



Wimberly Lawson
Seale Wright & Daves, PLLC

Attorneys & Counselors at Law

Briefly
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EMPLOYERS DEAL WITH LEGAL ISSUES ARISING DURING LAYOFFS



Ron Daves
 "One reason for the increase in employment law issues is that recessions inevitably result in layoffs, reduced hours, plant closings, and the like, all of which generate a large number of legal issues and lawsuits."

It has been said that there are only two types of legal work that increase during recessions, bankruptcy law and employment law. One reason for the increase in employment law issues is that recessions inevitably result in layoffs, reduced hours, plant closings, and the like, all of which generate a large number of legal issues and lawsuits. The legal issues to consider include notification requirements, wage-hour issues, various types of discrimination issues, and severance issues.

The Worker Adjustment & Retraining Notification Act, known as "WARN," requires employers to provide at least 60 calendar days' notice of closings of facilities or operational units that eliminate 50 or more jobs, or layoffs of 50 or more employees and at least 33 percent of the workforce, or layoffs of 500 or more employees, at an employment site. The law is more complicated than it first seems in making the necessary computation to see if the threshold numbers are met. Failure to give the required notices can result in not only a class action lawsuit, but also the awarding of as much as 60 work days' pay and benefits to affected employees.

While employers are aware of the discrimination laws, they may not be aware of all the intricacies of discrimination laws as applied to the "disparate impact" type of discrimination analysis. Under the more typical "disparate treatment" type of discrimination analysis, the question is simply whether the employer intentionally selected for discriminatory reasons one person in favor of another in a protected class. Under the "disparate impact" analysis, however, discrimination could be found in a disproportionate dismissal of minorities or females, even though the employer had no intent to discriminate. Basically a disparate impact case arises when a facially neutral employment practice or policy, even though consistently and evenly applied, results in an adverse impact on a protected employee or group. Proving disparate impact involves complicated statistical analyses, and should such disparate impact be shown by statistics, the employer has the burden of proving that its selection system was based on a valid non-discriminatory system required by business necessity.

Other issues arise where employers deal with salaried employees who are working reduced hours, additional hours, or assuming different duties. Some employers mistakenly assume that all salaried employees are exempt from overtime pay, which is not the law, or try to manipulate salaries based on the quantity or quality of work. For persons to be exempt from overtime laws, they must primarily perform certain exempt duties, and also must be paid a "salary" as defined by the wage-hour law, which may be different from the employer's definition of a salary.

Another issue arising with layoffs is that of severance pay. The Older Workers' Benefit Protection Act (OWBPA) sets forth certain requirements that must be met to waive or release an age discrimination claim, and additional requirements are mandated where there is a group separation of two or more employees. Among other things, these group requirements include giving the employees 45 days to consider a separation agreement with a release, a 7-day revocation period even after signing the release, and a requirement that employment data be provided the employee as to the classifications and ages of those selected for the plan, and those not selected for the plan. The intent of the provisions is to give a worker 40 and over an opportunity to review the ages of those laid off and retained, in order to make an intelligent decision as to whether to accept the employer's severance agreement and waive any age discrimination claims. If the strict language/provisions required by

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Our Firm Wimberly Lawson Seale Wright & Daves, 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, Weathersby & Schneider, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.

CONSULTANT JOINS FIRM



CAROL R. MERCHANT is a consultant with Wimberly Lawson Seale Wright & Daves, PLLC. She provides consulting services, in conjunction with the firm's attorneys, with emphasis on compliance with regulations under the Fair Labor Standards Act, Family and Medical Leave Act, Davis Bacon and Related Acts, Service Contract Act, Contract Work Hours and Safety Standards Act, Migrant and Seasonal Agricultural Worker Protection Act, H2A provisions of the Immigration Reform and Control Act, Employee Polygraph Protection Act and the Federal Wage Garnishment Law (Title III of the Consumer Credit Protection Act).

Carol recently retired from the U. S. Department of Labor, Wage and Hour Division, after 33 years of service with the Division. From 2000 to the end of 2007 she was the Nashville District Director, supervising enforcement of Wage and Hour laws in the state of Tennessee. Prior to that she had been Assistant District Director of the Knoxville Wage and Hour office after 11 years as an investigator in Columbia, South Carolina.

During her years as District Director and Assistant District Director, she reviewed investigative files, conferred with the Solicitor's Office of the U.S. Department of Labor on cases that should be litigated, and assessed and negotiated payment of civil money penalties under the Fair Labor Standards Act (including child labor), Migrant and Seasonal Agricultural Worker Protection Act, H2A and Employee Polygraph Protection Act.

She worked on rewriting portions of the Wage and Hour Divisions' Field Operations Handbook, organized and conducted the last three national training classes for Wage and Hour Technicians, and co-wrote the national training manual for investigators on developing litigation cases.

From 2003 until her retirement in December 2007 she was the Southeast Regional Representative on the National Health Care Team examining compliance problems in the health care industry. She testified in Federal Court on numerous cases litigated by the U. S. Department of Labor.

Carol received her Master of Arts degree in American History from the College of William and Mary and her Bachelor of Arts degree in History from Columbia College. In 2000 she was awarded the Distinguished Career Service Award from the Secretary of Labor.

OSHA ADOPTS FINAL RULE ON PPE PROVISION AND TRAINING: POTENTIAL LIABILITY TREMENDOUSLY INCREASED



On Friday, December 12, 2008, OSHA's final rule on the employer's duty to provide and train employees to use personal protective equipment (PPE) was published in the Federal Register. (73 Fed. Reg. 75568-89 (Dec. 12, 2008)). The rule takes effect January 12, 2009. While this rule imposes no new substantive obligations on employers, it greatly expands their potential liability for failure to provide PPE and, more importantly, for failure to train employees, subjecting employers to separate citations on a per-employee basis. This is of particular significance to employers in construction and certain other industries, where failure to train is one of the most commonly cited OSHA violations.

Bill Seale
"The new rule provides that each failure to provide PPE or to train an employee on proper use may be considered to be a separate violation for each employee affected."

The new rule provides that each failure to provide PPE or to train an employee on proper use may be considered to be a separate violation for each employee affected. For example, if an employer is determined to have failed to provide required PPE such as earplugs or respirators to 200 exposed employees in the workplace, OSHA could assess up to \$7,000.00 in penalties on a per-employee basis. In this example, that would be a total potential fine of \$1,400,000.00. Further, the failure to train the same employees could effectively double the penalty, to \$2,800,000.00.

The new rule amends a multitude of PPE and training standards in various industries. Given the enhanced potential liability for failure to train, it is in every employer's interest to be sure that if any PPE is required for any job, a record of training on the proper use of that equipment is created and maintained as to each employee. This may be achieved with sign-up sheets from training sessions or with signatures on orientation and training forms.

Per-employee penalties used to be assessed only in "egregious" situations, where OSHA deemed the violation to be particularly reprehensible. However, under this new rule, whether per-employee penalties are assessed or not is left up to the agency's discretion. In other words, a simple failure to train or provide PPE could expose an employer to penalties on a per-employee basis. The ability to propose substantially larger penalties will be a powerful weapon in OSHA's arsenal. The provisions is to give a worker 40 and over an opportunity to review the ages of those laid off and retained, in order to make an intelligent decision as to whether to accept the employer's severance agreement and waive any age discrimination claims. If the strict language/provisions required by the OWBPA are not followed precisely, a waiver or release by an employee under the ADEA is not valid.

MANDATORY E-VERIFY REQUIREMENT FOR GOVERNMENT CONTRACTORS POSTPONED



Jerry Pinn

“Employers have 30 days from the date of the contract award to enroll in E-Verify and 90 days from the date of enrollment to initiate verification requests through the system.”

The U.S. Department of Justice has agreed to postpone implementation of a new rule mandating that federal contractors use the Employment Eligibility Verification (E-Verify) System for verification of all new hires, as well as for existing personnel directly performing work, on covered federal contracts. The rule had been scheduled to go into effect January 15, 2009, but now has been pushed back to February 20, 2009. It is possible that the February 20 deadline may be extended further.

Federal contractors subject to this requirement must enroll in E-Verify and use the system for all persons hired during the term of the contract and all existing employees assigned to the contract. Employers have 30 days from the date of the contract award to enroll in E-Verify and 90 days from the date of enrollment to initiate verification requests through the system. Prime contractors must include a clause requiring subcontractors to use E-Verify for any subcontract with a value of over \$3,000.00 for services or construction.

The following will be exempt from the E-Verify requirement:

1. Prime contracts for less than \$100,000.00;
2. Contracts for commercially available off-the-shelf items, which includes nearly all food and agricultural products; and
3. Contracts less than 120 days in duration.

Note that contrary to the normal use of the E-Verify System, the new rule would have also applied to all persons, including existing employees, assigned to perform work on the federal contract.

The recent suspension of implementation of the new rule by the Department of Justice is in response to a lawsuit filed in December by several organizations, including the U.S. Chamber of Commerce, the Society for Human Resources Management, the Associated Builders and Contractors, and several other employer associations. These groups challenged the authority of the government to promulgate the regulation and sought an injunction from a federal court. The legal challenge argued that to require a broader use of the E-Verify would be illegal and expose employers to needless liability.

The rule had been scheduled to go into effect January 15, 2009, but now has been pushed back to February 20, 2009. It is possible that the February 20 deadline may be extended further.

RULING ON NO-MATCH SOCIAL SECURITY LETTERS TO BE DELAYED

On December 8, 2008, a federal judge in San Francisco denied a government request to quickly issue a final decision on whether the Bush Administration may implement its new Social Security Administration (SSA) “no-match” rules. The decision will not come until February or March of 2009 at the earliest. The judge observed that the Obama Administration might want to take another look at the issue, as Obama has not taken a position on the proposed rule as of yet.

The government checks Social Security numbers of employees’ tax forms against its database and notifies employers of discrepancies, but up until now has not required employers to take any specific action. Under the proposed no-match rule, employers and employees the subject of no-match Social Security numbers would have 90 days to clear them up and another three days for an employee to submit a new, appropriate set of documents. After that, an employer who failed to fire the worker would be subject to civil fines and criminal prosecution.

The federal court in October 2007 issued an injunction blocking the rule from taking effect, and set a standard schedule for consideration of the issues brought by labor unions and business groups challenging the rule. Immigrant, business and labor advocates have argued that the “no-match” SSA program is not equipped to function as an immigration enforcement tool.

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employers to use a new Form I-9 (Employment Eligibility Verification) for all new hires, and to reverify employees who submitted expired employment authorization documents. Employers were previously advised by USCIS to use the new I-9 form beginning February 2, 2009. As a result, employers should not use the new I-9 form dated February 2, 2009. Employers should continue to use the June 5, 2007 edition of the I-9 form between now and (at least) April 3, 2009. Further updates will be provided when there are additional developments in this area.

NEW I-9 FORMS DELAYED AGAIN

On February 2, 2009, the U.S. Citizenship and Immigration Services (“USCIS”) announced that it has delayed by 60 days, until April 3, 2009, the implementation of an interim final rule, published on December 17, 2008, which would require

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may contain provisions that, pursuant to recent cases and EEOC guidance, are no longer permissible and would be deemed to be retaliatory as a matter of law. Employers should not simply “re-cycle” old agreements and use them without reviewing them under current legal interpretation.

the OWBPA are not followed precisely, a waiver or release by an employee under the ADEA is not valid.

Waivers and releases can also be problematic even where the ADEA or OWBPA are not relevant. Release agreements that were permissible two or more years ago

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Pre-register by email:
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or call Bernice Houle at (865) 546-1000

Save the Date

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Make plans now to join us on

November 5-6, 2009

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for the coming year.*

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