EMPLOYMENT ISSUES IN THE TRANSPORTATION INDUSTRY

Paige A. Lueking
Jana Reist
COOPER & SCULLY, P.C.
900 Jackson Street
Suite 100
Dallas, Texas 75202
(214) 712-9500
(214) 712-9540 (fax)
paige.lueking@cooperscully.com
jana.reist@cooperscully.com

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I. INTRODUCTION

Complaints of employment discrimination and unfair employment practices have skyrocketed during these uncertain economic times. Employers must understand that those who evaluate and decide the outcome of employment discrimination cases, the EEOC staff investigators, judges, and juries expect that employees will be treated in a fair manner. Now, more than ever, employers need to be cautious in their employment practices. The New York Times Article titled "Layoffs Herald a Heyday for Employee Lawsuits," accurately captures the current trend.[1] According to the U.S. Department of Labor's Bureau of Labor Statistics, since December 2007, 5.8 million jobs have been lost.[2] Almost two-thirds (3.3 million) of these layoffs occurred between November 2008 and March 2009.[3] The transportation industry is no stranger to the effects of the current economy. In March 2009, the transportation and warehousing industry lost 34,000 jobs.[4] Employment declined by 15,000 jobs in truck transportation, 7,000 in support activities for transportation, and 5,000 among couriers and messengers.[5]

With an increasing unemployed workforce, contracting opportunities for employment and favorable laws, many disgruntled workers are now claiming their prior employers violated state and federal laws. Some of the applicable laws include: Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination based on race, color, religion, sex (including sexual harassment or pregnancy), as well as national origin, and also protects employees who complain about such offenses from retaliation; the Age Discrimination and Employment Act of 1967, which protects workers over age forty from discrimination based on age; the Equal Pay Act of 1963, which prohibits gender-based wage discrimination; the Rehabilitation Act of 1973, which prohibits employment discrimination against individuals with disabilities in the federal sector; Title I of the Americans With Disabilities Act, which prohibits employment discrimination against people with disabilities in both private and government sectors; Occupational Safety and Health Administration, and sections of the Civil Rights Act of 1991. In Texas, additional concerns from potential claims arise out of violations of the Texas Workers Compensation Act, and violations of the Texas Workforce Commission and Texas Commission of Human Rights regulations.

Employers in the transportation industry must be familiar with relevant employment law governing these issues to minimize potential liability. This article will highlight significant employment issues governing the transportation industry.

II. DISCRIMINATION CLAIMS

Recent corporate settlements are indicative of the millions of dollars at stake for employers in discrimination suits. Federal Express settled a race bias class action suit for $55 million.[6] Similarly, an interstate trucking firm, PittOhio Express, Inc., recently agreed to pay $2.4 million and provide other remedial relief to a class of women to settle a major sex discrimination lawsuit filed by the U.S. Equal Employment Opportunity Commission (EEOC).[7]

A record number of workers filed federal job discrimination complaints last year.[8] Claims of unfair treatment by older employers produced the largest increase.[9] In 2008, EEOC claims increased by fifteen percent, and a significantly larger increase is expected for 2009.[10] Claims of gender and age discrimination, harassment, violations of the Fair Labor Standards Act, denial of benefits, breach of contract, improper reductions in force (RIF) can expose an employer to costly investigation and treacherous litigation. Handling and responding to charges of discrimination requires diligent compliance with various state and federal statutes. Management is wise to implement adequate policies, procedures, and training for employees to minimize significant costs and time in defending these types of claims. While the economy has played a significant role in the increase of these claims, the changing political landscape, and new legislation combined with a tolerant judicial environment lead to a new era for employers. Proactive understanding of the basic laws governing

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[1] Jonathan D. Glater, *Layoffs Herald a Heyday for Employee Lawsuits*, N.Y. Times, Jan. 31, 2009, *available at* http://www.nytimes.com/2009/01/31/business/economy/31employ.html.

[2] News Release, Employment Situation Summary, Bureau of Labor Statistics (June 5, 2009), *available at* http://www.bls.gov/news.release/empsit.nr0.htm.

[3] *Id.*

[4] *Id.*

[5] Glater, *supra* note 1.

[6] *FedEx Settles Race Bias Class Action for $55 Million*, Ins. J., Aug. 15, 2007, *available at* http://www.insurancejournal.com/news/national/2007/08/15/82685.htm.

[7] *See generally EEOC v. Pitt-Ohio Express, Inc.*, No. 1:06 CV 0747, 2006 U.S. Dist. LEXIS 58157 (N.D. Ohio Aug. 16, 2006); *see also* Pitt-Ohio Consent Decree, *available at* http://www.eeoc.gov/consent/pitt-ohio/index.html.

[8] *Federal job discrimination complaints hit record*, L.A. Times, Mar. 12, 2009, *available at* http://articles.latimes.com/2009/mar/12/business/fi-discrimination12.

[9] *Id.*

[10] *Id.*

discrimination claims and the common pitfalls can help employers reduce exposure to these claims.

A. Federal Laws Prohibiting Discrimination Title VII

Under Title VII of the Civil Rights Act of 1964,[11] the Americans With Disabilities Act (ADA)[12], and the Age Discrimination and Employment Act (ADEA),[13] it is illegal to discriminate in any aspect of employment including:

- hiring and firing;
- compensation;
- transfer, promotion, layoff;
- fringe benefits;
- retirement plans, disability leave, and salary;
- harassment on the basis of race, color, religion, sex, national origin, disability, or age;
- retaliation against an individual for filing a charge of discrimination, participating in an investigation or opposing discriminatory practices;
- employment decisions based upon assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; or
- denying employment opportunities to an individual because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability.

Title VII also prohibits discrimination based on an individual's participation in schools or places of worship associated with a particular racial, ethnic, or religious group.[14] Title VII's broad prohibitions against sex discrimination specifically cover sexual harassment and pregnancy based discrimination.[15]

Title VII is the pillar of employment-discrimination law, tracing its roots to the Equal Protection Clause of the U.S. Constitution. Other federal laws prohibiting job discrimination include:

- the Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination;
- the Age Discrimination in Employment Act of 1967 (ADEA), which protects individuals who are forty years of age or older;
- Title I and Title V of the Americans with Disabilities Act of 1990 (ADA), which prohibit employment discrimination against qualified individuals with disabilities in the private sector, and in state and local governments;
- Sections 501 and 505 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified individuals with disabilities who work in the federal government; and
- the Civil Rights Act of 1991, which, among other things, provides monetary damages in cases of intentional employment discrimination.[16]

The U.S. Equal Employment Opportunity Commission ("EEOC") is a federal agency with the purpose of eliminating employment discrimination and enforcing these laws. The EEOC investigates discrimination complaints based on an individual's race, color, national origin, religion, sex, age, disability, and retaliation for reporting and/or opposing a discriminatory practice. The EEOC is also tasked with filing suits on behalf of alleged victims of discrimination against employers and serves as an adjudicatory for claims of discrimination brought against federal agencies.

Title VII of the Civil Rights Act of 1964 is the legal heavy-weight for discrimination claims. It has several provisions under which employees and applicants for employment may sue employers for allegedly unlawful employment practices. Section 703, sometimes referred to as Title VII's "anti-discrimination provision," provides in part, that it is an unlawful employment practice for an employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[17] Section 704, sometimes referred to as the "anti-retaliation provision," provides that it is "unlawful" for an "employer to discriminate against any of his employees or applicants for employment. . .

[11] Civil Rights Act of 1964, codified as amended, at 42 U.S.C. §§ 2000e-17 (1982).
[12] Americans with Disabilities Act, 42 U.S.C. §§ 12101, et seq. (1990).
[13] Age Discrimination and Employment Act, 29 U.S.C. §§ 621-634 (1978).
[14] 42 U.S.C. §§ 2000e-17.
[15] *Id.*
[16] EEOC Federal Law Prohibiting Job Discrimination Frequently Asked Questions and Answers, http://www.eeoc.gov/facts/qanda.html (last visited June 5, 2009).
[17] *See* 42 U.S.C. § 2000e-2(a)(1) (2000).

because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."[18]

B. Title I and VI of the Americans With Disabilities Act

The ADA prohibits discrimination on the basis of disability in all employment practices.[19] The ADA defines disability with respect to an individual as "a person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment."[20] "Major life activities" are activities that an average person can perform with little or no difficulty such as walking, breathing, seeing, hearing, speaking, and learning.[21] A reasonable accommodation may include, but is not limited to, making existing facilities used by employees readily accessible to and useful by a person with a disability including: modification of work schedules, providing unpaid additional leave, modifying equipment or devices, and possibly reassignment of offices or work spaces.

The American With Disabilities Act ban against age discrimination prohibits:

(1) statements or specification in job notices or advertisements of age preference and limitations. An age limit may be specified only in the unusual circumstance where age has been proven to be a bona fide occupational qualification (BFOQ);
(2) discrimination on the basis of age by apprenticeship program including joint labor-management apprenticeship program; and
(3) denial of benefits to older employees.[22]

Additional rights are available to parents and other family members under the Family Medical Leave Act (FMLA)[23] which is enforced by the United States Department of Labor. An employer may reduce benefits based on age only if the cost of providing the reduced benefits to older workers is the same as the cost of providing benefits to younger workers.

C. National Origin Discrimination

It is illegal to discriminate against an individual because of his or her birthplace, ancestry, culture, or linguistic characteristics. A rule requiring that employees speak only English on the job may violate Title VII unless the employer shows that the requirement is necessary for conducting business. If the employer believes that such a rule is necessary, employees must be informed when English is required and the consequences for violating the rule. The Immigration Reform and Control Act (IRCA) of 1986[24] requires employers to assure that employees hired are legally authorized to work in the U.S. An employer who requests employment verification only for individuals of a particular national origin or individuals who appear to be of foreign dissent may violate Title VII and IRCA. Verification must be obtained from all applicants and employees. Recently, E-verification has been enacted.

EQUAL PAY ACT

The Equal Pay Act (EPA)[25] prohibits discrimination on the basis of gender in the payment of wages or benefits where men and women perform work of similar skill, effort, and responsibility for the same employer under similar working conditions. On January 29, 2009, President Obama signed the Lilly Ledbetter Equal Pay Act[26] signaling the administration's focus on employment issues.[27]

In 2007 the United States Supreme Court ruled (5-4) that, although Lilly Ledbetter, a Goodyear employee paid less than her male co-workers, was the victim of pay discrimination, because she failed to make her allegations known within 180 days of the first act of discrimination she could not recover damages. At the lower court, Ms. Ledbetter had been awarded more than $3 million in back pay and damages. Justice Samuel Alito, referenced the 1964 Civil Rights Act and the strict timetable to support the majority's holding. Congress relaxed the statute of limitations when pay discrimination can be proven. Under the new law, the statute of limitations to file a claim now runs 180 days from each paycheck received by a person suffering discrimination. The Ledbetter Act is retroactive to May 28, 2007, and applies to all pay discrimination charges that were pending on or after that date.

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[18] *Id.* at § 2000e-3(a) (2000).
[19] 42 U.S.C. § 12101.
[20] *Id.* at § 12102.
[21] *Id.*
[22] *Id.* at § 12101.
[23] Family Medical Leave Act, 29 U.S.C. 2601, *et seq.*
[24] Immigration Reform and Control Act, 8 U.S.C. § 1101 *et seq.*
[25] Equal Pay Act, 29 U.S.C. § 206(d).
[26] Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, 123 Stat. 5.
[27] *See* Sheryl Gay Stolberg, Obama Signs Equal-Pay Legislation, N.Y. Times (Jan. 29, 2009), *available at* http://www.nytimes.com/2009/01/30/us/politics/30ledbetter-web.html.

D. Retaliation Claims Under Title VII

Over thirty percent of the EEOC's docket involves Title VII retaliation claims.[28] The average cost of defending a contested retaliation claim is $130,000.[29] One of the biggest mistakes employers can make is failing to recognize the seriousness of a Title VII retaliation claim.

In *Burlington Northern & Santa Fe Railway v. White*, [30] the Supreme Court ruled that a worker complaining of retaliation may recover monetary damages even if she did not suffer a tangible adverse action (one that causes economic loss) or experience a "hostile working environment" as previously defined by the Court. Now, an employee need only prove a "materially adverse" employment action--an action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[31]

In *Burlington*, Sheila White was the only woman working at Burlington's Maintenance of Way at the Tennessee yard. White, with prior experience operating forklifts, soon became a forklift operator, while performing other duties as a "track laborer." In June 1997, Burlington's roadmaster interviewed White and expressed interest in her previous experience operating forklifts. Burlington hired White as a "track laborer," which involved removing and replacing track components, transporting track material, cutting brush, and clearing litter and cargo spillage from the right-of-way. Yet, soon after White arrived on the job, a co-worker who previously operated the forklift chose to assume other responsibilities. Brown immediately assigned White to operate the forklift, while she continued to perform track laborer tasks.

A few months after she was hired, White complained to Burlington officials that her immediate supervisor had made inappropriate and insulting remarks to her, including a statement that "women should not be working in that department." The supervisor was suspended for ten days and required to attend sexual harassment training. Burlington's roadmaster informed White of her supervisor's suspension and his decision to remove White from operating the forklift to perform more "track laborer" tasks instead. He further stated that a "more senior man" should be a forklift operator.

White complained to the EEOC, claiming that the reassignment of her duties was gender discrimination and retaliation for making the claim against her supervisor.[32] Shortly thereafter, White filed a second retaliation charge with the EEOC, claiming that Brown had placed her under surveillance and was monitoring her daily activities. That charge was mailed to Brown on December 8th. A few days later, White and her immediate supervisor disagreed about which truck should transport White from one location to another. Brown immediately suspended White without pay. White invoked internal grievance procedures. Those procedures led Burlington to conclude that White had not been insubordinate. Burlington reinstated White to her position and awarded her back-pay for the thirty-seven days she was suspended. White filed an additional retaliation charge with the EEOC based on the suspension.

The Court held that the retaliation provision "covers those (and only those) employer actions that would be materially adverse to a reasonable employee or job applicant."[33] The Court explained "that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination." As for White's situation, the Court found that both temporarily suspending her (even though the unpaid suspension was later rescinded with full back-pay) and requiring her to perform on a full-time basis, the more physically demanding parts of her job duties could be illegal retaliation. Without the requirement of "material adversity," the Supreme Court feared that employees could recover for trivial harms, petty slights, and minor annoyances.[34] The Supreme Court's opinion thus addresses employers' concern that claims might be based purely on assertions of intangible harms.

The Court's test, however, is problematic. Although the Court stressed the need for an objective standard, it also said that "objectivity" includes taking into account the particular circumstances of each plaintiff. Similarly left unclear is how "trivial," "petty," and "minor" impacts on employees can be distinguished from "materially adverse" events. Finally, the Court rejected the argument pressed by BNSF and the Solicitor General that the test for adverse action should be the same for retaliation and protected-category discrimination claims, thus leaving entirely open the question of what impact on an employee must be shown for the latter type of claims.

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[28] EEOC, Charged Statistics FY 1997 through FY 2008, http://www.eeoc.gov/stats/charges.html (last visited June 5, 2009).

[29] Transcript of Oral Argument at 3, *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405 (2006) (No. 05-259) (explaining to the Supreme Court why its ruling on a retaliation claim will have a dramatic impact).

[30] 548 U.S. 53 (2006).

[31] *Id.* at 57.

[32] *Id.* at 58.

[33] *Id.* at 68.

[34] *Id.* at 68-69.

Consequently, as seemingly often happens, when the Court rules on employment law issues, controversies may well have created more questions for future litigants than it provided answers.

Burlington has not yet resulted in a deluge of jury trials on retaliation claims, as many predicted after the Court's decision. The materiality requirement has allowed lower courts to continue dismissing many claims involving insubstantial harms. Courts have also used White's "objective" standard to weed out claims brought by hypersensitive employees based on employment actions that would not deter a reasonable employee from protected activity.

Despite the ruling in *White*, the bottom line is that an employer should use extreme caution in terminating, or taking other serious adverse actions against, an employee who has recently made a discrimination claim. Of course, this does not, and should not mean that an employee is bullet-proof because they filed a discrimination claim. Each situation must be carefully analyzed on its facts.

E. Investigating Harassment Claims

Another common mistake employers make when dealing with harassment claims is failing to investigate the allegations because the complainant requests privacy. Often, after an employee comes forward to report harassment by a co-worker or supervisor, the complainant will request confidentiality, usually out of fear or embarrassment. In *Gallagher v. Delaney*,[35] the Second Circuit noted that confidential complaints of this type create a catch-22 situation for employers because the employer does not want to violate the privacy of the complainant, but wishes to act on the complaint.

Typically, the best course of action is to promptly and thoroughly investigate all workplace harassment claims. By doing so, the employer can assert the "prompt remedial action" defense described in the U.S. Supreme Court decisions *Faragher v. City of Boca Raton*[36] and *Burlington Industries, Inc. v. Ellerth*.[37] Without a defense, an employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate or successively higher authority over the employee. However, when no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.[38] The defense consists of two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

In *Ferris v. Delta Airlines, Inc.*,[39] the plaintiff alleged that while on a layover in Italy, a male flight attendant with whom she worked, invited her to his hotel room where he drugged her drink, and subsequently raped her. Evidence demonstrated that over a five year period, two other flight attendants reported the man for similar assaults. Additionally, a third flight attendant reported that he threatened to kill her after she refused to go out with him. One of these complainants requested confidentiality, but the others did not.

Delta Airlines took no formal action in response to these three complaints. An airline supervisor to whom one of the rapes was reported acknowledged to the victim that the male flight attendant was a known rapist, but merely instructed the victim not to discuss the incident with anyone. Another supervisor refused to take any action without a written report.

For nearly six weeks the plaintiff in that case refused to disclose to Delta the name of the male flight attendant, but eventually sued Delta for, among other claims, vicarious sexual harassment and negligent supervision and retention. The Second Circuit reversed the summary judgment in favor of Delta, noting that Delta had notice of the attacker's "proclivity to rape co-workers."[40] While these facts seem like an extreme case of failing to take corrective measures or properly investigating the claim, there are numerous cases involving less extreme facts. Each case exemplifies the potential for negative publicity, costly defenses, and immense consumption of precious corporate resources.

III. REDUCTIONS IN FORCE AND THE IMPLICATION OF THE WARN ACT AND IMMIGRATION LAW

Reductions in force (RIF) have also become commonplace during the economic downturn. RIFs are not nearly as simple as placing termination slips in employee lockers. From an employer's perspective, there are many issues to be considered, such as: employee releases, the WARN Act, discrimination status, Title VII, and payment of wages and other benefits.

[35] 19 F.3d 338 (2d. Cir. 1998).
[36] 524 U.S. 775 (1998).
[37] 524 U.S. 742 (1998).
[38] *See* FED. R. CIV. PROC. 8(c).
[39] 277 F.3d 128 (2d Cir. 2001).
[40] *Id.* at 136-37.

A. Releases

In connection with a RIF, it is often advantageous to obtain a release of claim. Releases are valid against most types of employment claims in most state law claims, including Title VII, ADA, ADEA, and WARN. The recently enacted Family Medical Leave Act (FMLA) makes it clear that a release of those claims is inappropriate in a RIF.[41] However, releases are not valid against claims arising out of the Fair Labor Standard Act (FLSA).[42] To be enforceable, the employee must enter into the release "knowingly and voluntarily."[43] The totality of circumstances includes many factors, including: the employee's education and business experience, the length of time the employee had to decide prior to signing the release, whether the employee negotiated the terms of the release, clear language of the release, whether the employee was represented by counsel, adequacy of consideration provided by employer, and whether the employee was advised to consult with legal counsel.

The Older Workers Benefit Protection Act or ("OWBPA")[44] applies only to the release of an ADA claim. The delineating factors can serve as the standard whereby courts are more apt to view a release favorably upholding its validity. OWBPA requirements in connection with a RIF include:

1. a document written in a manner calculated to be understood by the average eligible employee;
2. specific reference to the ADEA;
3. additional consideration;
4. written advice for the employee to consult a lawyer;
5. forty-five days to consider signing the release;
6. seven days to revoke the release;
7. no tender back; and
8. provision of information to the employee regarding the decisional unit, eligibility factors, time limits, job titles, and ages of other employees evaluated in connection with the RIF. (Informational Disclosure of Decisional Unit).[45]

Future claims are not released under OWBPA.[46] Employer compliance of these requirements does not necessarily mean the release is enforceable; however, a strong presumption of enforceability exists absent a showing of duress or fraud. The consideration must be above what the employee is entitled to by law and cannot be conditioned upon the final paycheck. Further, accrued PTO cannot be a consideration if already required by contract or law. Typical consideration valid for an OWBPA release includes lump sum severance payment, salary continuation, COBRA continuation, payment of a deferred bonus, or payment of profit sharing. The revocation periods are also important. For RIFs and voluntary separation agreements, the employee must be given forty-five days to consider the terms of the agreement. If there is any material change in the terms after the employee is given the release, the forty-five day time period restarts. Also, if the employee signs the agreement prior to the close of the forty-five days, the seven day revocation period begins immediately.

The employee's waiver and release should be in clear, concise language, and should include language providing that in exchange for the consideration, the company advises (employee) to seek the advice of an attorney before signing the release.[47] While this waiver can protect an employer from certain claims, it cannot (1) limit the rights of the EEOC in any way; or (2) contain language that waives an individual employee's right to bring an EEOC charge or participate in an EEOC investigation or limit the right of the employee to challenge the release (claims of duress or fraud in the inducement).[48] An employee who challenges a release as invalid is not required to tender the consideration received under the terms during the pendency of the dispute. If the release is invalidated, the employee's recovery on an ADEA claim is offset by the consideration given.

The informational requirement which causes most concern to employers in conducting a RIF is the disclosure of the "decisional unit." The disclosure chart must include job titles and ages of all those selected for the program and also list those who were not selected. It is important for management to coordinate with human resources and legal counsel when preparing the disclosure of the decisional unit.

B. Worker Adjustment and Retraining Notification Act or the WARN Act

RIFs of certain size may trigger the Worker Adjustment and Retraining Notification Act ("WARN Act").[49] The purpose of the WARN Act is to provide: protection to workers, their families and communities by requiring employers to provide notification 60 calendar days in advance of plant closings and mass layoffs. Advance notice provides workers and their families some transition time to adjust to the prospective loss of employment, to seek and obtain

[41] 29 U.S.C. at § 2601.
[42] Fair Labor Standard Act, 29 U.S.C. §§ 621-34.
[43] *See id.*
[44] Older Workers Benefit Protection Act, 29 U.S.C. §§ 621 *et seq*.
[45] *See id.* at § 621(f).
[46] *Id.* at § 626(f)(1)(C).
[47] *Id.* at § 626(f)(1)(D).
[48] *Id.* at § 626(f)(1)(D).
[49] Worker Adjustment and Retraining Notification Act (WARN), 29 U.S.C. §§ 2101 et seq.; 20 C.F.R. Part 639.

alternative jobs and, if necessary, to enter skill training or retraining that will allow these workers to successfully compete in the job market.[50]

The WARN Act applies to employers with 100 or more employees (excluding part-time), who in the aggregate work 4,000 or more hours per week (exclusive of part-time and overtime). The events which trigger the provisions of this Act include plant closing or mass layoff. A "plant closing" is an employment loss resulting from a permanent or temporary shutdown of a single site of employment that affects fifty or more employees.[51] A "mass layoff" can include employment loss resulting from a reduction in force affecting 500 or more employees, or fifty or more employees that make up 33% of the work force. Employment loss is defined by the Act as (1) termination; (2) layoff lasting greater than six months; and (3) reduction in hours of at least 50% for each month in a six month period. Those employees who voluntarily retire or those terminated for cause do not suffer an "employment loss" as defined by the Act. The WARN notice requirements include a sixty-day notice period before the plant closing or mass layoff. Employee or union representatives, state dislocated worker or elected chief official of local government (usually city mayor) receives the notice. The notice must contain information concerning the layoff or closing and contact information for the company. Notice can be served in any reasonable method.

By statute, an employer who violates the WARN provision is liable to each employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days. The employer's liability may be reduced by (1) wages paid by the employer to the employee during the period of violation; and (2) unconditional and voluntary payments made by the employer to the employee. Failure to provide the requisite notice to the local unit of government subjects the employer to a civil penalty not to exceed $500 for each day of violation. If the employer satisfies the liability to each aggrieved employee within 3 weeks after the closing or layoff, the penalty may be avoided.

Filing a WARN Act violation is relatively easy and can pose a substantial risk to employers.[52] For example, on September 25, 2008, a New York court approved a final settlement valued at over $1.6 million dollars for approximately 350 employees of EOS Airlines. A lawsuit was brought against EOS Airlines Inc., in the Bankruptcy Court for the Southern District of New York to secure the rights of former EOS Airlines' employees in connection with the WARN Act. In violation of the Act, EOS Airlines terminated approximately 350 employees at its facilities in Purchase, New York and JFK on or about April 27, 2008 without providing advance written notice.

C. Immigration Law

Companies that employ foreign nationals have additional obligations when terminating employees with H-1B (Specialty Occupation) Visa status.[53] The law requires that the employer compensate the H-1B employee at the prevailing wage until there is a "bona fide" termination of employment.[54] A bona fide termination does not occur until the employer has advised the Department of Homeland Security that the employment relationship has been terminated and has provided the employee with payment for his or her travel home. As a practice pointer, when the employee is notified of his termination, the employer should simultaneously notify the Department of Homeland Security.

After September 8, 2009, all federal contracts must contain a provision requiring contractors and subcontractors to use the government's E-verify system to verify employee's eligibility to work in the United States.[55] President Bush signed the original order effective January 2009; however, recent amendments extended the deadline for employers awarded federal contracts to September 2009. Employment verification eligibility applies to all new hires as well as existing employees directly performing work under the contracts.[56] Companies are required to enroll in the E-verify within thirty days of the contract award date, and must begin using the E-verify system within ninety days of enrollment.[57] The E-verify requirement will soon be included in all federal contracts with a period of performance longer than 120 days and a value above $100,000 and in subcontracts with a value above $3,000.[58]

United States Citizenship and Immigration Services (USCIS) has issued a Final Rule that reduces the number of acceptable identity documents, and prohibits the use of expired identity documents for I-9

[50] *Childress v. Darby Lumber, Inc.*, 357 F.3d 1000 (9th Cir. 2004).
[51] 29 U.S.C. § 2101(a)(2).
[52] *Castro v. Chicago Housing Auth.*, 360 F.3d 721 (7th Cir. 2004) (1,200,000 plus costs and three years' interest).
[53] Immigration and Nationality Act, 8 C.F.R. Part 214.
[54] *Id.*
[55] USCIS.gov, Frequently Asked Questions: Federal Contractors and E-Verify, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=cb2a535e0869d110VgnVCM1000004718190aRCRD&vgnextchannel=6a0988e60a405110VgnVCM1000004718190aRCRD (last visited June 5, 2009).
[56] *Id.*
[57] *Id.*
[58] *Id.*

employment eligibility verification process.[59] Employers must complete a form I-9 for all newly-hired employees to verify their identity and work authorization.[60] Approved documents that employees can present to verify identity employment authorization are as follows:

a. documents verifying both identity and employment authorization;
b. documents verifying identity; and
c. documents verifying only employment authorization.[61]

USCIS has increased the maximum issuance period that a trade NAFTA (TN) professional worker may remain in the United States before requiring an extension of stay.[62] The period of admission for TN workers has been extended from one to three years—making it the same as the initial period given to H-1B workers.[63] The TN VISA category is available to all Mexican and Canadian citizens with at least a Bachelor's degree or appropriate professional credentials, who work in specific professions in the NAFTA such as accountants, engineers, post-secondary teachers, and computer system analysts.[64]

Because of the potential liability under the WARN Act and immigration law, employers should carefully consider and review their obligations in the event of a RIF. Even though sound business reasons dictate the need for RIF, implementing a RIF with limited exposure to lawsuits requires thoughtful planning, and corporate coordination.

IV. WORKPLACE DRUG TESTING

Unfortunately, drug and alcohol consumption is invariably a factor in a significant percentage of transportation-related accidents each year and nothing can be more detrimental or prejudicial to the defense of a trucking case than a positive drug screen. Similarly, if a positive drug screen comes during the pre-employment screening process, it can provide credence to a plaintiff's claim of negligent hiring–even if there is no dispute that the driver was not impaired at the time of the accident. Competing interests of employee privacy, federal and state laws and public policy concerns made this topic one of particular interest.

DRUG ABUSE BY INDUSTRY – TRANSPORTATION

Position	Current Illicit Drug Use	Current Heavy Alcohol Use
Truck Drivers (light)	18.9%	15.1%
Vehicle Repairers	17%	14.9%
Truck Drivers (heavy)	16.4%	13.3%
Bus Drivers	13.6%	6.7%

Department of Transportation ("DOT") regulations issued in 1988 and those issued under the authority of the Omnibus Transportation Employee Testing Act of 1991,[65] require drug and alcohol testing of employees in safety-sensitive positions, such as aviation, trucking, mass-transit, pipeline, and other transportation industries.[66] These federally mandated drug tests are subject to procedural requirements intended to "protect individual privacy, ensure accountability and integrity of specimens, require confirmation of all positive screening tests, mandate the use of laboratories operating within [certain] guidelines . . . , provide confidentiality for test results and medical histories, and ensure nondiscriminatory testing methods."[67] The procedural regulations are enforced by administrative remedies in the form of civil and criminal penalties.[68] Yet, there is no private cause of action available to aggrieved employees for a violation of the procedural protections.[69]

However, outside of federally regulated industries in which drug testing is mandated by law, drug testing by private employers is not subject to the procedural protections imposed on drug testing in the federal sector. The lack of procedural standards prompted concerns about employee privacy, procedural errors resulting in false positives, and confidentiality in the reporting of positive results. Despite the need for drug testing in the transportation industry, fears that the drug testing erodes employees'

[59] *Id.*
[60] 8 U.S.C. § 1324a(b).
[61] *Id.*
[62] Press Release, USCIS, USCIS Increases Period of Stay for Trade NAFTA Professional Workers from Canada and Mexico, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=21a144880ccfc110VgnVCM1000004718190aRCRD&vgnextchannel=68439c7755cb9010VgnVCM10000045f3d6a1RCRD (last visited June 5, 2009).
[63] *Id.*
[64] *Id.*
[65] Omnibus Transportation Employee Testing Act, 49 U.S.C. § 5331
[66] 49 C.F.R. §§ 382.101, et seq.; id. §§ 392.1 et seq.; id. §§ 40.1, et seq; Department of Transportation Drug Testing Regulations for the Motor Carrier Industry, Procedures for Transportation Workplace Drug Testing Programs, 53 Fed. Reg. 47002, et seq. (Nov. 21, 1988).
[67] FHWA Controlled Substances Testing, Policy Statement, 53 Fed. Reg. 47134, 47135.
[68] 49 U.S.C. § 521; 49 C.F.R. § 382.507.
[69] *See Schmeling v. NORDAM*, 97 F.3d 1336, 1344-45 (10th Cir. 1996).

rights and privacy paralyze employers. To address these concerns, many states adopted statutes that impose procedural regulations on employee drug test conducted by private employers.[70]

In Texas, the Supreme Court, in *Mission Petroleum Carriers, Inc. v. Solomon*,[71] held that an employer administering a drug test mandated by the DOT did not owe a duty of reasonable care to his employee, despite the fact that the test, as conducted by the supervisor, violated a number of DOT regulations. Solomon was randomly chosen to submit to a drug test, and Mission opted to use its own employees to administer the test and collect the samples. During the testing, a number of the procedures were violated. The test results came back showing Solomon had used marijuana.

Mission terminated Solomon's employment and Solomon was unemployable as a truck driver. Solomon applied for positions with two other trucking companies. However, prospective employers are required by DOT regulations to examine drug test results from an applicant's previous employers taken within two years before the date of application. Solomon continued to insist he never used marijuana. Solomon further submitted to, and passed, a hair-follicle test conducted by an independent laboratory.

Solomon filed suit against Mission, alleging defamation, business disparagement, and negligence. Solomon argued that Mission violated a number of the DOTs drug-testing regulations when it conducted Solomon's test, including: improperly allowing the immediate supervisor of the employee to collect the employee's urine sample; opening a sealed collection kit outside the presence of the employee; failing to instruct the employee to wash his or her hands before offering the sample; failing to restrict access to the site where the specimen is collected; and failing to keep the receptacle in full view of the collector and the employee from the time the employee has provided the specimen to the moment the receptacle is sealed. The trial court agreed with Solomon's assertion that Mission was negligent and assed more than $900,000 in damages.[72] The court of appeals affirmed the trial court's judgment.

However, the Texas Supreme Court, relying on the same DOT regulations that Mission failed to comply with, reversed the judgment.[73] The Court found that Congress has not given employees a private cause of action under the DOT regulations at issue here. Further, the Court noted that employees have significant avenues of redress when employers fail or refuse to follow DOT protocol in collecting urine samples, and that Solomon did not avail himself of these protections.

The Court ultimately considered its obligation to balance any risk to employees against the burden it could place on Texas' employment-at-will doctrine. The Court declined to adopt the new theory of liability for negligent drug testing, reasoning that if a duty of care were to arise every time the harm to an employee transcends the employment agreement, the employment-at-will doctrine would be undermined because an employer's basis for termination would have to be justified by a reasonable investigation, which is contrary to the doctrine.

V. COVENANTS NOT TO COMPETE

With the increase of layoffs, RIFs, and a more mobile workforce, employers are concerned with the disgruntled and displaced employees who join competing businesses. Corporate integrity is at stake. Valuable business contacts and marketing materials could be improperly utilized. Often covenants not to compete are signed by the employee during the tenure with the employer. Upon dismissal or departure, the agreement is scrutinized by both employer and employee. Recently, the Texas Supreme Court addressed the appropriateness of a covenant not to compete. Yet again the Court has expanded the enforceability of covenants not to compete under Texas Law. With the decreasing bargaining power of many employees in the transportation industry due to the economy, this topic is more important now than ever before.

In *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*,[74] the Texas Supreme Court determined "whether a covenant not to compete in an at-will employment agreement is enforceable when the employee expressly promises not to disclose confidential information, but the employer makes no express return promise to provide confidential information."[75] The Court ultimately held that if the nature of the employment for which the employee is hired will "reasonably require the employer to provide confidential information to the employee for the employee to accomplish the contemplated job duties, then the employer impliedly promises to provide confidential information and the covenant is enforceable so long as the other requirements of the Covenant Not to Compete Act are satisfied."[76]

[70] *See Williams v. UPS*, 527 F.3d 1135, 1138 (10th Cir. 2008).
[71] 106 S.W.3d 705 (Tex. 2003).
[72] *Id.* at 708.
[73] *See id.* at 706.
[74] No. 07-0490, 2009 LEXIS 124 (Tex. Apr. 17, 2009).
[75] *Id.* at *1.
[76] *Id.*

In Fielding, an accounting and consulting firm hired a CPA, and as a condition of his employment, required him to sign one of its standard at-will employment agreements containing the following "client purchase provision":

If at any time within one (1) year after the termination or expiration hereof, Employee directly or indirectly performs accounting services for remuneration for any party who is a client of Employer during the term of this Agreement, Employee shall immediately purchase from Employer and Employer shall sell to employee that portion of Employer's business associated with each such client." By executing the agreement, the CPA also promised he would "not disclose or use at any time . . . any secret or confidential information or knowledge obtained by [him] while employed . . . .In the course of his employment, the CPA also signed a limited partnership agreement that included a similar client purchase provision.

The CPA later resigned and started his own accounting firm. He filed a declaratory judgment action to have the client purchase provisions in his employment and limited partnership agreements declared unenforceable pursuant to Texas Business and Commerce Code section 15.50(a). The statute states in part:

> "a covenant not to compete is enforceable if it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made to the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee."

Both the trial court and the Court of Appeals of Texas held that the agreement was unenforceable. The Supreme Court of Texas disagreed, and held that the client purchase provision was an enforceable covenant not to compete because (1) the employee expressly promised not to disclose confidential information and (2) the employer implied promised to furnish the employee with confidential information. Therefore, according to the Court, the parties did in fact, exchange mutual promises. The client purchase provision was part of an "otherwise enforceable agreement," as contemplated by Tex. Bus. & Com. Code Ann. section 15.50.

This decision only made it easier for Texas employers to enforce covenants not to compete since the Texas Supreme Court's decision in *Alex Sheshunoff Management Services L.P. v. Johnson*.[77] In Sheshunoff, the court held that the language "ancillary to or part of an otherwise enforceable agreement at the time the agreement is made" does not actually require the "otherwise enforceable agreement" to be enforceable at the time the agreement is made.[78] Instead, future performance will make the covenant not to compete enforceable.

Prior to these decisions, the consideration given by the employer had to be both explicitly promised and non-illusory.[79] However, with Sheshunoff, the consideration only needed to be promised--so long as the illusory promise was ultimately kept.[80] Now, with the addition of Fielding, the consideration given in the otherwise enforceable agreement need no longer be explicitly promised, but only reasonably inferred given the nature of the employment.

Despite the dramatic shift towards enforcing covenants not to compete, employers must continue to avoid poorly drafted non-compete agreements. Employers' counsel should review agreements and confirm inclusion of appropriate "limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee."[81]

VI. TERMINATING EMPLOYEES IN RETALIATION OF WORKERS' COMPENSATION CLAIMS

Chapter 451 of the Texas Labor Code prohibits discriminating against employees who make claims, or participate in certain proceedings, under the Texas Workers' Compensation Act.[82] Many other state workers' compensation laws also contain anti-retaliation provisions. Some of these statutes do not contain damages caps, making large jury verdicts in this area common.

For example, in *Breedlove v. Transwood, Inc.*,[83] Billy Breedlove was a truck driver who worked at a terminal in Oklahoma for Transwood, a national trucking company. Breedlove claimed he was injured during an accident when his partner was driving the 18-wheeler while he occupied the sleeper compartment. According to Transwood, Breedlove's

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[77] 209 S.W.3d 644 (Tex. 2006).
[78] *Id.* at 651-52.
[79] *Light v. Centel Cellular Co.,* 883 S.W.2d 642 (Tex. 1994).
[80] 209 S.W.3d at 651-52.
[81] TEX. BUS. & COM. CODE ANN. § 15.50(a).
[82] TEX. LAB. CODE § 451.001 (2009).
[83] *Breedlove v. Transwood, Inc*., Jury Verdict, No. CJ-2001-222, 2002 WL 32154694 (Okl. Dist. Aug. 15, 2002).

partner admitted to a co-worker that Breedlove was driving when the accident occurred.

Breedlove filed a workers' compensation claim and took time off work. Later, he asked his doctor to release him to work, and the doctor gave him a release with lifting restrictions. When Breedlove returned for his first day back at work, he could not walk up steps leading to the office. He notified his doctor, who submitted an additional report stating that further testing was required and Breedlove would remain off work for an additional two weeks. However, after receiving the conflicting doctor's reports, the terminal manager ordered Breedlove to return to work within seventy-two hours. Allegedly, he called Breedlove's home and left a message firing Breedlove after Breedlove failed to return to work. Later, Transwood allegedly sent notices to other trucking companies advising them to contact Transwood before hiring Breedlove and implied that Breedlove had a drinking problem.

Breedlove later died of a stroke and his widow brought a lawsuit claiming that Breedlove was fired in retaliation for filing the workers' compensation claim. She claimed the damage to his reputation forced him to take odd jobs paying significantly less than what he was making as a truck driver. The employer claimed it was unable to locate Breedlove's driving partner to produce him for trial. After less than two hours of deliberations, the jury found for the plaintiff, awarding nearly $2.2 million for wrongful termination.

This case emphasizes the need for employers to take extreme caution when firing an employee who recently filed a workers' compensation claim. By exercising caution when dealing with still-employed claimants and taking appropriate steps to eliminate the potential for retaliatory conduct, employers can effectively reduce the risk of lawsuits and damages.

VII. CONCLUSION

While the current economy has necessitated cost-cutting at many companies, employee layoffs are not without risks. Anytime employees are involuntarily terminated from their employment, there is potential liability for the employer. The liability can arise under a variety of federal or state statutes. With more than one-half of all workers over the age of forty years, reports of unemployment rates at 9.4%, and an estimated 14.5 million individuals unemployed, caution in handling employment situations is warranted.