EMPLOYMENT LAW ISSUES:

ADA, FURLOUGHS, LAYOFFS AND INDEPENDENT CONTRACTORS

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EMPLOYMENT LAW ISSUES: ADA, FURLOUGHS, LAYOFFS AND INDEPENDENT CONTRACTORS

Each year Employment Law Issues are examined in two seminars lasting almost three days - *Advanced Employment Law Course* and *Nuts and Bolts of Employment Law*. Since it is impossible to cover all employment law issues in a short paper and 30-minute presentation, the planning committee requested I address current issues regarding the Americans with Disabilities Act, furloughs, layoffs, and independent contractors. I have pulled information provided by the various expert presenters who fully covered these issues in their presentations at the two seminars. I recommend you use the State Bar of Texas services to obtain copies of the referenced articles if you need additional information about these topics or want excellent resource materials.

I. OVERVIEW OF DISCRIMINATION STATUTES

Dan C. Dargene, Ogletree, Deakins, Nash, Smoak & Stewart, P.C. presented an *Overview of Discrimination Statutes* at the 2010 *Nuts and Bolts of Employment Law*. Mr. Dargene provided a very comprehensive list of the federal and state statutes which provide protection against discrimination:

A. Federal Laws

1. *Title VII of the Civil Rights Act of 1964, as amended by the Civil Rights Act of 1991* - prohibits discrimination on the basis of race, color, sex, religion, national origin, and retaliation for exercising rights under the Act.
2. *Age Discrimination in Employment Act* - prohibits discrimination on the basis of age (40 and over) and retaliation for exercising rights under the Act. Note: States and state entities are not subject to the provisions of the ADEA. In addition, federal employees are not entitled to jury trials under the ADEA.
3. *National Labor Relations Act* - prohibits discrimination on the basis of union activity, protected concerted activity, and retaliation for exercising rights under the Act.
4. *Pregnancy Discrimination Act* - prohibits employers from discriminating against employees and applicants because they are pregnant or because they may require time off for child bearing.
5. *Occupational Safety and Health Act* - prohibits rimination against employees who have exercised their rights under the Act (workplace safety).
6. Fair Labor Standards Act - prohibits discrimination against employees who have exercised their rights under the Act (wage and hour issues).
7. *Employment Retirement Income Security Act* - prohibits discrimination against employees who are about to vest in an employee benefits pension plan or who exercise their rights under the Act (employee benefit plans).
8. *Bankruptcy Reform Act* - prohibits discrimination against employees who have sought protection under the bankruptcy laws.
9. *Employee Polygraph Protection Act* - prohibits discrimination against employees who either refuse to take a polygraph examination, or who fail a polygraph examination unless other evidence exists.
10. *Uniformed Services Employment and Reemployment Rights Act* - prohibits an employer from denying any benefit of employment, including reinstatement, on the basis of any individual's past or present service in the Armed Forces Reserve, the National Guard, or other uniformed services.
11. *Vocational Rehabilitation Act* -federal agencies and public and private entities receiving federal financial assistance are prohibited from discriminating against disabled applicants and employees.
12. *Americans With Disabilities Act* - prohibits discrimination against disabled applicants and employees. Note: States and state entities are not subject to the provisions of the ADA.
13. *Protection of Jurors' Employment* - prohibits discharge of employees because of jury duty.
14. *Immigration Reform and Control Act* - prohibits discrimination against applicants and employees based on immigration status as long as they are lawfully entitled to work in the United States.
15. *Consumer Credit Protection Act* - prohibits discrimination against employees whose wages have been subjected to garnishment.
16. *Worker Adjustment and Retaining Notification Act* - requires employers to give 60 days advance notice of plant closings and mass layoffs, as defined by the Act.
17. *Whistleblower Laws* - various environmental, nuclear, and defense industry laws prohibit retaliation against employees who report violations.
18. *Sarbanes-Oxley Act* - prohibits publicly

traded companies from discriminating against employees in retaliation for any lawful act done by the employee to provide information or otherwise assist in any investigation or proceeding regarding conduct which the employee believes constitutes a violation of federal securities fraud statutes or SEC rules.

19. *Family and Medical Leave Act* - employers must guarantee reemployment for twelve (12) weeks to employees who take a medical or familial leave of absence as defined by the Act; prohibits discrimination or retaliation against employees who have exercised their rights under the Act.

B. Texas State Laws

1. *Texas Commission on Human Rights Act* - prohibits discrimination on the basis of race, color, sex, religion, national origin, age, disability, and retaliation for exercising rights under the Act. Note: State law incorporates age claims and disability claims into the same statute as other discrimination claims, unlike the Federal laws. There are differences in the types of damages available under the ADEA than the state law.
2. *Workers' Compensation Discrimination* - prohibits discrimination against employees because they have instituted proceedings to collect workers' compensation benefits.
3. *Jurors' Right to Reemployment* - prohibits discharge of employees because of jury duty.
4. *Restrictions on Labor* - prohibits discrimination because of membership or non-membership in a labor union or because of participation in a strike.
5. *Restriction on Labor* - prohibits discharge of employees because of compliance with a valid subpoena.
6. *Texas Hazard Communication Act* - prohibits discrimination against employees who report violations and/or exercise their rights under the Act.
7. *Reemployment of Persons Called to Active Duty* - prohibits discharge of employees for serving in the state military.
8. *Texas Whistleblowers Act* - public employees cannot be discriminated against for reporting illegal conduct.
9. *Healthcare Employees* - cannot be discriminated against for reporting suspected abuse or neglect of a patient.
10. *Court-Ordered Child Support* - employees cannot be discriminated against based on the existence of an order obligating employers to withhold child support payments from the employees' earnings.
11. *Emergency Evacuation* - prohibits discrimination against employees who leave their worksite pursuant to an emergency evacuation order.

II. AMERICANS WITH DISABILITIES ACT

For several years James H. Kizziar, Jr., Bracewell & Giuliani, LLP and John W. Griffin, Jr., Marek, Griffin & Knaupp have thoroughly covered the Americans with Disabilities Act at the *Advanced Employment Law Course.* Their articles have become valuable resources for practitioners dealing with the ADA. In 2010, they focused on the recent amendments to the ADA.

A. Amendments of 2008

The Americans with Disabilities Act Amendments Act of 2008 (ADAAA) mandates liberal construction, precludes the use of mitigating measures to defeat coverage, and strengthens coverage under the "regarded as" prong of the ADA. The amendments became effective January 1, 2009. The Texas Legislature amended the Texas Labor Code similarly, effective September 1, 2009. The amendments were passed to restore the ADA to its original scope of coverage. The most significant changes are:

1. Stating that the coverage provisions are to be construed broadly, and explicitly rejecting Supreme Court interpretations setting demanding standards.
2. Requiring that the ameliorative effects of mitigating measures such as medication not be considered when determining the presence of a disability.
3. Expanding the list of major life activities, and including major bodily functions as a major life activity.
4. Requiring that conditions that are episodic or in remission be evaluated in their active state.
5. Expanding the "regarded as" category of disability so that a condition need not limit a major life activity to be the basis for a regarded as claim.

The ADAAA also amends the Rehabilitation Act of 1973, covering federal agencies and public and private entities receiving federal financial assistance.

B. Effect of Amendments

The ADAAA applies to conduct on or after the effective date at the federal and state levels. Therefore, the facts of each case must be reviewed to determine if

the old law or the amendments govern. Several courts have refused to apply the law retroactively, but a court recently held the amendments can be used as interpretive guidance in construing the original ADA, at least as to issues not previously decided by binding precedent. *Menchaca v. Maricopa Comm. Coll. Dist.,* 2009 U.S. Dist. Lexis 5510 (D. Ariz. 2009); *see also Rohr v. Salt River Project Agric. Improvement and Power Dist.,* 2009 U.S. App. Lexis 2856 (9th Cir. 2009) (ADAAA can inform court's interpretation of issues under the prior version of the ADA).

III. AVOIDING THE NOT SO SWEET SORROW OF PARTING WITH EMPLOYEES: MANAGING RISK IN WORKPLACE REDUCTIONS

At the 2010 *Advanced Employment Law Course,* Teresa Valderrama, Jackson Lewis LLP addressed the issues associated with non-performance based terminations which have become prevalent in the current economic times. Ms. Valderrama's presentation included a variety of methods for dealing with the need to reduce costs in the workplace.

A. Cost Cutting

Ms. Valderrama provided a list of alternatives to consider prior to involuntary RIFs to minimize risk. These measures can be used individually or in combination:

1. Hiring freezes.
2. Wage and bonus freezes.
3. Bonus reductions.
4. Reducing fringe benefits, including employee sharing of insurance premiums, increased insurance deductibles, and limited benefit eligibility for newer employees.
5. Work furloughs of limited duration or forced vacations.
6. Reducing work hours with proportionate pay cuts.
7. Assessing expected job attrition.
8. Job sharing.
9. Adjusting performance expectations and enforcement by termination.
10. Discontinuing the use of temporary and part-time employees and redistributing their work.

B. Voluntary Separation Plans

When such measures are insufficient, an employer may consider the interim step of a Voluntary Separation Plan, or VSP. In a VSP, an employer asks employees if they are willing to volunteer for a voluntary resignation incentive which might include severance pay, outplacement services, and/or extended group health insurance coverage.

C. Involuntary RIFs

Issues to be addressed when there is no choice other than involuntary RIFs:

1. Establish a timetable.
2. Consider notice requirements.
3. Plan for the Reduction in Force.
4. Create a selection process and criteria.
5. Conduct a review and analysis of the selections.
6. Avoid pretext by examining hiring practices.
7. Plan all communication and document actions.
8. Use releases and severance packages.

When using releases and severance packages, be aware of the mandatory requirements of the Older Workers Benefit Protection Act.

Disabled employees, older workers, and other employees in under-represented protected classes are not entitled to preferential treatment during a Reduction in Force, but employers should review selections to make sure these classes of people are not over-represented in the RIF.

Communication with employees regarding the need to reduce cost could be the best method for avoiding liability. While employees' first choice would be the status quo, when faced with RIFs employees will choose reductions versus eliminations.

IV. INDEPENDENT CONTRACTORS

A. Compensation Issues Under Flsa Wage And Hour

Valorie Glass, Atlas & Hall, L.L.P. focused on the Fair Labor Standards Act at the 2010 *Nuts and Bolts of Employment Law*. Since the FLSA only covers employees, Ms. Glass outlined the criteria for determining if an individual is an employee or independent contractor.

To determine whether an individual is an employee under the FLSA, courts will focus on the economic reality of the relationship and will generally consider the following factors:

1. The degree of the alleged employer's right to control the manner in which the work is to be performed (the more control you have over an individual, the more likely he will be deemed an employee).
2. The alleged employee's opportunity for profit or loss.
3. Whether the alleged employee provides the tools, equipment and materials required for his task or whether he employs helpers.
4. The degree of permanence of the working relationship.

5. Whether the service rendered requires a special skill.
6. The extent to which the alleged services in question are an integral part of the employing entity.

The FLSA regulates minimum wage, overtime, record keeping, exemptions, equal pay, enforcement of child labor laws, and timely payment of wages and overtime.

Any settlement of an FLSA claim must be under the direction and approval of the Department of Labor or pursuant to a court approval fairness review. Settlements of FLSA claims must resolve a bona fide dispute over something more than coverage or the settlement is void.

Unlike Equal Employment Opportunity Commission investigations which focus on one employee, Department of Labor investigations can begin with one employee and expand to all employees. In addition, FLSA claims have been the target of class actions.

B. Liability Issues

Katherine Butler, Butler & Harris provided the Federal Law Update at the 2010 *Advanced Employment Law Course*. Of particular interest is a case she found regarding independent contractors:

> *Brown v. J Kaz,* 581 F.3d 175 (3d Cir. 2009), is a race discrimination case brought by an independent contractor rather than an employee. Because the plaintiff was not an employee, she had no right to make a claim under Title VII. But things were different under 42 U.S.C. Section 1981 and the Third Circuit became the fourth circuit (joining the 1st, 7th and 11th) to say an independent contractor could make a claim under 42 U.S.C. Section 1981. The statute does not refer to employment contracts, but rather to all contracts and therefore includes contracts by which an independent contractor provides services to another.