



**Wimberly Lawson**  
 Wright Daves & Jones, PLLC

*Attorneys & Counselors at Law*

**Briefly**  
 April 2010 Volume 10, Issue 4

**WE CAN HELP!** U.S. DEPT. OF LABOR, WAGE AND HOUR DIVISION



**Carol Merchant,**  
**Wage and Hour**  
**Consultant** .....

*"The public awareness campaign is specifically designed to reduce the perceived risk of filing a complaint and 'to increase the benefit to employees and their co-workers of reporting violations.'"*

We Can Help! Those words might have different meanings to employers and employees. The Wage and Hour Division of the U. S. Department of Labor has this logo on its home page as part of its newly launched campaign to encourage workers to file complaints with the agency about perceived failures to pay them in compliance with the Wage and Hour laws. The agency is targeting "worker populations and industries in which workers are reluctant to report violations." The public awareness campaign is specifically designed to reduce the perceived risk of filing a complaint and "to increase the benefit to employees and their co-workers of reporting violations."

In order to be able to investigate the anticipated higher number of complaints, the Wage and Hour Division has increased its investigatory staff by more than one-third. What all this means is that employers have a significantly higher likelihood of being the subject of an investigation by the agency than they have had in the past. And, if you happen to be an employer who uses independent contractors, the likelihood is even higher. The 2011 budget for Wage and Hour, beginning October 1, 2010, includes \$12 million for a joint Treasury-Labor initiative to detect and deter the inappropriate misclassifications of employees as independent contractors.

If an employer is investigated, the potential for Wage and Hour finding violations is quite high. In the past, violations were found in 78% of agency investigations. The potential for violations is further exacerbated by changes in the agency's interpretations of the applicability of certain exemptions. The Wage and Hour Administrator recently issued an interpretation on the inapplicability of the administrative exemption to mortgage loan officers. This interpretation withdrew two previous opinion letters which had found the exemption applicable. Presuming that future interpretations will also narrow

the applicability of exemptions, employers may find themselves in the position of having Wage and Hour and/or the courts determine that employees are nonexempt when the employer had felt comfortable in claiming an exemption for these employees.

If you have concerns about whether you are fully in compliance with Wage and Hour laws, now is the time to address those concerns, before you are the subject of an investigation or a private lawsuit. And remember, that's what Wimberly Lawson is here for, We Can Help!



*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, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*

## EEOC PROPOSES REGULATIONS ON "REASONABLE FACTORS OTHER THAN AGE" DEFENSE



The EEOC has proposed regulations defining the "reasonable factors other than age" defense to be consistent with recent U.S. Supreme Court decisions in the area. Revision was particularly important in light of *Smith v. City of Jackson*, 544 U.S. 228 (2005), a case holding that employment practices having a disparate adverse impact on workers 40 and older may violate the ADEA. In another case, *Meacham v. Knolls Atomic Power Lab*, 128 S.Ct. 2395 (2008), the Court ruled that once an adverse impact is shown, employers have the burden of proving the statutory defense that a challenged employment practice causing the impact was based on "reasonable factors other than age."

### Anne T. McKnight....

"The EEOC proposal includes a non-exhaustive list of relevant considerations in deciding whether an employment practice is "reasonable" within the meaning of the defense."

The proposed rule explains that "a reasonable factor is one that is objectively reasonable when viewed from the position of a reasonable employer under like circumstances." It is one that would be used in a like manner by a prudent employer mindful of its responsibilities under the ADEA. A "prudent" employer "knows or should know that the ADEA was designed in part to avoid the application of neutral employment standards that disproportionately affect" employment opportunities for older persons. "Accordingly, a reasonable factor is one that an employer using reasonable care to avoid limiting the employment opportunities of older persons would use."

The proposed rule provides that an employer asserting the "reasonable factor other than age" (RFOA) defense must show its challenged employment practice was "reasonably designed to further or achieve a legitimate business purpose and was reasonably administered to achieve that purpose." The EEOC proposal includes a non-exhaustive list of relevant considerations in deciding whether an employment practice is "reasonable" within the meaning of the defense. These considerations include whether the employment practice and its implementation are "common business practices"; the extent to which the factor is related to the employer's stated business goal; whether the employer took steps to define the factor accurately and apply the factor fairly; whether the employer assessed the adverse impact of its practices on older workers; the severity of harm to older individuals; and whether the employer had other options available and why it selected the option it did.

The EEOC gives some examples of how its criteria would work, such as where an employer is downsizing for business reasons. Employers are cautioned against giving unfettered discretion to low level supervisors to decide who has such aptitude or skills, such as the ability to learn new computer skills, where such aptitude or skills might rely on age stereotypes. Employers must be particularly careful to avoid giving such discretion to rate employees on criteria known to be susceptible to age-based stereotyping, such as flexibility, willingness to learn, or technological skills. Employers are urged to use evaluation criteria "as objectified to the extent feasible."

The EEOC in its proposal contrasts certain more stringent requirements under Title VII, as opposed to the ADEA. Under the ADEA, those asserting the RFOA defense need not prove "business necessity" to an adverse impact claim. However, under Title VII, where an employment criteria adversely impacts a protected group, an employer must show that the employment practice causing the disparate impact based on things such as race or sex was necessary and that there existed no less discriminatory alternatives. In contrast, in an age discrimination case, an employer need only show that its use of a factor causing adverse impact is "reasonable," and the employer need not choose the option with the least discriminatory impact.

## UPCOMING APRIL SEMINARS

April 21, 2010 – Navigating the Minefield: Workers' Compensation Update – Smithville, Appalachian Center for Craft

April 27, 2010 – MySpace, My Gun Case and My Back Brace: An Employment Law Seminar Covering Social Media, Workplace Violence, and the Family and Medical Leave Act – Tullahoma, Motlow State Community College

April 29, 2010 – Employment Law Update – Newport, Newport Community Center

Please visit our website, [www.wimberlylawson.com](http://www.wimberlylawson.com), for registration information.

## OFCCP GOVERNMENT CONTRACTOR AUDIT SHOWS TRENDS IN ENFORCEMENT



Federal government contractors and subcontractors are required to meet a number of federal regulations concerning the maintenance and enforcement of affirmative action plans. A review of audits conducted in fiscal 2008 shows the most common enforcement actions initiated by the Labor Department's Office of Federal Contract Compliance Programs (OFCCP).

### Mary Dee Allen..

**"The trends seem to be a continued OFCCP focus on systemic discrimination in hiring as opposed to promotions, terminations, or compensation, and the use of aggregate data to make statistical comparisons."**

The vast majority of settlements reached by the OFCCP involved alleged race or sex discrimination in hiring for lower-level jobs. In spite of the public emphasis on so-called "glass ceiling" initiatives, none of the enforcement actions involved discrimination in pay practices. The trends seem to be a continued OFCCP focus on systemic discrimination in hiring as opposed to promotions, terminations, or compensation, and the use of aggregate data to make statistical comparisons.

Unofficial data for both fiscal 2008 and fiscal 2009, which ended September 30, 2009, indicates that more than 90% of OFCCP settlements involved alleged discrimination in hiring for the job titles of laborer, operative, and service workers. The OFCCP reportedly took a median of 2.5 years from scheduling a contractor for a compliance review to closing a settlement.

The settlements also showed a variety of statistical methodology to evaluate both findings of discrimination, and remedies resulting therefrom. On occasion, the OFCCP continues to use the so-called "4/5ths rule" contained in the Uniform Guidelines on Employee Selection Procedures. Thus, in addition to using technical statistical analyses, the OFCCP also occasionally uses the former approach that was designed for simplicity purposes. The theory of the "4/5ths rule" is that, if less than 4/5ths of a protected group is proportionally hired or promoted as compared to others, there is a prima facie case of adverse impact-type discrimination, shifting the burden to the employer to show that there were bona fide legitimate business reasons for the discrepancy.

The bottom line appears to be that the OFCCP uses more than one type of statistical significance model. In addition, the OFCCP varies on the issue of whether "job title" or "job group" is the proper level at which adverse impact analyses are conducted. The aggregating of data can have significant consequences on the results and adequacy of adverse impact analyses. In other words, based on the same statistical tools, adverse impact may or may not be found depending upon the statistical model used and pools of workers addressed.

## KNOW YOUR ATTORNEY REBECCA BRAKE MURRAY



REBECCA (BECKY) BRAKE MURRAY is Of Counsel in the Knoxville, Tennessee office of Wimberly Lawson Wright Daves & Jones, PLLC, which she joined in March

2010. Becky has been a trial attorney since 1985, practicing civil litigation with an emphasis in employment law and nursing home defense litigation in state and federal courts. Becky is also a TN Sup. Ct. Rule 31 Approved Mediator. Becky received her undergraduate degree from the University of Michigan with a certificate in physical therapy. She attended Case Western Reserve University where she obtained a Masters Degree in Health Sciences Education. Becky worked as a physical therapist in Detroit and Harrisburg, Pennsylvania before moving to Cleveland, Ohio where she taught in the Physical Therapist Assisting program at Cuyahoga Community College. She attended Cleveland-Marshall College of Law in Cleveland, Ohio, where she was an editor of the Cleveland State Law Review. Becky received her law degree from the University of Tennessee. She is a past president of the Tennessee Defense Lawyers Association and served on the Board of Governors for the Knoxville Bar Association for three years.

**Be sure to visit our  
website often  
[www.wimberlylawson.com](http://www.wimberlylawson.com)  
for the latest legal updates,  
seminars, alerts and  
firm biographical  
information!**

**TO SUBSCRIBE** to our complimentary newsletter, please go to our website at [www.wimberlylawson.com](http://www.wimberlylawson.com) or email [bhoule@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)

## SPIKE IN MALE SEXUAL HARASSMENT CLAIMS



**Ron Daves** .....

**"Employers should continue to be certain that their anti-harassment policies are in keeping with the latest court decisions and EEOC positions."**

.....

Men who feel that they are victims of sexual harassment may tend to view their situation as a no-win dilemma. They could appear to be unmanly if they are claiming harassment by a male and if they are being harassed by a female, they may be viewed as weak if they cannot take care of it themselves. That can cause them to be reluctant to report what is occurring in their workplaces. Men also may, perhaps correctly, fear that a jury will not be as sympathetic toward them as it would be toward a similarly-situated female victim.

There may be some correlation between sexual harassment claims filed by men and the economic recession. The recession has resulted in almost twice as many men losing their jobs as women according to the U.S. Bureau of Labor Statistics. A statistical link can also be seen between the increase in jobs lost in some states and in the increase in charges filed in those states. Whereas in the past, when jobs were more available, men (and women) may be chosen to simply change jobs rather than file a sexual harassment complaint. When jobs are more scarce, they may choose to endure the harassment or to file a complaint.

Employers should continue to be certain that their anti-harassment policies are in keeping with the latest court decisions and EEOC positions. It is also advisable to conduct periodic training and education sessions for supervisor and employees. Focus should be placed on all types of illegal harassment, including religion, disability, race and age.

## EMPLOYERS SHOULD PLAN FOR MORE COBRA SUBSIDY EXTENSIONS



**Fred Baker** .....

**"Some surveys indicate that the proportion of employees electing COBRA has doubled from around 19% to 39%."**

.....

The availability of the subsidy has caused the proportion of employees electing COBRA to double. Some surveys indicate that the proportion of employees electing COBRA has doubled from around 19% to 39%. Some also believe the subsidies have increased employers' costs due to the fact that those opting for COBRA typically are above-average users of medical services.



**Wimberly Lawson**

Wright Daves & Jones, PLLC

Attorneys & Counselors at Law

# TARGET OUT OF RANGE



## THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE

Knoxville Marriott - Knoxville, Tennessee - November 18 – 19, 2010

**COST:** Early, Early Bird (registration AND payment received by June 18, 2010)

\$289 per person

\$269 for each additional person from same company

\$229 for eight or more from same company

Early Bird (registration AND payment received by October 15, 2010)

\$299 per person

\$289 for each additional person from same company

\$239 for eight or more from same company

Registration and payment received AFTER October 15, 2010

\$339 per person

\$329 for each additional person from same company

\$299 for eight or more from same company



### REGISTRATION INCLUDES:

Seminar (1½ days), materials, two continental breakfasts, lunch and evening reception on Thursday

**CANCELLATION POLICY:** 50% cancellation fee will be incurred for cancellations after October 29, 2010. Cancellations made after November 10, 2010 will forfeit registration fee (registrants will receive the conference materials post-seminar).

#### FIVE WAYS TO REGISTER:

1. **Mail to:** Bernice Houle  
Wimberly Lawson Wright  
Daves & Jones, PLLC  
P.O. Box 2231  
Knoxville, TN 37901-2231
2. **Fax to:** 865-546-1001
3. **Email to:** [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. **Via website:** [www.wimberlylawson.com](http://www.wimberlylawson.com)
5. **Phone:** 865-546-1000

Name \_\_\_\_\_

Company \_\_\_\_\_

Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip \_\_\_\_\_

Phone \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ Fax \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

Email \_\_\_\_\_

BPR and State for CLE \_\_\_\_\_

Number attending reception \_\_\_\_\_



**Wimberly Lawson**

Wright Daves & Jones, PLLC

*Attorneys & Counselors at Law*

## TARGET OUT OF RANGE



Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. **PLEASE PLAN NOW TO JOIN US.**

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- Impact of Healthcare Reform on Employers
- FMLA Intermittent Leave Regs and How They Affect You
- Social Media in the Workplace
- COBRA Expansion
- 21<sup>st</sup> Century Contracts and Agreements
- Avoiding Issues Later with Effective Hiring Now
- When is Mediation Best?
- Avoid Top Wage-Hour Violations
- Sweatpants, Tattoos and Body Piercings – Issues and What You Need to Know
- Violence in the Workplace
- Latest Developments in Workers Compensation
- Understanding the EEOC – EEOC Officials Will Comprise Panel

Join us in Knoxville on November 18 and 19! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves  
Managing Member