

# Labor & Employment Bulletin

Winter 2009

## A Sign of the Times: Employers Confront Reductions in Force

In these challenging economic times, employers are increasingly faced with the difficult, but necessary, task of downsizing their operations. When structured and implemented effectively, a reduction in force (RIF) should be viewed as a corporate opportunity; it not only helps a company to weather difficult times, it also assists the organization so that it is well-positioned going forward. However, an ill-planned RIF can cost an employer more than it is seeking to save – both in litigation costs and in reputational damage. Following the steps outlined below will help minimize the risks inherent in a RIF.

### Establish and Document the Rationale for the Reduction in Force

A company contemplating a reduction in force should first assess, and then document the business objective sought to be achieved by the RIF. This will help to provide an overall conceptual backdrop for the RIF, and will help frame the decision-making process when actual personnel decisions are made. Companies contemplating RIFs should consider present and future markets, corporate resources, profitability and the workforce skills needed to meet future corporate goals in order to determine the shape of the resulting organization. This assessment should be supported by a business plan that identifies how the company will meet its objectives. In short, the employer needs to articulate, in concrete terms, the objectives that the RIF seeks to accomplish.

Once the business plan is completed, the company should conduct a review of its entire organization in light of the goals identified in the business plan. This entails identifying jobs or units to be eliminated or consolidated, duplication of functions, and redundant layers of management. Moreover, this process should be done before any personnel decisions are made, in order to create a conceptual framework or blueprint for the company. Once the company has developed a preliminary

estimate of the total number of positions to be affected, it should next consider the potential impact of the federal Worker Adjustment Retraining and Notification (WARN) Act and any similar state law requirements. The WARN Act requires covered employers (those with more than 100 full-time employees) to provide 60 days of advance notice to employees, and other specified entities, of any “mass layoff” (defined as a layoff of 50 full-time employees, comprising 33% of the workforce or a layoff of 500 full-time employees) or “plant closing” (defined as a permanent or temporary shutdown of a single site of employment that results in the termination of 50 or more full-time employees). The WARN Act requires employers to consider personnel actions that have been taken both prior to and following a particular RIF, such that several distinct RIFs, if conducted closely together, could trigger the WARN Act requirements even if each of the RIFs, considered individually, would not.

After the organizational review is complete, the company should conduct an audit of its pre-RIF workforce. Given the importance that statistical information often plays in employment discrimination cases, the employer should create a matrix identifying the race, sex, ethnic and age distribution of the workforce, both on a company-wide basis and within the units or departments to be affected by the RIF. The age analysis should be broken down into five-year ranges (rather than simply having two groups, one under 40 and one 40 and over) to provide a more complete view of potential age implications.

### Identify Affected Persons

As the company moves on to the personnel decision-making phase, it should establish, to the maximum extent possible, objective criteria for evaluating employees. From a litigation perspective, this may be the most crucial aspect of the RIF. It may be helpful to:

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### COMPLIMENTARY WEBINAR PROGRAM

New Federal Red Flag, Massachusetts and Other State Data Security Rules



See Page 12 For Further Details



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*"...an ill-planned RIF can cost an employer more than it is seeking to save – both in litigation costs and in reputational damage."*

## Recognitions

The firm's Chief Diversity Officer and a partner in the firm's Madison office, **Paulette Brown**, will accept the Award of Excellence from the Thurgood Marshall College Fund, Inc. at their annual dinner. The Fund's Awards of Excellence recognize leaders nationwide who exemplify professional and civic excellence and individuals who share Justice Thurgood Marshall's concern for civil rights and his passion for justice.

- Document specific, job-related guidelines for evaluating employees;
- Use a structured appraisal method;
- Use proven skill, performance, knowledge and experience qualifications for the retained positions as criteria.

The company should begin to evaluate specific employees only after it establishes the criteria to be used. To decrease the likelihood that subjective (and thus more easily challenged) criteria are employed, the company can structure the employee evaluations as a two-tiered process, with the in-line manager conducting the initial review and then a member of upper management or human resources reviewing the managers' evaluations along with the affected employee's past performance evaluations and any other objective, documented evidence of the employee's performance and skills that might be available. The second reviewer should ensure that the documents support the in-line manager's evaluation. In other words, have an internal check and balance mechanism in place to keep internal decision-makers honest.

In addition, at this stage the company should take great care to ensure the confidentiality of the RIF decision-making process. If information about a RIF leaks out to the workforce, it will be difficult, if not impossible, for the company to combat the rumor mill that surely will develop, as employees share whatever information (which is usually incomplete and inaccurate) they have gleaned about the company's plans.

Once the employees affected are identified, the company should then conduct a second internal audit to determine whether there may be a disparate impact on a particular protected class. In general, the EEOC and many human resource professionals use the so-called "80 percent" rule to determine if an adverse impact exists; that is, if a selection rate for any protected class is less than 80% of the rate of the group with the highest selection rate, the EEOC will consider this to be evidence of adverse impact. If the second audit reveals a potential adverse impact on a particular protected class, the company should not necessarily "swap in" employees from a different protected class to "correct the numbers," as such an action could, in turn, lead to a claim of unlawful discrimination. Rather, the employer should re-assess its criteria, and how the affected employees measured up to those criteria, to ensure that the criteria are business-related and consistent with the current, and anticipated future, needs of the company.

Finally, if the company is going to offer separation benefits, such as severance pay and extended health insurance, to the employees subject to the RIF, it should prepare the appropriate documents, including a release of claims from the affected employees. At this point, the company must consider the impact of another federal statute, the Older Workers Benefits Protection Act (OWBPA), which contains several specific

requirements in order to have an effective release of age discrimination claims (and thus applies only to employees who are 40 or older). Care must be taken to ensure that a separation agreement complies with OWBPA, including certain informational disclosures that must be made to employees, as the consequences of non-compliance are severe. If a release does not comply with the OWBPA, the employee may still sue the company for age discrimination, but would not be required to return any severance pay or other benefits otherwise received under the agreement.

### Implementing the RIF

After all of the decisions have been made, the company must communicate its decisions to the workforce - a step fraught with nearly as much peril as the decision-making process itself. However, once the company announces to the workforce-at-large that it will be conducting a RIF, it should carry out the RIF as quickly as possible; indeed, it is most beneficial to have all employees subject to the RIF depart on the same day, rather than having employees leave in separate waves. A RIF occurring in several stages, most likely, will create employee morale issues, even for those employees not selected for the RIF, as they see their co-workers slowly departing over time.

The company should draft a script to be followed by the persons who will be informing the employees about the RIF decisions. The message conveyed to each employee will be attributed to the company in any future litigation, and the script will prevent managers from offering their own, unauthorized explanations for RIF decisions. Also, the text will keep the company's explanation for its decisions consistent across different business units, and thus will eliminate the appearance of a varying or shifting rationale for the RIF. Indeed, the script may help avoid litigation in the first place – employees often sue when they perceive that decisions have been made on the basis of arbitrary, unfair or illegal factors. A message that communicates that the company has reached difficult decisions based on carefully-considered, objective standards may allow the affected employees to better understand the decisions (even though they still may not agree with them), and move on without suing the company.

In the individual employee meetings, the following should be explained clearly:

- Why their job functions were eliminated;
- How the selection process worked;
- The separation benefits offered (including any special benefits, such as outplacement assistance); and
- Who to contact with any questions about the separation benefits.

Following the steps described above, of course, does not guarantee that every employee will accept the ultimate decisions made in the RIF. It will, however, help to insulate the company from potential claims and strengthen the company's position in any future litigation.

## Employers Brace Themselves for Expected Enactment of Employee Free Choice Act

On March 1, 2007, by a vote of 241-185, the U.S. House of Representatives passed H.R. 800, the Employee Free Choice Act of 2007 (EFCA), a bill that has revived concern among employers given the strong support that it has received from the Obama Administration. Employers should beware of EFCA and familiarize themselves with its dangerous provisions.

The EFCA law would streamline the process for union organizing through a card-check process. It is expected to increase dramatically the success of unionization efforts throughout the US.

Specifically, the bill would amend the National Labor Relations Act to require the National Labor Relations Board to certify a bargaining representative without directing an election if a majority of employees in a bargaining unit authorize the designation of the representative (the card-check process) and there is no other individual or union currently certified or recognized as the exclusive representative of any of the employees in the bargaining unit.

In effect, the bill would deprive employers of the opportunity to force a secret ballot election by the NLRB upon presentation of a majority of pro-union signatures on the authorization cards. While awaiting the election, employers have the right to educate their workforce concerning the facts regarding union membership.

While unions have been critical of this process, they have the reciprocal right to present their perspective on unionization and most often have begun the process by the time the authorization cards are presented. Moreover, when unions resort to coercive or improper tactics, employers truly need the time prior to an election to counteract these measures to level the playing field.

The Bush Administration had noted that the bill would "strip workers of the fundamental democratic right to a supervised private ballot election, interfere with the ability of workers and employers to bargain freely and come to agreement over working terms and conditions, and impose penalties for unfair labor practices only on employers — and not on union organizers — who intimidate workers." By contrast, the Obama Administration views this law as a means of giving the middle class a voice in determining their future. Employers previously took solace that it would never be signed into law. With the President's approval of EFCA and a Democratic Senate behind him, employers are bracing themselves for the expected enactment.

### Amendment of the National Labor Relations Act

Currently under the National Labor Relations Act

employees are permitted to form or join a union in one of two ways.

The most common process is through a secret ballot election conducted by the NLRB. After an election the NLRB counts the ballots to determine whether the union received a majority of the votes. If a majority of the employees in the bargaining unit voted in favor of the labor organization, the NLRB certifies the union as the bargaining representative.

The second way is commonly known as the card-count process. The union obtains a majority of cards from the prospective bargaining unit and offers to send them to the employer for review. The employer would have the opportunity to review the cards and recognize the union, although this is generally inadvisable and does not often occur.

Rather, the employer typically declines to count the cards, claiming that the union does not represent an uncoerced majority of the prospective bargaining unit. The union would then file a petition for an election with the NLRB.

The EFCA would amend the law to require the NLRB to investigate any petition filed by an employee or group of employees or any individual or labor union acting in their behalf alleging that a majority of employees in a unit wish to be represented by a union. If the NLRB determines that a majority of employees have signed valid authorizations designating a union and no other union is currently certified or recognized as the exclusive representative of any employees in the unit, the NLRB "shall not direct an election but shall certify the individual or labor organization as the representative described." Once the union is certified, bargaining is to begin immediately.<sup>1</sup>

Perhaps the most significant change in the law is a provision allowing employers or a union to refer disputes regarding initial collective bargaining agreements that are not resolved through negotiations after the expiration of a 90-day period to the Federal Mediation and Conciliation Service for mediation. If an agreement is not reached after the expiration of the 30-day period, beginning on the date of the request for mediation, the contract dispute is referred to binding arbitration.



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## New Partner

**John G. Stretton**

Stamford Office



We are pleased to announce that **John G. Stretton**, in the firm's Stamford, CT office, has been admitted to the partnership.

John is a member of the firm's Litigation Department and Labor & Employment Group. He has successfully defended employers in lawsuits involving wrongful termination and discrimination claims on the basis of age, sex, sexual harassment, disability, religion, race and national origin as well as equal pay claims and claims under the FLSA. In addition to providing training sessions for clients, John often counsels clients on various employment law issues, such as employment handbooks, hiring and termination, wage and hour laws, and trade secret and confidentiality claims. He received his law degree from Boston University School of Law and his B.A. from Boston College.

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### Summary of Other Provisions

The bill also provides for other significant changes in current law. For example, the bill revises enforcement requirements regarding unfair labor practices during union organizing drives. Specifically, the bill requires a preliminary investigation of an allegedly unfair labor practice, which can lead to proceedings for injunctive relief.

Priority is given to a preliminary investigation of any charge that, while employees were seeking representation by a labor organization or during the period after a labor organization is recognized as a representative until the first collective bargaining contract is entered into, an employer:

- Discharged or otherwise discriminated against an employee to encourage or discourage membership in the labor organization;
- Threatened to discharge or to otherwise discriminate against an employee in order to interfere with, restrain or coerce employees in the exercise of guaranteed self-organization or collective bargaining rights; or
- Engaged in any other related unfair labor practice that significantly interferes with, restrains or coerces employees in the exercise of such guaranteed rights. Under the bill, the NLRB general counsel is required to seek a court injunction in such cases.<sup>2</sup>

As remedies for those violations, the bill provides for back pay and liquidated damages for employees discriminated against during those periods. The bill also amends the NLRA with respect to civil penalties against employers that willfully or repeatedly commit any unfair labor practice during the same time frames. An employer is subject to a civil penalty of up to \$20,000 for each violation.

In determining the amount of the penalty, the NLRB is to consider the seriousness of the unfair labor practice and the impact of the practice "on the charging party, on other persons seeking to exercise rights guaranteed by this act or on the public interest."

### Impact on Employers

The Employee Free Choice Act contains numerous anti-employer provisions, including the prioritization of investigations of unfair-labor-practice charges with possible injunction proceedings in federal court, as well as liquidated damage and civil penalties. In that regard the bill would increase penalties against employers, but not unions, that commit unfair labor practices.

Several business groups, such as the U.S. Chamber of Commerce, the Society for Human Resource Management and the National Federation of Independent Business have expressed opposition to the bill, citing the elimination of the secret ballot process and the compulsory binding arbitration provision, and have vowed to fight passage of the Senate bill.

Perhaps the bill's most significant provision effectively requires that any bargaining disputes must be submitted to binding arbitration after 90 days on an initial collective bargaining agreement. Mandatory binding arbitration could foster bad-faith bargaining until the end of this period, thus allowing an arbitrator to impose unwanted employment conditions on both employees and employers.

In other words, binding arbitration may cause parties to stay far apart in their bargaining positions with the hope that their position would prevail in arbitration and may discourage them from resolving their bargaining differences.

The legislation also has been criticized because it would take away employees' private and free choice and force them to make public their decisions on whether to support a union, thereby exposing them to pressure and coercion and promoting a threatening work environment. Their decisions would be made known to union officials, their employers and their co-workers.

In that regard, some have observed that NLRB-conducted secret-ballot elections are preferable to the card-check process, in which employees can be observed signing or declining to sign a union authorization card and the employer does not necessarily have an opportunity to speak out against union representation.

In fact, because the union only needs authorization cards from a majority of employees, the remainder of the employees in the bargaining unit might not even be aware of the organizing campaign before the union is certified under the bill.

Furthermore, the provisions in the bill, unlike an NLRB-conducted election, do not require that employees receive information on both the costs and benefits of union representation and leave employers with no opportunity to educate employees.

## Footnotes:

- 1 The bill would still permit unions to continue to petition for NLRB-supervised secret-ballot elections if they so choose.
- 2 Under current law the NLRB general counsel is required to seek a court injunction if there is reasonable cause to believe a union has engaged in a secondary boycott. It is within the general counsel's discretion, with the NLRB's permission, to seek an injunction to address an employer's probable illegal actions.

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## How to “Waive” Good-Bye to More Employee Lawsuits

As a result of recent market turmoil, there have been layoffs in many sectors, including at some of the nation’s largest and historically stable institutions. In addition to the obligations to properly handle reductions in force, this combination of layoffs and the sluggish economy - which will leave many people unemployed for extended periods of time - will likely increase the number of employment-related lawsuits. Utilizing waivers to limit the timeframe in which an employee may file an employment-related claim can be an effective, yet inexpensive way, to reduce exposure to some types of employee lawsuits.

A waiver is the contractual relinquishment of a right or privilege and can be added to employment applications and other documents to require the initiation of most employment-related claims sooner than the expiration of the applicable statutory limitation. Properly drafted waivers can reduce the number of claims filed, the uncertainty surrounding whether a claim will be filed, and the inconvenience of defending suits filed several years after the employment action which gives rise to the claim.

### Validity of Waivers

Courts typically enforce waivers that limit the timeframe in which an employee may file employment-related lawsuits. In fact, a Michigan District Court recently rejected an employee’s challenge to a waiver that imposed a six month limitation period. *Steward v. DaimlerChrysler Corp.*, 533 F. Supp. 2d 717 (E.D. Mich. 2008).

In *Steward*, a former employee of the DaimlerChrysler Corporation (Chrysler) sued the company for race discrimination, intentional infliction of emotional distress, and violations of state and federal disability statutes. All of the claims were filed at least six months after the events giving rise to the claims. Chrysler moved for summary judgment on all counts, arguing that the waiver clause in the employment application precluded the claims. The clause in the employment application stated: *I agree that any claim or lawsuit relating to my service with Chrysler Corporation or any of its subsidiaries must be filed no more than six (6) months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary.*

The court granted summary judgment in favor of Chrysler, finding that the waiver clause barred the claims.

The number of cases challenging waivers is limited, but the U.S. Court of Appeals for the Sixth and Seventh Circuits, and District Courts in Delaware, North Carolina, Missouri, Michigan, Ohio, Oregon, and Texas have upheld waivers limiting an employee’s timeframe for filing employment-related claims.

### Elements of a Valid Waiver

Courts who have addressed this issue, have enforced waivers which are “reasonable.” A waiver is reasonable when (1) the employee has a sufficient opportunity to investigate the claim and file an action; (2) the time period is not so short to work as a practical abrogation of the employee’s right to file a claim; and (3) the action is not barred before the employee’s loss or damage can be ascertained. Limitation periods as short as six months can be reasonable.

### Claims Limited by a Waiver

There is a limited body of case law addressing which employment-related claims can be time-barred by a waiver. As an example, 42 U.S.C. 1981 (Section 1981), the federal statute prohibiting race discrimination and retaliation, has a four year statutory limitation period and no damage cap for emotional distress or punitive damages. Most state common law claims for breach of contract, negligence, intentional infliction of emotional distress, defamation, and other similar claims have equally long statutory limitation periods and limited or no caps on emotional distress or punitive damages. Courts have enforced waivers limiting the period to file Section 1981 claims and the aforementioned common law claims.

However, there is some uncertainty whether waivers can be used to limit the timeframe for filing compensation related claims under the Family and



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*“Given the uncertainty as to the enforceability of waivers, employers should take steps to make the waiver language and provision as clear and reasonable as possible.”*



## Recognitions

The attorneys that comprise the Labor & Employment Practice Group at Edwards Angell Palmer & Dodge are frequently recognized as the best in the nation. Throughout 2008 several EAPD Labor & Employment attorneys were named in prestigious legal directories including Chambers USA: America's Leading Lawyers for Business, The Best Lawyers in America and Super Lawyers.

### Chambers USA

#### America's Leading Lawyers for Business

- Marty Aron
- Mark Freel
- Mark Pogue

### The Best Lawyers in America

- Mark Freel
- Daryl Lapp
- Robert Novack
- Mark Pogue
- Mark Schreiber
- Jeffrey Swope

### Super Lawyers

- Martin Aron
- Paulette Brown
- Kenneth Cesta
- Mark Freel
- Elaine James
- Barbara Lee
- David Marshall
- Robert Novack
- Mark Pogue
- Dennis Reznick
- Mark Schreiber
- Timothy Van Dyck
- Marc Zaken

Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), and the Equal Pay Act (EPA). All of these claims carry a two year limitation period, which can be extended to three years after a willful violation of the law. Federal appeals courts have not addressed whether the statutory limitation periods for FMLA, FLSA, and EPA claims can be contractually reduced. Additionally, district courts are split as to whether federal regulations that prohibit employers from interfering with employee's rights under FMLA prohibit the use of waivers to reduce the time limit for filing FMLA claims. Compare *Badgett v. Federal Express Corp.*, 378 F.Supp.2d 613 (M.D. N.C. 2005) (holding that six month waiver was enforceable to bar FMLA claim) with *Lewis v. Harper Hosp.*, 241 F. Supp. 2d 769 (E.D. Mich. 2002) (holding that six month waiver was not enforceable).

There is also some disagreement in federal courts regarding whether waiver clauses can bar claims for statutes enforced by the U.S. Equal Opportunity Commission (EEOC). The EEOC is charged with investigating and enforcing the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act. Employees are prohibited from maintaining these claims in court until they have first exhausted all administrative remedies and received a right to sue letter from the EEOC. Given that this process often takes more than six months, at least one court has refused to enforce a shorter waiver period. *Salisbury v. Art Van Furniture*, 938 F. Supp. 435 (W.D. Mich. 1996) (stating that the six month waiver period effected a "practical abortion" of the right to file an EEOC claim). However, the Seventh Circuit has taken the view that the EEOC administrative process should not prohibit waivers from being enforced. *Taylor v. Western & Southern Life Insurance Co.*, 966 F.2d 1188 (7th Cir. 1992) (stating that employee could have filed suit and asked for a stay pending the receipt of EEOC right to sue letter). Additionally, in the *Steward* case, discussed above, the court enforced a waiver when the right to sue letter was received before the end of the waiver period.

### Implementing Waiver Provisions

Given the uncertainty as to the enforceability of waivers, employers should take steps to make the waiver language and provision as clear and reasonable as possible.

#### *The Waiver Should be Conspicuous.*

Regardless of whether the waiver is contained in an employment application or another stand-alone document, it is imperative to make the waiver conspicuous. If the waiver is "buried in the fine print," there is a risk a court will disregard the waiver on the grounds that the employee did not knowingly and voluntarily agree to the abbreviated limitation period. Highlighting the waiver can be accomplished

by using bold, italic or enlarged font, capital letters, and headings that draw attention to the waiver. Additionally, the waiver should clearly and explicitly state the time period allowed for filing a claim,

*"Utilizing waivers to limit the timeframe in which an employee may file an employment-related claim can be an effective, yet inexpensive way, to reduce exposure to some types of employee lawsuits."*

and explain that such period may be less than what is permitted by statute. Requiring a signature acknowledging understanding and agreement of the waiver can also assist in rebutting later assertions by an employee that the waiver was not read or understood.

#### *Adequate Consideration.*

It is possible for a court to void a waiver for lack of consideration. This does not typically present a problem for waivers in an employment application, but can be an issue when current employees are asked to sign a waiver. Whether offering continued employment alone constitutes adequate consideration depends on the applicable state law. In some cases, the length of time the employee is subsequently employed before filing a claim against the employer may be a factor negating a waiver for lack of consideration. To avoid any uncertainty, employees should consider offering a small monetary payment or other benefit as additional consideration, particularly when the waiver is signed after the employee is hired.

### Bottom Line for Employers

Waivers can be an efficient way to reduce exposure to employment related lawsuits. Given the limited use of waivers to date, unsurprisingly, there is a limited body of case law addressing to the enforceability of waivers which limit the time an employee has to file suit. However, courts which have vetted the issue have enforced reasonable waivers limiting the time period to bring federal and common law claims, and some courts have applied waivers to bar FMLA and EEOC claims. Therefore, adding reasonable waiver provisions to employment applications and other employment-related documents could be an effective way to limit an employer's potential exposure.



## New Liabilities and Policies for Incidental Private Use of Company Electronic Systems and PDAs

Incidental personal use of company supplied computer devices and services, including Blackberries, often supported or hosted by third party providers, is commonplace. With it comes new risks and liabilities for companies and third party providers that are only beginning to be understood and managed. The trend of outsourcing service functions suggests that these problems will likely increase.

Allowing employees to use company electronic communication systems and personal digital assistants (PDAs) for incidental personal use, but retaining the right to monitor and audit the content of emails, messages and web traffic, is standard practice. But reviewing "personal messages" can be problematic. A recent unexpected case, finding that a public employer had violated employees' privacy rights and that its text messaging provider had breached federal privacy law, provides a sobering example of why companies should be alert to this problem so they can adjust their strategies accordingly.

### The *Quon* Case

In *Quon v. Arch Wireless Operating Company, Inc.*, 529 F.3d 892 (9th Cir. 2008), the court found that a police department had violated the Fourth Amendment and state constitutional rights of several employees and those with whom they exchanged text messages by reviewing "personal" text messages created on pagers owned and issued by the employer. It also found that the text messaging provider, Arch Wireless, violated the Stored Communications Act (SCA), 18 U.S.C. §§2701-2711, by providing transcripts of these messages to the employer. Although the case involves the public sector, it is still instructive for private sector employers.

The employer in *Quon* had issued a written policy clearly notifying employees that any use of department computers for email or other internet access must be strictly limited to official business, and that employee communications using the department's computers or internet service provider would be monitored by the department. The policy stated unequivocally that internet and email systems were not to be used for personal or confidential communications, and that pagers were covered by the employer's policy with respect to monitoring or auditing.

Despite these formal policies, however, the department had an informal practice of allowing employees to use their pagers for personal text

messaging as long as they did not exceed the 25,000 characters allotted to each pager by the employer's contract with its text messaging provider. When employees exceeded this limit, they paid for the excess usage from their personal funds. After the employer decided that the bookkeeping for these transactions was too time-consuming, it reviewed the employees' text messages to ascertain the proportion of business-related to personal messages. When the employees learned that their personal messages had been provided by the text messaging provider, they sued both their employer and the provider.

Although the trial court ruled for the defendants, the Ninth Circuit reversed, finding that the text messaging provider was an "Electronic Communication Service" (ECS) within the meaning of the SCA, and therefore could not release the messages without the permission of either the sender or the recipient. Addressing the privacy issues, the court ruled that the informal practice of permitting personal use created an expectation of privacy, despite the clarity of the written policy.

The court explained that the department could have given the plaintiffs advance notice that henceforth their text messages would be audited to determine whether any were personal, or could have given the employees an opportunity to redact the content of their personal messages if the intent of the "search" was to ascertain the relative amounts of personal and official use of the pagers. Because the police chief had testified that the object of the search had been to ascertain whether the character limits on pager texting should be increased, reviewing the content of the text messages was ruled broader in scope than necessary.

### Lessons from *Quon*

It is not clear that *Quon* can or should be extrapolated to claims by employees of private companies, as there are significant distinctions and different defenses. Yet the practical lessons are clear. Among them are:



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*"Addressing the privacy issues, the court ruled that the informal practice of permitting personal use created an expectation of privacy, despite the clarity of the written policy."*





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- Even if some personal use is permitted, policies regarding employee use of email, internet access, and PDAs should be clear that employees have no expectation of privacy and can expect their use of these systems and devices, including personal use and messages, to be subject to monitoring and access by the employer with or without notice.
- Employers should require employees to expressly confirm that they have read, understood, and agree to the policy (i.e., they consent) by a signed acknowledgement, a “click through” link on the company’s site or intranet, and/or annual reminders. The consent, in whatever form, should be tracked, stored and recoverable.
- There should be no informal practice or mechanism by managers or superiors for avoiding, overriding or “opting out” of this policy, and it should be enforced consistently. Staff should be trained about the importance of uniform oversight and should be reminded periodically of the policy.
- Carefully draft or “push back” on service agreements with outsourced or third party providers, where possible. This may include (a) contractual attempts to comply in advance

with the SCA or other “wiretap” type statutes, such as by definitions (e.g., the employer is both the “sender” and “recipient” in this third party context) or other “consent” language; and (b) robust indemnity provisions, including coverage for any data breach or improper disclosure by the provider, to encompass data breach notices, forensic computer services, investigation costs, credit monitoring and related attorneys fees.

- Regardless of past practices, companies and their third-party vendors will need to check rigorously and, if necessary, update their standard subpoena and document response policies and protocols to comport with the SCA and possibly foreign laws if the company operates internationally. Consider privacy or cyber risk insurance, now offered by a number of carriers. These products have increased in sophistication and scope, and frequently provide useful cover for a variety of data disclosures, intrusion and breach event expenses and fees.

With proactive and protective procedures such as these, adverse results such as in the *Quon* case may be avoided or minimized.

## Legal Updates



By Sheryl D. Hanley  
Providence

### U.S. Supreme Court Broadens Definition of Retaliation

The U.S. Supreme Court unanimously held that employees who voluntarily cooperate with an employer’s internal investigations are protected by the anti-retaliation provisions of Title VII of the Civil Rights Act of 1964, even if the employee didn’t initiate the investigation and did not file a formal charge.

In *Crawford v. Metropolitan Government of Nashville & Davidson City*, Vicky Crawford was asked by a human resources officer of the Metro School District, where Ms. Crawford had worked for 30 years, if she had witnessed any “inappropriate behavior” by Gene Hughes, the school district’s employee relations director. Although Crawford had never reported any harassment, she described several instances of sexually harassing behavior toward her by Hughes. Two other employees also reported being harassed by Hughes. The school district took no action against Hughes, however, but within a few months fired Crawford and the two other employees who had reported harassment. The district claimed that Crawford had been fired for embezzlement, although no charges were filed against her.

Crawford claimed she was fired in retaliation for the statements she made during the investigation and filed suit against the school district. The federal trial

court and appellate court each held that Crawford’s conduct was not covered by either the opposition or participation clauses of the anti-retaliation provisions of Title VII. The Sixth Circuit stated that simply answering questions during an investigation was not sufficient to constitute opposition of discrimination or participation in an investigation, both of which are protected by Title VII. The court also found that because Crawford did not file a formal charge of discrimination with the Equal Employment Opportunity Commission (EEOC), she had not “participated” in an investigation under Title VII.

The Supreme Court disagreed, holding that Crawford’s actions satisfied the requirements of the “opposition” clause, notwithstanding the fact she had not filed a formal complaint. The court noted that an employee may oppose a supervisor’s action without taking aggressive action to complain about it or stop it, and that Crawford’s response to the human resource officer’s question and her description of her discomfort with Hughes’ actions was clearly a form of opposition. The Court declined to rule on whether or not her claim was protected by the “participation” clause, in light of its decision that she met the requirements of the “opposition” clause.

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## Massachusetts Court Limits Employers' Ability to Enforce Personal Appearance Policy

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A recent decision by the Massachusetts Supreme Judicial Court substantially restricts the ability of employers to enforce workplace personal appearance or grooming policies where the policy conflicts with an employee's religious beliefs.

In *Brown v. F.L. Roberts & Co., Inc.*, 425 Mass. 674 (2008), the employer maintained a policy requiring all employees who had customer contact to be clean-shaven and to keep their hair "clean, combed and neatly trimmed." Plaintiff Brown, a Rastafarian, notified his manager that his religion prohibited him from shaving or cutting his hair. Relying on federal law, the company refused to make any exceptions to the grooming policy and the plaintiff was reassigned to a position that did not involve customer contact.

Federal and state law both require an employer to reasonably accommodate an employee's *bona fide* religious beliefs, unless the employer can demonstrate that the accommodation would be an undue hardship. An undue hardship typically is viewed as one that would force the employer to incur more than a minimal cost. One of the leading federal cases from the First Circuit (which includes Massachusetts) also concluded that an undue hardship could include potential harm to a company's "public image." Under federal law, an employer has discretion in determining whether an accommodation would negatively affect its public image, and thereby has considerable discretion in denying requests for exceptions to these policies.

According to the *Brown* decision, however, under Massachusetts state law, an employer must have *specific* proof that an exception to a personal appearance policy would cause real, tangible harm to the company's business or image. The threshold for establishing this harm is high. In *Brown*, the court refused to find that the employer has met this burden even though the employer provided evidence that approximately 12 customers commented negatively on employees' facial hair, and that the company's profitability actually increased after institution of the personal appearance policy.

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## Court Finds Employment At-Will After Expiration of Contract Term

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In *Goldman v. White Plains Center for Nursing Care, LLC*, the New York Court of Appeals recently declined to extend the plaintiff's written employment contract for a successive term, even though she continued to work after the contract's stated expiration date. In 1990, the plaintiff, Lorraine Goldman, entered into a two-year written employment agreement to become the administrative director of two skilled nursing facilities. The employment agreement provided that negotiations for renewal were to be made within nine months before the contract term expired and that expiration of the contract released the employer of all obligations and responsibilities in connection therewith. The contract also contained a clause acknowledging that the contract encompassed the entire understanding of the parties and could only be modified in a writing signed by the parties. Ms. Goldman's two-year contract term expired without modification of the original contract and without negotiations for renewal. She continued to be employed in the same position for over 12 years after the expiration of her original contract term. In 2004, the skilled nursing facilities were sold and Ms. Goldman's employment was terminated.

Ms. Goldman sued the company for breach of contract, claiming that her continued employment after the expiration of the original contract term demonstrated that "the parties intended to renew the contract

for successive one-year terms." In support of her argument, Ms. Goldman relied on a 19th Century common law theory supporting an inference of an intent to renew for a successive one-year term when an employee continues working past the expiration of the original contract term. Ms. Goldman prevailed at trial and the company appealed. Applying basic contract law principles, the Appellate Division concluded that the express language of the employment contract was controlling and that it would be inconsistent with those terms to imply any arrangement after the two-year period.

The New York Court of Appeals agreed, stating, "A fundamental tenet of contract law is that agreements are construed in accordance with the intent of the parties and the best evidence of the parties' intent is what they express in their written contract." Because the employment contract was clear and unambiguous as to (1) a contract term of two years; (2) the process for negotiating successive terms; and (3) the contract encompassing the entire understanding of the parties, the Court concluded it had no reason to look "outside the four corners of the document." The Court also noted that implying additional terms would be inconsistent with the longstanding employment-at-will doctrine, which allows either employer or employee to terminate an employment relationship at any time, absent an agreement for a specified term.

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## Lilly Ledbetter Fair Pay Act is First Legislation Signed by President Obama

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On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act. The legislation effectively reverses a 2007 ruling by the United States Supreme Court and provides workers with additional time to file charges of pay discrimination. In *Ledbetter v. Goodyear Tire & Rubber Co.*, the Supreme Court held that Ms. Ledbetter waited too long to bring a claim of gender discrimination since she had been paid less than her male counterparts for the vast majority of her 19-year career. Under Title VII of the Civil Rights Act of 1964, as amended, employees have 180 days to bring a charge of discrimination. The Supreme Court held that an employee was required to file a discrimination charge within 180 days of the initial decision to pay a worker less than another for doing the same job, and that each allegedly discriminatory paycheck did not restart the statute of limitations as had been routinely held by the courts.

The new legislation makes it clear that each paycheck received does reset the 180-day limit to file a charge. As such, it provides employers with the incentive to correct discriminatory pay practices in order to ensure that employees are being compensated fairly. Employees who bring a charge of discrimination may recover back pay for no more than two years, regardless of the length of discrimination alleged. Although the Supreme Court case that provided the impetus for the legislation was based on gender discrimination, the Act applies to all forms of workplace discrimination, including, race, religion, national origin, disability and age.

*“While similar in scope to the federal law, the NY Warn Act lowers the threshold for affected employees and increases the required notice period.”*

## New York Enacts State Version of WARN Act

Governor David Patterson recently signed into law the New York State Worker Adjustment and Retraining Notification Act.

The requirements imposed by the new legislation are in addition to those currently imposed by the federal WARN Act. While similar in scope to the federal law, the NY Warn Act lowers the threshold for affected employees and increases the required notice period. Under federal law, employers of 100 or more employees are required to provide 60 days of advance notice to employees affected by a plant closing or mass layoff, as well as notice to state and municipal leaders. By contrast, the NY WARN Act is applicable to employers with 50 or more employees and these employers are required to provide 90 days of advance written notice of mass layoffs, plant closings or relocations. The NY WARN Act defines a mass layoff as an action that results in employment losses during a 30-day period affecting at least 25 full-time employees representing at least 33% of the workforce, or at least 250 full-time employees. A relocation is defined as involving a removal of all or substantially all of the industrial or commercial operations of an employer to another location at least 50 miles away, regardless of whether there are any employment losses. Under the statute, notice must be given to affected workers, the New York State Department of Labor (NYS DOL) and local workforce

investment boards. Employers are exempt from the notice requirements if the need for notification was not reasonably foreseeable at the time the notice was required; the employer was actively seeking capital or business when the notice was required and such capital or business, if obtained, would have enabled the employer to avoid or postpone the relocation or layoff; the closing or layoff was due to a natural disaster; the operation being closed was a temporary facility or project closed upon completion of the project; or if the action constitutes a strike or lockout.

Under the NY WARN Act, employers who violate the act must provide back pay and the cost of benefits (including medical expenses incurred by an affected employee that would have been covered under a benefit plan) for the period of the employer's violation, up to a maximum of 60 calendar days, to each terminated employee who lost his or her employment without receiving the required notification. Employers are also liable to pay civil penalties of not more than \$500 for each day of violation.

## New York Employers Subject to New Obligations Regarding Use of Applicant's Criminal History

New York recently enacted three pieces of legislation aimed at enhancing employment opportunities for individuals with prior criminal convictions, as well as providing some protection for employers against claims of negligent hiring. The new laws relate to Article 23-A of New York's Correction Law, which requires employers to consider and balance a number of factors before terminating or refusing to hire individuals with a prior criminal conviction. Article 23-A does not apply where there is a specific legal prohibition on hiring applicants with a criminal history.

Effective February, 2009, employers are required, as part of their background check process, to provide a copy of Article 23-A to individuals subject to background checks. Employers also are required to post a copy of Article 23-A of the Correction Law in a visually conspicuous manner in the workplace.

Additionally, the New York State Human Rights Law has been amended to protect New York employers from negligent hiring claims in the event that an employee with a criminal conviction causes harm in the workplace. Under the amendment, if an employer has evaluated an applicant's criminal history in accordance with the Article 23-A factors and decided in good faith to hire the individual, then the employer is afforded a rebuttable presumption that information regarding the individual's criminal background should be excluded from evidence in a negligent hiring claim.

## Employers Required to Use Revised Version of I-9 Beginning February 2, 2009

The U.S. Citizenship and Immigration Services (USCIS) announced on December 15, 2008, that it submitted an interim final rule to the Federal Register revising form I-9 used in the employment verification process. The interim final rule makes the following changes to current I-9 rules:

- Specifies that expired documents are no longer considered acceptable for proof of identification or work authorization;
- Eliminates three more documents from List A (Temporary Resident Card, and older versions of the Employment Authorization Card / Document);
- Adds foreign passports containing special machine-readable visas for certain citizens of the Federated States of Micronesia (FSM) and the Republic of the Marshall Islands (RMI) to List A;
- Adds the new U.S. Passport Card to List A; and
- Revises the employee attestation section of the form.

Employers who do not begin using the new I-9 form by February 2, 2009 may be subject to fines.



## Recognitions

**Antoinette Theodossakos**, a partner in the firm's West Palm Beach office, was recently elected to the Board of Directors of Nonprofits First. Nonprofits First provides technical assistance and consulting services to nonprofit organizations throughout Palm Beach County and the Treasure Coast. Nonprofits First houses several divisions including nonprofit agency certification, education, leadership and consulting services, management support services, and human resources and workforce development.

## Failure to Provide Interpreter Violated ADA

A physician was found to have violated the federal Americans with Disabilities Act (ADA) and the New Jersey Law Against Discrimination (LAD) by failing to provide a deaf patient with an interpreter, and was ordered to pay \$400,000, including \$200,000 in punitive damages, to the plaintiff. The plaintiff had lupus, a chronic inflammatory disease, and her primary care physician referred her to a rheumatologist, Dr. Robert Fogari, for treatment. The plaintiff was deaf and had poor communication skills, including a limited ability to use written English. During the medical visits, Fogari sometimes would exchange written notes with Gerena's partner, who had better written English skills than Gerena, or communicate through the couple's 9-year-old daughter.

The plaintiff asserted that she repeatedly asked Fogari to hire an American Sign Language interpreter in order to help her communicate during her medical visits. She even gave him an interpreter's business card and had the interpreter call the doctor to explain the law to him. Fogari, a solo practitioner, claimed he could not afford the \$150 to \$200 per visit an interpreter would charge when he was being reimbursed only \$49 per visit by the plaintiff's medical insurer. The plaintiff continued her treatment with Dr. Fogari for nearly two years without the use of an interpreter and claimed that she continued to see him because she was referred to him by her primary care physician and because of her anxiety over her worsening symptoms. Even so, she claimed she was deprived of the opportunity to participate in and understand her medical situation and the treatment she was receiving, as well as any risks, and alternatives that might be available to her. After the plaintiff repeatedly requested an interpreter, Dr. Fogari told her to go to another physician. She sued the doctor for violations of the ADA and the New Jersey LAD, and the jury awarded her \$400,000, including \$200,000 as punitive damages.

The court relied on *Borngesser v. Jersey Shore Medical Center*, 340 N.J. Super. 369 (App. Div. 2001), in considering when a hospital or doctor must provide "auxiliary aids and services" to a patient. The court required a fact-sensitive inquiry to differentiate between critical points in treatment and routine care. The court found that "auxiliary aids and services," such as interpreters, video displays and note takers, are necessary to enable "effective communication" during critical points when, for example, taking a patient's medical history, explaining a course of treatment and obtaining informed consent, but might not be necessary for routine care, such as taking a blood-pressure reading.

## Events / Announcements

- On January 28, **Paulette Brown**, a partner in the firm's Madison office, discussed the evolution of employment law at "The NAACP and the Law: Celebrating 100 Years," a special meeting sponsored by the Middlesex County Bar Association.
- On January 29, **Barbara Lee**, counsel in the firm's Madison office, was a presenter at The Anker Department Chair Conference – Online. She addressed "Higher Education Law and Difficult Faculty Members."
- On February 5, **Mark Schreiber**, a partner in the firm's Boston office, was co-presenter at the American Arbitration Association's webcast, "Understanding and Addressing Bias in the Workplace."
- On February 25, **Paulette Brown**, a partner in the firm's Madison office, is scheduled to speak at the Practising Law Institute's "Beyond Diversity 2009: The Next Generation" program in New York. For more information, visit: [www.pli.edu](http://www.pli.edu).
- A Legal Guide for Student Affairs Professionals, 2nd edition (Updated and Adapted from The Law of Higher Education, 4th Edition) co-authored by **Barbara Lee**, counsel in the firm's Madison office, will be published in March 2009. For more information, visit the publisher's website at: <http://www.josseybass.com/WileyCDA/>.
- On March 19, **Barbara Lee**, counsel in the firm's Madison office, will present "New Frontiers in Title IX Litigation: Employment and Peer-to-Peer Sexual Harassment Claims and Cases" at the National Association of College and University Attorneys' (NACUA) Spring 2009 CLE Workshop in Tempe, AZ.

A list of our offices & contact numbers are below. We hope you find this publication useful and interesting and would welcome your feedback. For further information on topics covered in this newsletter or to discuss your labor & employment issue, please contact one of the editors or any of the attorneys listed on page 12:

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## WEBINAR

## New Federal Red Flag, Massachusetts and Other State Data Security Rules

COMPLIMENTARY  
WEBINAR PROGRAM

Tuesday 24 February, 2009

On February 24th, the EAPD Privacy Group will host a complimentary webinar on the new security and privacy requirements and federal Red Flag duties.

The federal Red Flag rules, effective May 1, 2009, cover financial entities and "creditors" (very broadly defined) requiring risk assessments and effective written policies reducing and preventing identity theft. The new Massachusetts rules will impact almost every business that stores personal data of Massachusetts employees and residents (whether or not the company operates in Massachusetts, over the internet or otherwise). These rules will require significant security and policy changes for most businesses, and are now effective January 1, 2010. Many other states mandate prompt notification and effective responses to security breaches when personally identifiable information is inadvertently disclosed or accessed without authorization. This informative session will review these new requirements, their effect on employers and companies of all sizes and sectors, and what companies can do now to develop and implement an effective information security plan.

DATE  
February 24 2009PROGRAM  
12:00PM - 2:00PM


SPEAKERS  
Mark Schreiber,  
Chair, Privacy Group  
  
Theodore Augustinos,  
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