

**SELECTED TOPICS IN EMPLOYMENT DISCRIMINATION LAW: CASES
AND LEADING CURRENT ISSUES IN RACE AND GENDER, RETALIATION,
AND AGE DISCRIMINATION**

**By Morris J. Baller
Goldstein, Demchak, Baller, Borgen & Dardarian
300 Lakeside Drive, Suite 1000
Oakland, CA 94612
(510) 763-9800
www.gdblegal.com**

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By Morris J. Baller

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I. GENDER AND RACE

A. The Supreme Court's decision in *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962 (May 18, 2009).

1. *Hulteen* does not explicitly address the main open questions about the application of the Lilly Ledbetter Act (see below). Instead, it goes off on issues that seem more like the renewal of old debates than current topics in employment discrimination law. But it does suggest an inclination to apply the Act narrowly.

2. The Supreme Court held that a retirement benefit plan that credits time for most disability leave but does not credit service time for pregnancy disability leaves taken prior to the adoption of the Pregnancy Discrimination Act of 1978 (PDA), which made such non-credit rules prospectively unlawful, does not discriminate on the basis of sex when currently applied to the calculation of retirement benefits.

a. Under *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Court held that use of a disability benefit plan that excluded pregnancy-related disabilities was not unlawful sex discrimination under Title VII. The PDA reversed that decision prospectively.

b. In addressing the question presented, the Court found, without dissent, that the current retirement benefit plan was an “ancillary rule” related to a seniority system which was protected by § 703(h) of Title VII, relying on the very broad definition of what constitutes a “seniority system” in *Calif. Brewers' Assn. v. Bryant*, 444 U.S. 598 (1980).

c. Under §703(h) and *Teamsters v. U.S.*, 431 U.S. 324 (1977), a seniority system does not violate Title VII and is protected unless it is “the result of an intention to discriminate.” . The Court held that AT&T's benefit plan was not the result of an intention to discriminate because when adopted and applied – before the PDA's enactment – it was not discriminatory under the law as interpreted in *Gilbert*.

d. The Court ruled this result is not affected by the Ledbetter Act, which makes unlawful “a discriminatory compensation decision . . .when an individual is affected by application of [such] decision or other practice, including each time . . . benefits or other compensation is paid,” because the pre-PDA system for crediting disability leaves was not discriminatory at the time it was in effect. The Court in passing also characterized the Act as “dealing specifically with discrimination in compensation.”

e. In strong dissent, Justice Ginsburg argued that the PDA effectively invalidated the “repetition or continuation of pregnancy-based disadvantageous treatment” of women such as the continued use of calculation rules that disadvantage pregnancy leaves. She argued that AT&T's seniority system in this regard was not “bona fide” under § 703(h) because it “was infected by an overt differential” adverse to women. Characterizing the PDA as not a change in the law but rather implementing a Congressional finding that *Gilbert* was an erroneous interpretation of Title VII, Justice

Ginsburg suggested overruling *Gilbert* explicitly “so that the decision can generate no more mischief.”

B. Future issues in application of the Lilly Ledbetter Act.

1. How does the Act affect compensation decisions that apply anew (not just carry forward) prior discriminatory compensation decisions that may not now be themselves the subject of a timely charge? *Hulteen* suggests the Supreme Court will take a narrow view of the Act’s scope.

2. What actions or decisions are covered by the “other practice” language of the Act, in addition to compensation? *Hulteen* suggests a narrow reading that would, at a minimum, exclude actions not directly related to compensation, such as hiring or promotion, which were explicitly held up as examples of actions that occur at a particular point in time in the Supreme Court’s *Ledbetter* decision. But what about other decisions that directly relate to compensation, such as a performance evaluation that results in lesser compensation?

3. What actions or decisions may be outside the scope of the Supreme Court’s *Ledbetter* decision restricting the timeliness of charges of discrimination in compensation and, by explicit illustration, certain other types of actions?

a. Hostile environment and ongoing harassment or retaliation claims are outside *Ledbetter*’s holding.

b. *Ledbetter*’s rationale does not apply to adverse impact claims, i.e. claims not requiring an action carrying out an intent to discriminate that may be considered to have been effectuated at a particular point in time.

c. *Ledbetter*’s rationale is applicable only with difficulty, if at all, to class action claims where the discriminatory action is a pattern and practice of discrimination or a practice that unjustifiably produces adverse impact against a class of persons over an extended period of time.

d. In statistical analysis of employment decisions involving a class, may the analysis be limited to the period of time during the period within 300 (or 180) days of the filing of the class representatives’ EEOC charge?

e. *Hulteen*’s focus on whether the prior actions were discriminatory and unlawful when they were committed, rather than whether or when they were actionable as discussed in *Ledbetter*, suggests that the Ledbetter Act may apply more broadly to actions unlawful when they occurred, if the charge challenging those acts can be found timely.

II. RETALIATION

In recent years, the Supreme Court has supported an expansive application of retaliation claims in various statutory settings.

A. Retaliation cause of action for federal employees under the ADEA – *Gomez v. Potter*, 128 S. Ct. 1931 (2008).

1. ADEA’s private sector discrimination provisions expressly include a prohibition on retaliation (29 U.S.C. § 623(d)). But its federal employee provisions do not (29 U.S.C. § 633a(a)).

2. Issue: Whether a private right of action for retaliation based on protected activity of asserting age discrimination claims should be implied in the ADEA’s prohibition on age discrimination in federal sector employment.

3. The Supreme Court held that the ADEA federal employee provisions prohibit retaliation for age-related protected activity. (6-3 decision by Justice Alito.)

a. The Court ruled there is no clear difference between cause of action for age discrimination and cause of action for retaliation in age-discrimination context.

b. The Court found that the Act’s express provision for a cause of action for age discrimination reflects Congressional intent to prohibit both age discrimination and retaliation for assertion of age-related protected activity, based on its interpretation of a similar private right of action provision of Title IX in *Jackson v. Birmingham Board of Ed.*, 544 U.S. 167 (2005) (recognizing cause of action for retaliation in Title IX sex-discrimination context although provision creating private right of action was explicitly available only for discrimination, not retaliation). The Court also reasoned that Congress modeled ADEA’s federal employment provisions after those of Title VII, which provides for actions based on retaliation as well as discrimination.

c. The Court rejected the Government’s argument based on sovereign immunity, holding that the enactment of ADEA’s federal employee protections constituted a Congressional waiver of sovereign immunity.

B. Retaliation cause of action under 42 U.S.C. § 1981 – *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951 (2008).

1. The text of § 1981 prohibits racial discrimination but does not expressly address retaliation.

2. Issue: Whether § 1981 should be read as prohibiting retaliation for protected activity involving racial discrimination claims.

3. The Supreme Court held that § 1981 prohibits such retaliation. (7-2 decision by Justice Breyer.)

a. The Court’s reasoning was based on the principle of *stare decisis* applied to line of decisions interpreting similar provisions of 42 U.S.C. § 1982, and the legislative intent of Civil Rights Act of 1991 relating to § 1981.

b. *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), held that § 1982 applies to private conduct. *Jackson v. Birmingham Bd. Of Ed.*, 544 U.S. 167 (2005) (finding Title IX prohibits retaliation) interpreted *Sullivan* as including retaliation claims among discriminatory practices prohibited by §1982. *Runyon v. McCrary*, 427 U.S. 160 (1976), described § 1981 and § 1982 as similar in structure and purpose, in finding that § 1981, like § 1982, reaches private conduct. Putting these precedents together, the Court held that the question presented was resolved by the logic of the prior decisions.

c. The Civil Rights Act of 1981 superseded *Patterson v. McLean Credit Union*, 491 U.S.164 (1989), which seemed to hold that § 1981 did not prohibit retaliation. The Court found a Congressional intent to reverse the *Patterson* holding on this point.

C. Application of Title VII's Opposition Clause to complaints made in course of internal investigation of other person's claim – *Crawford v. Metropolitan Gov't of Nashville etc.*, 129 S. Ct. 846 (2009).

1. Issue: Whether an employee who reports discriminatory actions that would violate Title VII (here, sexual harassment) during an employer's internal investigation of the like claim of another employee, and who is allegedly retaliated against for that report, may assert a claim of retaliation based on her own report of unlawful conduct?

2. The Supreme Court held that an employee's report of unlawful conduct in the course of an internal investigation of another employee's claim of discrimination is activity protected under Title VII's Opposition Clause (42 U.S.C. § 2000e-3(a)) because it "opposes" the unlawful conduct. Hence, the report provides a basis for the retaliation claim. The Court did not reach the additional question of whether the Participation Clause of Title VII's anti-retaliation provision would also support the claim. (9-0 decision by Justice Souter.)

3. This decision is a subject to be discussed in a later panel at this Conference. Therefore, no more detailed analysis is provided here. I note only that this decision, like the others outlined above, takes a broad approach to retaliation issues. The trend in all these decisions is to protect the right of protected group persons to be free of retaliation for the assertion of rights or claims under all of the anti-discrimination statutes, whether the statutes clearly provide for anti-retaliation remedies or not.

III. AGE DISCRIMINATION: ADEA AND OWBPA ISSUES

A. Validity of Waivers and Releases Under the OWBPA.

1. The OWBPA, 29 USC §§ 621, 623, 626, 630, "is designed to protect the rights and benefits of older workers....via a strict, unqualified statutory stricture on waivers." *Oubre v. Entergy Operations, Inc.*, 522 U.S. 422 (1998). OWBPA prohibits enforcement of any waiver of ADEA claims unless the waiver is "knowing and

voluntary.” The party asserting the waiver has the burden of showing that the waiver is “knowing and voluntary.”

2. OWBPA (§ 626(f)(1)) and implementing regulations (29 CFR § 1625.22) spell out in detail the criteria for determining whether a waiver of ADEA claims is “knowing and voluntary.” They impose minimum standards of two types: procedural and substantive.

3. Procedural requirements: To be valid the waiver must be comprehensible to the employee or the average such employee affected by the waiver; specify the rights to be waived; not waive future or prospective claims; include advice to consult an attorney; and provide for certain specified minimum periods of time for the employee to consider, accept, and/or rescind the waiver. § 626(f)(1)(A)-(G).

a. For applications of these requirements, *see Thomforde v. IBM Corporation*, 406 F.3d 500 (8th Cir. 2005), and *Syverson v. IBM Corporation*, 472 F.3d 1072 (9th Cir. 2007). Both decisions held that IBM’s standard release and waiver form, contained in the standard severance package given to thousands of employees IBM laid off in group RIFs, were confusing and ambiguous to the average (in this case, comparatively highly educated and literate) plan participant, and therefore failed the “knowing and voluntary” test of the OWBPA and was unenforceable.

4. Substantive requirements: If the waiver is part of an “exit incentive or other employment termination program offered to a group or class of employees” – as is typically the case in mass layoffs or large-scale RIFs – in order to be valid the waiver must provide the individual employees written notice, in comprehensible form, of information concerning, most importantly, the job titles and ages of all employees selected and not selected for layoffs in the work units covered by the layoff programs. § 626(f)(1)(H).

a. For applications of these requirements, *see Kruchowski v. Weyerhaeuser Co.*, 446 F.3d 1090 (10th Cir. 2006) (waiver found invalid where written notice to employees failed to define the “decisional unit” involved in the layoff properly; because notice defined the unit too broadly, employees could not determine whether the layoff had adverse impact on older employees in relevant work unit); *Adams v. Ameritech Services, Inc.*, 231 F.3d 414 (7th Cir. 2000) (holding waiver invalid where notice provided information broken down by “salary grade” rather than “job titles” thus preventing affected employees from determining whether layoffs caused adverse impact against older workers in the relevant job unit); and *Ruehl v. Viacom, Inc.*, 500 F.3d 375 (3rd Cir. 2007) (invalidating waiver where employer offered in writing to provide employees the requested information, and contended that it would have provided it on request, but did not do so since employees didn’t request it).

B. Collective Action Procedures Under the ADEA.

1. The distinction between ADEA procedures applicable to individual and class/collective actions:

a. ADEA procedures are drastically different for collective as compared to individual actions; however, issues related to the procedural requirements for individual actions also arise in connection with the definition and certification of collective actions.

b. ADEA individual actions generally follow the administrative and pre-litigation requirements of Title VII, which require that the plaintiff have filed a timely and sufficient EEOC charge and file suit with 90 days of receipt of a “right to sue” notice from the EEOC – in effect an exhaustion of administrative remedies, similar to that required by Title VII – as a prerequisite to filing suit. 29 U.S.C. § 626(d)-(e); *Freeman v. Oakland Unified School Dist.*, 291 F.3d 632 (9th Cir. 2005). The period for filing a charge – 300 days in deferral states, and 180 days in other states - runs from the date “when the employee received unequivocal notice of the adverse employment decision.” *Grayson v. K Mart Corp.*, 79 F.3d 1086 (11th Cir. 1996).

i. One difference between ADEA suit filing procedure and that of Title VII is that an ADEA plaintiff may not file suit within 60 days after filing her EEOC charge, but may do so thereafter even if the EEOC does not issue a right to sue notice. 29 U.S.C. § 626(d).

c. The ADEA does not permit true Rule 23 class actions. Instead, section 7(b) of the ADEA, 29 U.S.C. § 626(b), borrows the collective action procedures of the FLSA. Under this procedure, in an action brought by an individual employee as a representative of “one or more employees ... similarly situated” to the class representative, class members may become parties to the action by filing of a consent to join form with the court. *Hoffman-LaRoche, Inc. v. Sperling*, 493 U.S. 165 (1989). That is, ADEA collective actions are “opt in,” not “opt out,” class proceedings.

i. The ADEA’s statutory language does not provide standards for determining whether persons who opt in to a collective action are “similarly situated.” Courts have developed a majority, though not universal, approach to this determination and the procedure by which courts should make it. This procedure involves two stages, at each of which the court rules on the “certification” issue of whether a “class” exists and whether opt-in plaintiffs should be allowed to participate in the collective action.

ii. At the first stage, the court preliminarily determines, for purposes of sending an initial notice to members of the putative class, whether class members are “similarly situated” to the named plaintiff and should therefore receive notice of the action and an opportunity to opt into it as a party. This determination is typically made at an early stage of proceedings and the standard applied in a preliminary certification finding is a “lenient” one that does not require extensive proof beyond the complaint’s allegations and some supporting declarations or other evidence that a proper class exists. *Hipp v. Liberty Nat’l Life Ins. Co.*, 252 F.3d 1208 (11th Cir. 2001); *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095 (10th Cir. 2001); *Grayson*. To be found “similarly situated,” class members need not be identically situated, and need not present evidence on the merits issues. *Morgan v. Family Dollar Stores*, 551 F.3d 1233 (11th Cir. 2008) (FLSA case).

iii. The second stage determination occurs after class members have had an opportunity to opt into the action, is based on more extensive discovery, and applies a higher burden and standard of proof on the plaintiff seeking certification. Typically this determination is made on the employer's motion for decertification. *Thiessen; Morgan*.

d. In order to serve as a class representative and enable similarly situated persons to opt into an ADEA collective action, the individual plaintiff must have properly and timely filed an individual EEOC charge giving the employer notice of the class nature of the claims and specifying the discriminatory practices in regard to which the class members are similarly situated. If these criteria are met, class members may opt in without having to file their own EEOC charges. *Hipp; Mooney v. Aramco Servs.*, 54 F.3d 1207 (5th Cir., 1995); *Bean v. Crocker Nat'l Bank*, 600 F.2d 754 (9th Cir. 1979); *Whalen v. W&R Grace & Co.*, 56 F.3d 504 (3rd Cir. 1995); *Foster v. Ruhrpumpen, Inc.*, 365 F.3d 1191 (10th Cir. 2004). This procedure is analogous to the "piggybacking" or "single filing" procedure long recognized for Title VII class actions under Rule 23.

i. The single filing rule applies *only* in collective actions; it does not permit an employee "similarly situated" to an individual case plaintiff to join that plaintiff's case. *Whalen; Ruehl v. Viacom, Inc.*, 500 F.3d 375 (3rd Cir. 2007).

ii. The single filing rule may be used by putative class members to join a collective action if "the individual claims of the filing and non-filing plaintiff arise out of similarly discriminatory treatment in the same time frame." *Bost v. Federal Exp. Corp.*, 372 F.3d 1233 (11th Cir. 2004); *Grayson*. Some courts hold that the underlying charge must, to be used in this way, have alleged class-wide or at least similar issues to those of the opting-in plaintiffs. *Lusardi v. Lechner*, 855 F.2d 1062 (3rd Cir. 1988). Some courts also limit the class of persons who can "piggyback" on another's EEOC charge to those who could have filed a *timely* charge on their own claim as of the date of the other person's charge, but not all courts so limit the potential class on timeliness grounds. *See, Anderson v. Montgomery Ward*, 852 F.2d 1008 (7th Cir. 1988).

iii. The sufficiency of the class representative plaintiff's EEOC charge, which provides the basis for "piggy-backing" by similarly situated employees, is also determined pursuant to familiar Title VII standards (as modified slightly by the ADEA).

iv. Thus, certification issues in ADEA collective actions often involve application of principles from FLSA and Title VII law as well as direct application of the provisions of the ADEA itself.

C. Class Age Discrimination Claims and Standards of Proof

1. Like Title VII class actions, ADEA collective actions may be brought on either of two theories: a pattern and practice (intentional) discrimination theory, *Thiessen; Adams v. Ameritech Services Inc.*, 231 F.3d 414 (7th Cir. 2000); or an adverse impact

theory. *Smith v. City of Jackson*, 544 U.S. 228 (2005). Both claims can be made in the same case.

a. Substantive principles governing ADEA pattern and practice cases are generally drawn from, and similar to, those of Title VII. Thus, the plaintiff has the burden to show that the employer's age-discriminatory actions are "standard operating procedure" and/or reflect a general policy of discriminating against older workers. *Hipp*. Other than the rare case in which there is a facially discriminatory policy based on age (such as a maximum age limit not authorized by statute or an age-differentiated benefits plan), proof of statistical analysis of the results of the employer's practices or decisions and the employer's awareness of those results, policies and practices from which an inference of discriminatory intent can be drawn, and anecdotal evidence, may all be used. *Adams; Mooney*. To justify certification, plaintiff must show that the class members are "similarly situated" with respect to the allegedly discriminatory practices challenged as constituting a pattern and practice of discrimination.

b. Adverse impact claims in ADEA collective actions are governed by a blend of ADEA and Title VII principles.

i. The basic adverse impact model developed in Title VII case law defines the burdens and standards of proof for making out an adverse impact age discrimination claim. Statistical evidence of adverse impact is of paramount importance. *Smith v. Xerox Corp.*, 196 F.3d 358 (2nd Cir. 1999); *Lusardi v. Xerox Corp.*, 855 F.2d 1062 (3rd Cir. 1988). The plaintiff's initial burden is to show the existence of a particular employment policy or practice that has adverse impact against older workers. *Ward's Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989) (Title VII case), reiterated in *Meacham v. Knolls Atomic Power Laboratory*, 128 S. Ct. 2395 (2008).

c. However, the standards under which the employer may defend cases in which adverse impact is shown are drastically different under the ADEA compared to Title VII in ways outlined below.

i. The ADEA provides a statutory defense where the allegedly age-discriminatory decision is based on a "reasonable factor other than age" (RFOA). 29 U.S.C. § 623(f)(1). The RFOA defense has been construed as precluding liability where "the adverse impact was attributable to a nonage factor that was 'reasonable'." *Smith*. An RFOA may be seen as merely the flip side to a showing of intentional age discrimination, in an individual case, i.e., a defendant's showing of an RFOA tends to negate the inference of discriminatory intent. But the RFOA defense has separate content, and major importance, in a collective action under the pattern and practice or adverse impact theories.

ii. In *Smith*, the Supreme Court specified that an RFOA defense can defeat an adverse impact age discrimination claim, even where the plaintiff proves that a specific employment practice has adverse effect on older protected workers, and even if the practice facially differentiates based on age.

iii. In *Meacham*, the Court ruled that the RFOA defense is an affirmative defense on which the defendant employer has both the burden of going forward and the burden of persuasion. It further suggested a sliding-scale approach to evaluating the employer's RFOA showing, stating "the more plainly reasonable the employer's 'factor other than age' is, the shorter the step for that employer from producing evidence raising the defense, to persuading the factfinder that the defense is meritorious." (6-2 opinion by Justice Souter.)

iv. Although the content of the RFOA standard has not been fully explored by the courts since the Supreme Court's decision in *Smith*, the broad language of the RFOA by its terms, and the Supreme Court's permissive dicta in *Meacham*, would seem to leave employers free to argue that a broad range of economic and business reasons for non-intentionally discriminatory actions are justified. Plaintiffs may argue in response that when (as almost always is the case in mass-layoff cases that could give rise to collective actions) the employer is fully aware of the impact of its actions in advance (in mass layoff cases, due to its statutory obligation to compile the OWBPA-required information regarding the effects of the layoffs), and nevertheless proceeds without considering alternatives to meet its financial or economic goals, the actions should be deemed intentionally discriminatory and the RFOA analysis does not come into play.

v. The Supreme Court in *Smith* and *Meacham* made clear that the business necessity test, which originated in bedrock Title VII caselaw (*Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and was later codified in the Civil Rights Act of 1991's Title VII amendments at 42 U.S.C. § 2000e-2(k)(1)(A) (1991), has no place in ADEA collective actions based on disparate impact theory. Although the Court's holding was based on analysis of the caselaw background to the 1991 Act and the Act's language, structure, and legislative history in relation to that background, the decision appears to give some deference to the "age is different" theme sounded by employers in justifying denial of promotions, raises, or continued employment to older workers based on the purportedly diminished capacities that accompany the aging process.

d. Circuits are divided as to whether ADEA claims may be brought on a theory of discrimination against workers in an age subgroup whose lower limit is greater than 40, or only based on alleged discrimination against all over-40 workers (the statutory protected class).

i. The Second Circuit has held that disparate impact claims must analyze the impact a challenged practice has on the entire protected class (those over 40). *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1373 (2d Cir.1989), cert. denied, 494 U.S. 1026 (1990) (holding that in the Second Circuit under *Lowe*, plaintiffs must allege a disparate impact on the entire protected group, i.e., workers aged 40 and over, and cannot base claim on discrimination against workers over 50 years old); *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); see also *Barnes v. GenCorp, Inc.*, 896 F.2d 1457, 1467 fn. 12 (6th Cir.), cert. denied, 498 U.S. 878 (1990) (holding that plaintiff has disparate treatment claim if employer gives preference to a younger employee who is within the protected class of persons age 40 and over, but that

subgroup analysis “may not” apply to discriminatory impact cases.) The court in *E.E.O.C. v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999), based its similar holding on a number of perceived policy rationales.

ii. The Ninth Circuit took a contrary position in *Rose v. Wells Fargo & Co.*, 902 F.2d 1417, 1425 (9th Cir. 1990) (permitting disparate impact claim by plaintiffs claiming that a corporate reorganization resulted in a discharge rate for employees age 50 and over that was higher than for younger employees). A number of district court decisions have also rejected or questioned the Second Circuit’s holding in *Lowe*, or have considered plaintiffs’ disparate impact claims among subgroups, even though they did not actually rule on the issue of whether a valid claim can be based on data concerning just a subgroup of those within the protected age groups, and the EEOC has stated its disagreement with the holding in *McDonnell Douglas Corp.* in the EEOC Compliance Manual § 2-II.A.3. fn. 30.

iii. This issue may play out both in the proof of substantive allegations generally, and in statistical analysis of the results of the disputed policies or practices. While it is logical, and consistent in the increasing longevity of the workforce and changing societal views of what constitutes an “older” age since the enactment of the ADEA, to permit claims against protected groups of workers in an over-50, over-55, or over-60 subgroup, the question of how such subgroup analysis applies to the proof requirements of the ADEA is open for debate in many class cases.

D. Class/collective actions based on violations of OWBPA.

1. Can an ADEA plaintiff state a cause of action on a collective action basis for denial of rights secured by the OWBPA (as distinct from a substantive age discrimination claim under the ADEA)? The courts are divided, with the majority view in the negative.

2. Courts that find no independent cause of action exists for OWBPA rely on the plain language of the OWBPA, which does not by terms create any right to affirmative relief under the ADEA but only addresses requirements for valid waivers of ADEA rights. *See, Whitehead v. Oklahoma Gas & Electric Co.*, 187 F.3d 1184 (10th Cir. 1999). Some district court decisions, such as *Commonwealth of Massachusetts v. Bull HN Info. Sys., Inc.*, 16 F.Supp. 2d 90 (D. Mass. 1998), and *Krane v. Capital One Services, Inc.*, 314 F.Supp. 2d 589 (E.D. Va. 2004), have held that OWBPA does create an independent cause of action for injunctive and declaratory relief, but not for monetary relief in the absence of other damages caused by ADEA violations.

3. While this question might in theory arise in individual ADEA actions, it is of most consequence in class/collective actions, since if such an affirmative right of action is recognized, that would provide common questions as to which class members are similarly situated, and a common claim for class-wide injunctive relief, which could support the argument in favor of certification.

E. Damages under the ADEA.

4. General principles

a. ADEA remedies are based, like ADEA procedures, on a combination of those established by Title VII and the FLSA. The overarching principle animating the remedies and guiding their application is that victims of unlawful age discrimination should be made whole – that is, restored to the position (financial and otherwise) that they would have occupied but for the discrimination. *Rodriguez v. Taylor*, 569 F. 2d 1231 (3rd Cir. 1977); *Abrahamson v. Board of Education*, 374 F.3d 66 (2nd Cir. 2004). Both legal and equitable relief are available. 29 U.S.C. §§ 626(b),(c)(1). The remedies available for employees of the federal government and state/local government workers are more limited than those available to private sector, and enforcement procedures differ as well for government workers. This section focuses briefly, as a basis for the discussion of recent case developments, on remedies available to private sector employees.

i. With regard to federal government employees, although the enactment of the ADEA is held to be a waiver of sovereign immunity by the United States, and therefore monetary relief is available to federal government employees.

ii. The Eleventh Amendment issues raised by claims for monetary relief by state government employees under the ADEA are complex. While the states themselves are immune from claims by individuals for damages under the ADEA (but not the federal government acting on their behalf), under *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), the question arises, in suits against other public entities that are formed by or subordinate to state governments whether they are an “arm of the state” for purposes of immunity from damages. *Williams v. Dallas Area Rapid Transit*, 242 F.3rd 315 (5th Cir. 2001).

b. The basic ADEA remedies are declaratory and injunctive relief to terminate and remove the consequences of discriminatory practices; reinstatement to positions lost due to discrimination; back pay and front pay; fringe benefits, and liquidated damages in the case of a “willful” violation.

c. Back pay:

i. Under *Lorillard v. Pons*, 434 U.S. 575 (1978) and the 1978 Amendments to the ADEA, 29 U.S.C. § 626(c)(2), claims for both legal and equitable relief are to be decided by a jury.

ii. The numerous disputed issues about when back pay begins to accrue and stops accruing, how it may be limited by questions of mitigation, and how it is to be calculated are beyond the scope of this paper.

d. Reinstatement and front pay: Where the preferred remedy of reinstatement is not feasible, front pay may be awarded as an alternative. *Pollard v. E.I.*

DuPont de Nemours & Co., 532 U.S. 843 (2001) (Title VII case); *Duke v. Uniroyal, Inc.*, 928 F.2d 1413 (4th Cir. 1991).

e. Liquidated damages: 29 U.S.C. § 626(b) authorizes an award of doubled liquidated damages “only in cases of willful violations” of the ADEA. The award of liquidated damages is for the jury to make. Numerous questions regarding the meaning of the “willful violation” requirement and the relevance of an employer’s “good faith” are outside the scope of this paper.

f. Neither compensatory damages nor punitive damages are available under the ADEA. These limitations also applied to Title VII prior the amendments enacted as the Civil Rights Act of 1991, which provided for such damages subject to caps; however, the 1991 Amendments were held not to extend to the ADEA by the Supreme Court in *Smith v. City of Jackson*.

IV. COMMENT ON WARN ACT CASES.

A. The Worker Adjustment and Retraining Notification Act (WARN Act), 29 U.S.C. §§ 2101, *et seq.*, requires that covered employers must provide 60 days’ notice before carrying out certain mass layoff or plant shutdowns, with certain exceptions. Although the Conference agenda does not include WARN Act issues, since such layoffs and resulting litigation are likely to be common in the current economic conditions, and the WARN Act may provide alternative remedies for laid-off workers who cannot effectively bring age or other discrimination claims, this paper below briefly identifies several key legal issues that arise under in WARN Act litigation. This list of issues is based on a brief, non-comprehensive search of federal appellate decisions in the last three years.

1. The WARN Act has been interpreted in detailed regulations promulgated by the U.S. Department of Labor at 20 C.F.R. Part 639. Courts give *Chevron* deference to these regulations unless on the particular point at issue they are found “arbitrary, capricious, or contrary to the statute.” *Meson v. GATX Technology Services Corp.*, 507 F.3d 803 (4th Cir. 2007).

B. WARN Act requirements apply to plant closures or mass layoffs that affect at least 33% of the workers at a “single site of employment” and a minimum of 50 employees in a 30 day period. 29 U.S.C. § 2101(a)(3).

1. Where two or more layoffs occur at a single site of employment within a 90 day period, the number of employees affected by the layoffs may be aggregated to meet the 33% and 50-worker minimums, unless the employer shows the various layoffs were “the result of separate and distinct actions and courses” and not ruses. 29 U.S.C. § 2102(d).

a. This exception, and the exceptions to it, are discussed in *Allen v. Sybase, Inc.*, 468 F.3d 642 (10th Cir. 2006).

C. What employers are subject to WARN Act requirements?

1. Covered employers are those that employ at least 100 full-time employees at a single site of employment.

a. Issues arise as to what constitutes such a “single site,” where the plaintiff or other employees work in more than one location or largely while traveling, or where the employer maintains multiple facilities in proximity to each other and/or with interlocking functions and operations. *See* 20 C.F.R. § 636.3(i); *Brewer v. American Power Source, Inc.*, 291 Fed.Appx. 656 (5th Cir. 2008) (not published) (plaintiffs presented insufficient evidence to avoid summary judgment on question of whether plants in two different Mississippi locations did not constitute a “single site” although they performed the same functions and shared some employees); *Meson* (traveling outside salesperson did not work at “single site of employment” where mass layoff occurred although she reported to supervisor who worked at that facility). Issues may also arise as to the determination of whether the requisite number of employees work “full time”.

b. The regulations define an employer as a covered “business enterprise.”

i. Two or more “affiliated” companies may, in certain circumstances, be considered a single “business enterprise.” The regulations set out a five-factor test to determine whether the entities are a “single employer” for WARN Act purposes. *See* C.F.R. § 639.3(a)(2), *In re APA Transport Corp. Litig.* 541 F.3d 233 (3rd Cir. 2008) (discussing application of the five factor “balancing test” as a “fact-intensive analysis” and the weight and application of the five factors).

ii. A Court has held that an individual who employees the requisite number of workers can be liable as a “business enterprise.” *Plasticsource Workers Committee v. Coburn*, 283 Fed.Appx. 181 (5th Cir. 2008) (not published).

c. Where the employer lays off the employees on the order of the government (i.e., TSA employees ordered to replace employees of a private contractor at airport security station), no WARN Act violation occurs as the “employer” did not cause the layoffs. *Deveraturda v. Globe Aviation Security Svcs.*, 454 F.3d 1043 (9th Cir. 2006).

2. What is required of covered employers?

a. Covered employers must give affected workers 60 days’ written notice before layoffs covered by the WARN Act. 29 U.S.C. § 2102(a).

b. However, when the employer pays affected workers 60 days’ pay from the time the shutdown or layoff is announced or carried out, the workers’ employment is not technically terminated (i.e., an “employment loss” has not occurred) until the expiration of the 60 days’ paid period, and therefore no WARN Act violation occurs. *Long v. Dunlop Sports Group*, 506 F.3d 299 (4th Cir. 2007). In *Long*, the court held that the employer did not violate the WARN Act when it stopped payments during

the 60 day period to those workers who began other paid employment during that same period, since their taking other jobs, not an “employment loss,” terminated their employment with Dunlop.

3. There are three statutory exceptions to the obligation of employers to provide the required notice: the “faltering business” exception; the “unforeseeable business circumstances” exception; and the “natural disaster” exception. 29 U.S.C. § 2102(b).

a. Each of these exceptions is an affirmative defense, on which the employer bears the burden of going forward and persuasion. 20 C.F.R. 639.9; *APA Transport*.

b. The “faltering company” exception is narrowly construed, and requires the employer to show that it was actively seeking capital which it had a realistic and good faith belief would be available and which it would have been prevented from obtaining if it had issued the 60 day notice. 29 U.S.C. § 2101(b)(1); 20 C.F.R. § 639.9(a); *APA Transport*.

c. The “unforeseeable business circumstances” and “natural disaster” exceptions are also spelled out in statutory and regulatory provisions. 29 U.S.C. § 2101(b)(2); 20 C.F.R. § 639.9(b); *see Allen v. Sybase* (effect of 9/11 bombings on business located in Utah not sufficiently shown to be “unforeseeable business circumstance”).

d. An employer that invokes these exceptions is required to provide as much notice as possible and an explanatory statement. 29 U.S.C. § 2101(b)(3).

4. WARN Act rights may be waived.

a. An enforceable general release will bar WARN Act claims. *Hardy v. Chicago Housing Authority*, 189 Fed.Appx. 510 (7th Cir. 2006). There are no restrictions similar to those of the OWBPA applicable to waiver of WARN Act rights.

b. An individual’s WARN Act claims may be waived or barred by an agreement entered into by an employee’s authorized collective bargaining representative, even if the employee group by the union is no longer employed and even if the suing employee is a former not present member of the union who lacks actual knowledge of the waiver, *McMillan v. LTV Steel, Inc.*, 555 F.3d 218 (6th Cir. 2009); *Hardy*.