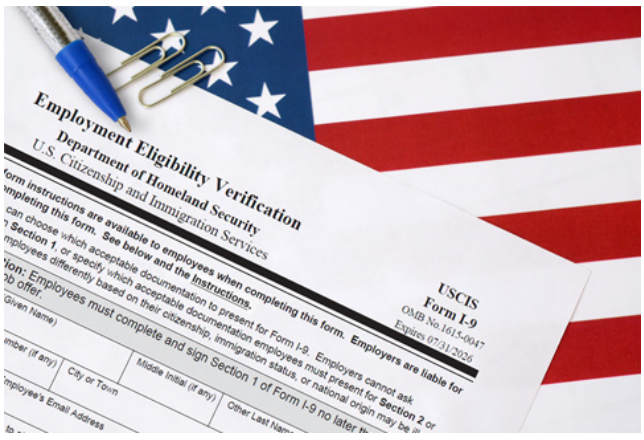
The Federal Register document provides an alternative for certain employers to remotely examine Form I-9 documents, instead of the current requirement to examine documents in-person. To participate in the remote examination of Form I-9 documents under the alternative procedure, employers must be enrolled in E-Verify, examine and retain copies of all documents, conduct a live video interaction with the employee, and create an E-Verify case if the employee is a new hire.

Employers who were participating in E-Verify and created a case for employees whose documents were examined during COVID-19 flexibilities (March 20, 2020 to July 31, 2023) may choose to use the new alternative procedure starting on August 1, 2023 to satisfy the physical document examination requirement by Aug. 30, 2023. Employers who were not enrolled in E-Verify during the COVID-19 flexibilities must complete an in-person physical examination by Aug. 30, 2023.

The revised Form I-9:

- Reduces Sections 1 and 2 to a single-sided sheet;
- Is designed to be a fillable form on tablets and mobile devices;
- Moves the Section 1 Preparer/Translator Certification area to a separate, standalone supplement that employers can provide to employees when necessary;
- Moves Section 3, Reverification and Rehire, to a standalone supplement that employers can print if or when rehire occurs or reverification is required;
- Revises the Lists of Acceptable Documents page to include some acceptable receipts as well as guidance and links to information on automatic extensions of employment authorization documentation;
- Reduces Form instructions from 15 pages to 8 pages; and
- Includes a checkbox allowing employers to indicate they examined Form I-9 documentation remotely under a DHS-authorized alternative procedure rather than via physical examination.

The revised Form I-9 (edition date 08/01/23) was published on uscis.gov on Aug. 1, 2023. Employers can use the former Form I-9 (edition date 10/21/19) through Oct. 31, 2023. Starting Nov. 1, 2023, all employers must use the new Form I-9.



US DOL PROPOSES RULE TO INCREASE EXEMPT EMPLOYEES' MINIMUM SALARY LEVEL

Mary C. Moffatt and Jerome D. Pinn

"While the DOL's publication is only a proposed increase, employers would be wise to take steps now to assess how such an increase in the salary required for overtime exemption would impact their employees and budgetary considerations, if finalized."

On August 30, 2023, the US Department of Labor (DOL) issued its long-awaited proposed Rule to increase the salary threshold required for employees to be exempt from overtime under the Fair Labor Standards Act (FLSA). To satisfy the requirements for the executive, administrative or professional (EAP) exemption, employees must meet certain tests regarding job duties and generally must be paid on a salary basis in an amount that is at least the amount specified in the DOL regulations.

Under the DOL's proposed Rule, the salary level required for the EAP exemptions would increase from the current salary of $35,568 annually ($684/week) to $55,068 annually ($1,059/week) for a full-time worker. The DOL's proposed Rule includes raising the total annual compensation requirement for the Highly Compensated Employee (for whom less duties are required) to the annual salary of $143,988.

The DOL also proposes to include an "automatic updating mechanism" that would adjust the salary threshold every 3 years.

It is estimated the Rule, if finalized, would render approximately 3.6 million workers currently classified as overtime exempt eligible for overtime under the FLSA.

While the DOL's publication is only a proposed increase, employers would be wise to take steps now to assess how such an increase in the salary required for overtime exemption would impact their employees and budgetary considerations, if finalized.

Interested parties may comment to the DOL for sixty (60) days following the publication of the proposed Rule in the Federal Register. There will almost certainly be legal challenges to the Rule. Legal challenges to prior DOL overtime rules were successful, but it is uncertain if they will succeed in this instance.

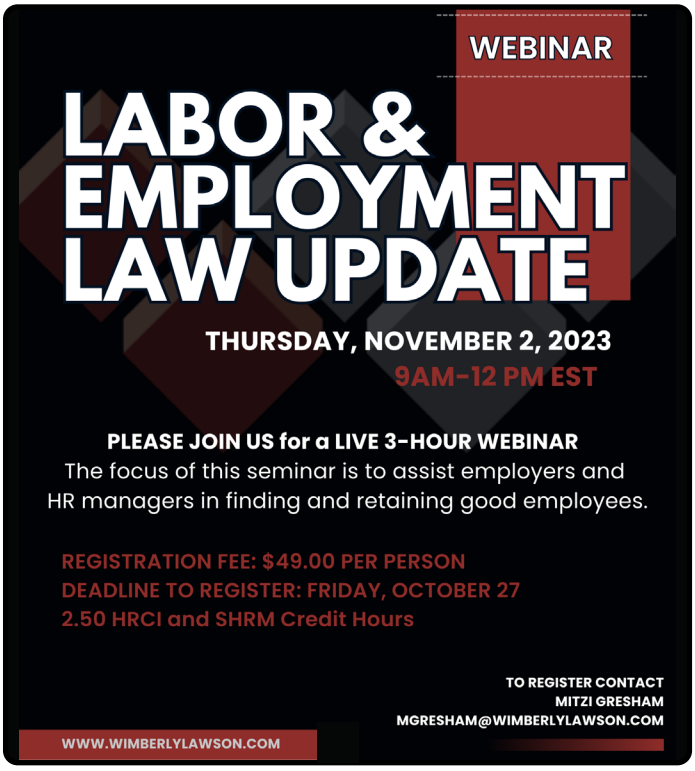
Employers with questions about the Rule may contact the attorneys at Wimberly Lawson for additional information and analysis.

WORKERS' COMP UPDATE THANK YOU!

The Attorneys and Staff of Wimberly Lawson would like to express their immense gratitude to all of the employers and carriers who were able to attend our 2023 TN Workers' Compensation Update held on August 17, 2023. This conference, which was held at the Radisson at the Airport in Nashville, TN, had an excellent turnout. Our attendance included a diverse cross section of both insurance adjusters and safety and human resource professionals. A number of Wimberly Lawson attorneys presented on various new issues pertaining to TN Workers' Compensation law. Various topics covered were:

- Assaults & Intentional Acts
- How to Deal with the Non-Compliant Employee
- Handling Panels the Right Way
- Tips for the Better Letter for Medical Causation

For those of you that were unable to attend this year's seminar and would be interested in hearing about the topics listed (and more!), please stay tuned as in the near future we will be advertising our plans for an August 2024 version.



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