

# Employment Law Digest

An Update from Thornton, Biechlin, Segrato, Reynolds & Guerra, L.C. Employment Law Department

**Vol. IX, No. 3**  
Fall 2006

## San Antonio

5th Fl, One International Centre  
100 NE Loop 410  
San Antonio, Texas 78216-4186  
Phone 210.342.5555  
Fax 210.525.0666  
labor@thorntonfirm.com

## Michael L. Holland

Board Certified  
Labor & Employment Law  
Texas Board of Legal  
Specialization  
mholland@thorntonfirm.com

## Lance C. Blankenship

lblankenship@thorntonfirm.com

## Elena Villaseñor

evillaseñor@thorntonfirm.com

## Susan Stone

Of Counsel  
sstone@thorntonfirm.com

## Austin

912 S. Capital of Texas Highway  
Suite 300  
Austin, Texas 78746-5242  
Phone 512.329.6666  
Fax 512.327.4694

## Curtis J. Kurhajec

ckurhajec@thorntonfirm.com

## McAllen

418 E. Dove Avenue  
McAllen, Texas 78504-2240  
Phone 956.630.3080  
Fax 956.630.0189

## Highlights

Wage Hour Update .....	2
Retaliation Revisited .....	4
Statistics In The Law .....	6
Upcoming Seminars .....	7
The Firm .....	7

## Possible Liabilities of Pre-Employment Background Screening

Many employers check the background of potential employees in an effort to avoid the liability of hiring a person who has misbehaved in the past and is slightly more likely than others to do so again in the future. This often includes looking at an applicant's driving record, criminal record, and credit history. Although screening a person's background is often highly advisable or even required, employers do need to be careful about how they obtain and use certain information about those individuals being considered for employment.

Advancing technology has made checking a person's background today much easier than it was 20 or 30 years ago when an employer would have to hire a private investigator and wait several weeks to learn an applicant's criminal, driving and credit information. All of this information is now easily accessible on either state or nationwide databases, which makes obtaining it not only faster and easier, but also much cheaper. Surprisingly, employers who think they are very carefully limiting their own liability by screening potential employees may actually be exposing themselves to liability if they choose to ignore a number of legal limitations on their use of background data in making employment decisions.

One area in which employers need to be most careful is in their use of criminal background information about an applicant. When employers use a person's arrest record as the sole reason in making an employment decision, the employer runs the risk of a disparate impact lawsuit under Title VII of the Civil Rights Act of 1964, because statistics indicate African-Americans are more likely to have these kinds of records. When an employer instead uses a person's conviction record in making an employment decision, it is important that there be some connection between what the person was arrested for and the type of job they are applying for.

Another body of law that employers need to be aware of when screening potential employees are the requirements and limitations imposed by the Fair Credit Reporting Act. The FCRA establishes national standards that employers must follow when obtaining a "consumer report" about a prospective employee. A consumer report includes a person's credit history and possibly motor vehicle and criminal history records. The FCRA




also provides job applicants with certain legal protections. Although the requirements and limitations of the FCRA only come into play when an employer obtains a consumer report from an outside consumer reporting agency, such as a credit bureau or a background screening company, this will be the case more often than not, so most employers need to be wary.

Under the FCRA, before an employer can get information about an applicant's credit, (and arguably) driving and criminal history, the employer must obtain written authorization from the applicant. This authorization may simply be included in the pre-hire packet, along with the application, the I-9, and other similar documents. In a separate document, the employer must also tell the applicant that a consumer report is being prepared on that individual.

If an employer obtains a consumer report, and based upon that report, decides not to hire an applicant, the employer has additional responsibilities under the FCRA. First, the employer must notify the applicant either verbally or in writing that the applicant is not being hired at least partly based on the contents of the consumer report. Second, the employer must provide a copy of the report to the applicant. Third, the employer must tell the applicant the name, address, and phone number of the consumer reporting agency that provided the report. Fourth, the employer must tell the applicant that he or she can get a free copy of the report from the reporting agency for 60 days. Fifth, the employer must advise the applicant that he or she may dispute the accuracy or completeness of any information in the report with the reporting agency. Finally, the employer must give the applicant a written description of his or her rights under the FCRA.

The FCRA is meant to balance an employer's need for this background information in certain hiring situations against the applicant's right to privacy and accuracy. Many of the protections for applicants are aimed at informing them of any errors in these reports and providing them with avenues to change or remove any inaccurate or unverified information.

Although these background checks are becoming much easier and cheaper, it is important that employers not let this type of information be the only thing they consider in making hiring decisions. While it is true that a person's past activities are often a good indication of how they will act in the future, a pristine background might not always be the most important job qualification. Employers who do conduct background checks on applicants should consider this information along with references and job experience. 

### **Administrative Exemption Under the FLSA De-coded**

The exemptions from minimum wage and overtime pay requirements under the Fair Labor Standards Act are numerous and confusing. The Department of Labor's Wage and Hour Administration attempted to clarify and update some of these exemptions in August of 2004, but what the Department of Labor calls a "clarification" leaves much to be desired. Along with the Executive and Professional exemptions, the Administrative exemption continues to be one of the most confusing, which is one of the reasons the Department of Labor recently issued an opinion letter attempting to further explain it.

Those employees who fall under the Administrative exemption of the

FLSA are not entitled to the overtime pay requirements granted by the Act. The initial question in determining whether or not an employee falls under the Administrative exemption is whether or not that employee makes at least \$455 per week. If so, then we must look at whether the employee meets the other two requirements of the exemption. The first requirement is that the employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer. Under this requirement, "primary duty" means the main or most important duty that the employee performs. In order for the employee's primary duty to be "related to the management or general business operations of the employer," the employee must perform work directly related to assisting with the running of the business.

The next requirement under the Administrative exemption is that the employee's primary duty must include the exercise of discretion and independent judgment over significant matters. The exercise of discretion and independent judgment must involve the comparison and evaluation of different courses of action, and decision making after the various possible actions have been considered. This requires that the employee have the authority to make an independent choice, free from immediate direction or supervision. One factor to consider in determining whether an employee exercises discretion and independent judgment is whether the employee has the authority to waive or deviate from an established policy without prior approval - the fact that the employee's decision may be reversed after review does not mean that the employee is not exercising discretion and independent judgment. To qualify as the exercise of discretion and independent judgment,



an employee must do more than simply use skill in applying well established techniques, procedures, or specific standards described in a manual or other source.

This exemption may seem so straightforward that no further clarification is needed, but just in case, the Department of Labor occasionally issues opinion letters on specific aspects of the exemption.

Recently, the DOL received a letter from a company that contracts with the Department of Defense to conduct background checks on people seeking top secret clearance, which asked whether or not the investigators qualify for the Administrative exemption. The DOL answered that the investigators do not qualify for the FLSA Administrative exemption because their work is not directly related to management or administration.

The DOL clarified in this letter that the August 2004 updates to the FLSA did not really change the scope of the rules, they merely clarified many of the existing rules and exemptions. Therefore, the DOL said, opinion letters issued by the DOL before the 2004 changes, stating that investigators were not administrative employees, still hold true. Even though the investigators in question do have some level of independence and discretion, this did not rise to the level of performing administrative tasks.


These investigators in question interview people being considered for top secret clearance, follow leads, and interview other witnesses who may have relevant information. The investigators have the responsibility to schedule and prioritize any leads they come across, and they have the discretion to determine which leads to follow. There are, however, broad

Department of Defense guidelines which outline the minimum efforts an investigator must make. Although the investigators make decisions about when and where to do different tasks, this small bit of discretion and independent judgment does not make them administrative employees. The DOL's opinion letter states that in order to qualify for the Administrative exemption, the employee's discretion and independent judgment must be more important in managing the employer's business than the discretion the investigators have.

Around the time that the DOL answered this question about the Administrative exemption, it also answered a question about overtime pay for nurse practitioners. The hospital with this question wanted to know whether it could classify as "nonexempt" nurse practitioners who were called in to cover shifts for salaried nurse practitioners who were absent, without affecting the classification as "exempt" of other nurse practitioners. Basically, the hospital wanted to know whether paying the shift-covering nurse practitioners overtime would require them to pay their regular nurse practitioners overtime as well.

The DOL responded, saying the nonexempt classification of shift-covering nurses would not affect the exempt status of other nurses, because it is not a person's job title that determines their classification, but their salary and job responsibilities. Further, the DOL stated an employer may provide an exempt employee additional compensation, above and beyond their salary, without affecting the employee's exempt status.

Although these two opinion letters do not provide answers to all possible minimum wage and overtime questions, they are a good start and the

reasoning behind these two answers may help guide employers in many other administrative exemption questions. 


### Docking Pay Under the FLSA

Many employers have questions about how to handle employee absences due to inclement weather under the Fair Labor Standards Act. The Department of Labor recently addressed two such situations when dealing with employees who are exempt from the minimum wage and overtime pay requirements of the FLSA (many types of salaried workers).

The first situation is where the workplace is closed due to inclement weather or some type of disaster. The Department of Labor says that employers may require exempt employees to use accrued leave or vacation time to cover either full or partial days of work missed for this reason. This is because the FLSA does not require employers to provide their employees with any vacation time. However, the exempt employee must still receive his or her guaranteed salary. Therefore, if the exempt employee does not have any accrued leave or vacation time, the employer cannot force the employee to take leave without pay, nor may the employer dock the exempt employee's salary.

The second situation is where the workplace, usually a health care institution, remains open even though there is inclement weather or some type of disaster. If an exempt employee is unable to make it to work due to the weather or disaster, the employee's absence is considered to be an absence for personal reasons, and the employer may take a full day deduction from the employee's salary.



Although one of the requirements for being classified as an “exempt” employee under the FLSA is being paid on a salary basis, neither the deduction from salary nor the required use of leave time provided for in inclement weather situations violates the “salary basis” requirement. Therefore, such deductions from salary and leave time will not affect an employee’s exempt status. 

### **Mandatory Arbitration Provision Unlawful**

**NLRB Finds the Mandatory Arbitration Agreement of A Non-Union Employer is in Violation of the NLRA**

The National Labor Relations Board (the Board), in *U-Haul Co. of California and Machinist District Lodge 190*, 347 NLRB No. 34 (2006), found a provision in the employee handbook describing U-Hauls arbitration policy as violating the National Labor Relations Act (NLRA). Specifically, the Board found the policy, as stated, could reasonably inhibit employees from filing NLRA related charges.

U-Haul, a non-unionized organization, implemented a mandatory arbitration policy as a condition of employment for all employees. The Machinists Local Lodge filed the original charge against U-Haul claiming violations of Section 8(a)(1) and (3) of the NLRA. Following a trial on the merits, the Administrative Law Judge found that the policy restrains an employee’s right to file unfair labor practice charges with the Board. In response to U-Hauls exceptions, the Board convened a panel to review the decision.

The standard arbitration policy read as follows:


... applies to all UCC employees, regardless of length of service or status and covers all disputes relating to or arising out of an employee’s employment with UCC or the termination of that employment. Examples of the type of disputes or claims covered by the UAP include, but are not limited to, claims for wrongful termination of employment, breach of contract, fraud, employment discrimination, harassment or retaliation under the Americans With Disabilities Act, the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964 and its amendments, the California Fair Employment and Housing Act or any other state or local anti-discrimination laws, tort claims, wage or overtime claims or other claims under the Labor Code, or any other legal or equitable claims and causes of action recognized by local, state, or federal law or regulations. (Emphasis added.)

The Board recognized that the policy did not explicitly limit employees right to the remedial procedures of the Board, however, the breadth of the applicability of “any other legal or equitable claims” as “recognized by local, state, or federal law or regulation” could reasonably be construed by an employee as precluding the right to seek redress with the Board. As an employee could plainly construe remedies under the NLRA as included under federal law, the policy could reasonably be read to require an employee to resort to the arbitration agreement rather than the procedural rights under the NLRA. Yet, in a footnote the Board noted the “decision, however, is limited to the specific clause at issue in this case. . . . We do not pass on the lawfulness of mandatory arbitration provisions.” However, the Board also stated that courts and administrative agencies have recognized that individuals

possess non-waivable rights to file discrimination charges through the Equal Employment Opportunity Commission, and such mandatory arbitration agreements restricting that right are void as a matter of public policy.

Accordingly, the Board held that U-Haul violated Sections 8(a)(1) of the NLRA because the arbitration agreement precluded an employee’s right to file unfair labor practice claims. The Board, therefore, ordered the employer to: (1) cease requiring employees to sign waivers of their right to filing of Board charges; (2) remove all unlawful waivers from files and notify present and former employees that waivers will not be used in any way; (3) post curative notices at the facilities where the policy was in effect.

Following this decision and the implications that the NLRA has on all employers, not just those with unionized workforces, employers should review their mandatory arbitration policies for compliance to this decision. Specifically, ensure that claims falling under the NLRA are exempted from mandatory arbitration. A thorough review of new and existing arbitration agreements will reduce an employer’s liability in this evolving area of the law.

A full text of the NLRB’s decision in *U-Haul of California* is available from the NLRB website: [http://www.nlr.gov/nlr/shared\\_files/decisions/347/347-34.htm](http://www.nlr.gov/nlr/shared_files/decisions/347/347-34.htm). 

### **Employers Exposed**

**The United States Supreme Court Expands the Definition of Retaliation under Title VII**



The United States Supreme Court, resolved a long standing split in the circuit courts, by defining an expanded standard for determining whether the anti-retaliation provision of Title VII of the 1964 Civil Rights Act is confined to actions by an employer occurring in the workplace or related to employment and how harmful must the employer's action be to fall within the provisions scope. The Court held that an employer's action is retaliatory if a reasonable employee would find the challenged action to be "materially adverse" in that it would "dissuade a reasonable worker from making or supporting a charge of discrimination." Even when an employer's action does not result in any loss to the employee, the action can be asserted as retaliatory. This broader, more employee friendly benchmark most certainly will encourage a growth in retaliation claims.

In Burlington Northern, Sheila White, a female forklift operator with Burlington Northern, complained of sexual harassment by her supervisor. After her complaint, the supervisor was disciplined. However, White was subsequently removed from forklift duty to a standard track laborer assignment. An assignment considered less desirable. She then filed a discrimination and retaliation complaint through the appropriation channels of the EEOC based on the initial sexual harassment and reassignment of her work. Following her complaint, White was suspended 37 days without pay for insubordination. Later, Burlington determined she was not insubordinate and reinstated her with back pay. Yet White filed suit against Burlington for unlawful retaliation.

A unanimous Court held that unlike the substantive provision, the anti-retaliation provision is not

limited to discriminatory actions related to employment or occurring in the workplace. An employee need only show that a reasonable employee would have found the challenged action materially adverse, meaning in context an employer's actions could "well dissuade a reasonable worker from making or supporting a charge of discrimination." The substantive provision of Title VII (section 703(a)) explicitly confines actions that affect employment or the workplace by using language like "hire," "discharge," "employment opportunities," and "compensation, terms, conditions, or privileges of employment." The anti retaliation provision of Title VII (section 704(a)) does not contain such limiting words. These two provisions are not coterminous, therefore, "the scope of the anti retaliation provision extends beyond workplace related or employment related retaliatory acts and harm." Furthermore, the retaliation must produce an injury or harm. A plaintiff must show that a "reasonable employee would have found the challenged action materially adverse, 'which in this context means it well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"

This Court found that a jury need not find the employers actions were related to the terms of employment and a jury could reasonably conclude that the change in work assignments was materially adverse to a reasonable employee considering the standard laborer duties were less desirable and the forklift duty was better and more prestigious. Also, a jury could reasonably conclude the 37-day suspension without pay as materially adverse, even when rescinded with back pay. A reasonable employee would find a month without pay, to be a hardship. These actions could deter

a reasonable worker from making a charge of discrimination.

The enlarged standard of the kind of employer actions giving rise to retaliation claims will most certainly encourage a growth in retaliation claims. This decision heightens the need for employers to review their existing anti-retaliation policies for clarity and compliance with this decision. Further, employers should take every step to ensure managers, human resource team members, and supervisors are trained on how to lawfully and adequately respond to a discrimination complaint. 📖

### **"Reverse" Age Discrimination Not Unlawful Under the ADEA**

#### EEOC Plays Catch-Up to Supreme Court Decision

The Equal Employment Opportunity Commission (EEOC) is proposing to incorporate into its regulations the results of a 2004 Supreme Court decision interpreting the Age Discrimination in Employment Act (ADEA) as not prohibiting the favoring of an older employee because of age. The amendment proposes to revise and clarify EEOC regulations currently describing the ADEA as prohibiting age-based favoritism.


In the 6-3 decision, the Court ruled that the Age Discrimination in Employment Act's "text, structure, purpose, history, and relationship to other federal statutes show that the statute does not mean to stop an employer from favoring an older employee over a younger one." The Court overruled the U.S. Court of Appeals for the Sixth Circuit decision, finding that the ADEA was not intended to protect "younger" workers from being treated less favorably than



“older” workers. As currently written, the ADEA protects employees 40 years and older from age discrimination. In *General Dynamics Land Systems, Inc. v. Cline*, the Court rejected the claim of employees between the ages of 40 and 49 when they were excluded from future retiree health benefits under a newly agreed to collective bargaining agreement with General Dynamics. The agreement offered a “grandfather” provision where if employees were 50 and older they were to receive retiree health benefits pursuant to the past agreement. On July 1, 1997, the employees aged between 40 and 49 sued, claiming age discrimination in violation of the ADEA. Justice Souter rejected Cline’s argument. He stated that if Congress had been concerned with protecting younger employees against older, it would not have omitted workers under 40 from the protection of the act.

The EEOC now seeks to amend 29 CFR chapter XIV part 1625, in part, by adding the language reflecting the Cline decision in that “favoring an older individual over a younger individual because of age is not unlawful discrimination under the Act, even if the younger individual is at least 40 years old.” Further the EEOC is amending allowable language in employment advertisements that limit or deter the employment of older individuals. Terms used in advertising “such as age 25 to 35, young, college student, recent college graduate, boy, girl, or others of a similar nature violate the Act unless one of the statutory exceptions applies. Employers may post help wanted notices or advertisements expressing a preference for older individuals with terms such as over age 60, retirees, or supplement your pension.” Finally, in asking applicants to state their age does not indicate in itself a violation, however, the purpose of the request

will be closely scrutinized for lawful purpose.

The proposed rule will seek to bring the EEOC regulations in compliance with the 2004 Supreme Court interpretation of the ADEA. Comments to the rule must be accepted on or before October 10, 2006. The proposed rule would apply to all employers with at least 20 employees. As employers are required to follow U.S. Supreme Court decisions, the EEOC proposal does not impose any further obligations related to the ADEA. In fact, the change will reduce employer’s liability by allowing certain age-based employment decisions that were previously forbidden. 

### Statistics in the Law

#### Greater Jury Awards for Employment Discrimination Claims

A nationwide database of plaintiff and defense verdicts, maintained by Jury Verdict Research, has analyzed and reported on the following trends in employment discrimination claims. Over 60 percent of the discrimination claims filed against employers have prevailed over the past seven years. This trend has remained constant at the 65 to 70 percent mark.


Sex discrimination accounts for the most commonly litigated claim (39%), followed by race discrimination (22%). The highest jury awards, averaging \$262,405, goes to the least litigated claim of age discrimination (14%). The second highest average jury award, at \$211,272, went to employees claiming disability discrimination, trailed by sex discrimination at \$186,250 and race discrimination at \$138,880. This results in a median jury award of \$187,583 for

employees’ discrimination claims.

#### Union Membership Steady

According to the U.S. Department of Labor’s Bureau of Labor Statistics, 12.5 percent of all workers were union members in 2005, unchanged from 2004. This represents nearly 15.7 million wage and salary workers as union members in 2005. Union membership was at a high in 1983 at 20.1 percent when using comparable data. BLS reports that the public sector accounts for a greater percentage of union members at 36.5 percent, more than four times greater than that of private sector employees. Texas, having the second largest workforce, reports union membership at 5.3 percent, which is less than one-fourth that of New York with the third largest workforce. To view the full report, visit <http://www.bls.gov/news.release/pdf/union2.pdf>.

#### EEOC Monetary Benefits Down in 2005

The Equal Employment Opportunity Commission garnered slightly fewer benefits for job discrimination claims for fiscal year 2005 according to preliminary figures provided by the Commission to the Bureau of National Affairs, Inc. Approximately \$378 million in benefits were obtained by the EEOC in fiscal year 2005, down from \$415.4 million the previous fiscal year. However, there were record highs in the amount of money awarded through administrative procedures, up from \$251.7 million to \$271.5 million in monetary benefits. 



Be sure to check our website at: [www.thorntonfirm.com](http://www.thorntonfirm.com) for the most recent significant changes in the law that affect you.

### Upcoming Seminars

- |                 |  |
|-----------------|--|
| Nov. 15, 2006   | Human Resource Update-Retaliation Has Changed-Be Prepared! and More, complimentary seminar presented by Mike Holland & Tom Potter, One International Centre, 100 N.E. Loop 410, GL100 San Antonio, Texas |
| March 1-2, 2007 | Council on Education In Management, Employment Law Update, Austin, Texas   |

*The contents of this newsletter are presented as general information only and are not intended as legal advice. The reader is invited and advised to consult with an attorney for more specific information regarding the matters and materials addressed herein, or for advice based on the individual circumstances of his or her specific situation.*

The employment law section of the Thornton law firm represents management in a wide variety of employment law matters. Because we have offices located in San Antonio, Austin and McAllen, Texas, we can offer exclusive and timely insight into handling particular employment matters in diversified areas of the state. Of course, our focus is still on claim avoidance through timely advice and counsel before events occur which can lead to lawsuits; however, our firm has extensive jury trial experience in a wide variety of employment law matters. Our expertise includes the following areas:

- management counseling;
- review and preparation of personnel policy and procedures including employee handbooks;
- representation in administrative matters before the Equal Employment Opportunity Commission and the Texas Workforce Commission;
- representation of management in state and federal court for employment related claims involving Title VII of the Civil Rights Act of 1964, Americans with Disabilities Act, Age Discrimination in Employment Act, Polygraph Protection Act, Consolidated Omnibus Budget Reconciliation Act, Worker's Compensation Retaliation, Family Medical Leave Act, Fair Labor Standards Act, Texas Commission on Human Rights Act and a variety of state court claims such as intentional infliction of emotional distress, invasion of privacy, defamation and negligence;
- preparation of arbitration agreements and non-subscriber programs;
- Training and preventative seminars to comply with recent U.S. Supreme Court decisions; and
- Wage/hour audits; FLSA claims.