VEDDER PRICE

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Labor and employment law trends
of interest to our clients and other friends.

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Editor's Note

We are adding two columns to our newsletter. **NY/NJ** will discuss labor and employment law developments affecting clients and other friends of our offices in New York and New Jersey. In this issue we report on two recent state court decisions; one voids a controversial law that required New York City contractors to provide dependent benefits to the domestic partners of their employees, and the other extends to certain contract workers the protection given to regular employees under New Jersey's whistleblower statute. The second new column, **Q & A**, will answer a question that we think is of general interest to our readers. Our lead-off answer discusses what an employer may tell an employee who asks how to decertify a union. We intend to make both columns a regular feature.

Developing Law on English-Only Policies

Background

EEOC regulations prohibit blanket restrictions on the use of languages in the workplace, and the agency has targeted employers who impose broad English-only policies. However, a narrowly drawn policy that requires English to be spoken at certain times and/or in certain areas is permissible if the employer can establish a business necessity for the policy.

What qualifies as a business necessity is often critical to the outcome of litigation over English-only policies. The handful of federal courts that have considered the issue have looked at such factors as safety, workplace harmony, customer relations and productivity. The EEOC tends to take a narrow view of what constitutes a business necessity, and the Seventh Circuit Court of Appeals has yet to rule on the matter. The Illinois Human Rights Act allows employers to impose English-only restrictions on conversations that involve work-related matters, or that take place while work is being performed.

Recent Court Decision

In *Maldonado et al. v. City of Altus, Oklahoma*, No. 04-6062 (10th Cir. Jan. 11, 2006), the Tenth Circuit Court of Appeals considered a policy requiring that English be spoken in all work-related communications except personal conversations during lunch or rest breaks.

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According to the City, the policy grew out of complaints from Street Department workers who could not understand what was being said in Spanish over the City's radio units, and who were concerned that Hispanic employees might be talking about them. The City also raised safety concerns about the use of a noncommon language during the operation of heavy equipment.

Although it found no evidence of safety or morale problems, the lower court nevertheless granted summary judgment to the City. The Court of Appeals reversed, however, finding that evidence of a legitimate business necessity was too scant to justify summary judgment. The court noted claims that the policy had been applied to private phone conversations, lunch hours and breaks.[*]

An employer considering an English-only policy should be prepared to document the business reasons for the policy . . . and identify when and where the restrictions apply.

Writing a Defensible Policy

An employer considering an English-only policy should be prepared to document the business reasons for the policy. While the preservation of workplace harmony may suffice in certain circumstances, it will face the stiffest challenge. Safety considerations and customer service needs are likely to carry more weight. However, business justification is just the reason for the policy. To pass muster, the policy itself should clearly identify when and where the restrictions apply. Blanket restrictions should be avoided. On the other hand, a policy that is too vague will enable affected employees to claim that they are being prohibited from speaking their native tongue on breaks, or in private conversations with coworkers.

Vedder Price has handled English-only claims in federal court and before the EEOC. If you have questions about English-only policies, or about national origin and/or race discrimination claims in general, please call Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

"White Collars" Do Not Guarantee Exempt Status

Over the past nine months, Merrill Lynch, Morgan Stanley and UBS have settled Fair Labor Standards Act and state law overtime lawsuits for a combined total of more than $160 million. Plaintiffs in the lawsuits claimed that the companies' stock brokers and financial advisors were incorrectly classified as exempt "white collar" employees and thus were due overtime pay. Copycat suits have been filed against other brokerage companies, including A.G. Edwards, Wachovia, Prudential, J.P. Morgan Chase and Bear Stearns. Given the success plaintiffs' attorneys are having with these cases, more lawsuits can be expected.

The FLSA requires employers to pay employees overtime for all hours worked in excess of forty in a week, unless the employee falls within the executive, administrative, professional, outside sales or computer employees exemption. These are generally called "white collar" exemptions. The administrative exemption is most commonly applied and is the most frequently litigated. Under the U.S. Department of Labor's regulations (issued August 23, 2004), an employee qualifies for the administrative exemption if:

(1) the employee is paid on a salary basis at a rate not less than $455 a week;

[*] Establishing a business necessity can even be a problem for an employer seeking to encourage *non*-English communications. A Kentucky coal mine recently was turned down by a state mining board when it sought permission to hire non-English-speaking Hispanic coal miners. The coal mine wanted approval to bypass a state law that all miners be able to speak and read English. To no avail, the mine president argued that the pool of English-speaking miners was shrinking because the work is dangerous and many young applicants fail mandatory drug tests. The United Mineworkers characterized the coal mine's request as an effort to keep the union out.

(2) the employee's primary duty is the performance of office or nonmanual work directly related to the management or general business operations of the employer or the employer's customers; and

(3) the employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Despite the settlements, the brokerage firms maintain that their stockbrokers and financial advisors fall within the administrative exemption. The plaintiffs' attorneys contend that the brokers and advisors are essentially internal salespersons (who are nonexempt under DOL regulations) and do not exercise the requisite discretion. Whether the administrative exemption actually applies to stockbrokers and financial advisors will be determined only if the remaining or future cases go to trial or are decided by summary judgment.

. . . financial services employers should shun antiquated industry norms and avoid the temptation to classify employees as administratively exempt simply because they perform what is perceived to be sophisticated "office work."

Mortgage companies and banks also are vulnerable to these types of lawsuits. In *Casas v. Conseco Finance Corp.*, No. CIV 00-1512, 2002 WL 507059 (D. Minn. Mar. 31, 2002), a federal judge determined that loan originators were not exempt under the FLSA because their "primary duty was to sell lending products on a day-to-day basis" directly to consumers. They called potential customers from a list provided by their employer and obtained the financial information needed to process the applications; ran credit reports on the applicants; forwarded the applications to underwriters; and tried to match the customer's needs with one or more of Conseco's products. The court concluded that this was ordinary "production" work of Conseco, which is in the business of designing, creating and selling home lending products. The court also found that the plaintiffs did not exercise discretion or independent judgment because they followed strict guidelines and operating procedures, and could not approve loans.

Given the serious threat these overtime cases pose, financial services employers should shun antiquated industry norms and avoid the temptation to classify employees as administratively exempt simply because they perform what is perceived to be sophisticated "office work." An audit of pay practices by counsel is a cost-efficient way for employers to ensure that their employees are correctly classified under the FLSA, and to minimize liability in this area.

Vedder Price is highly experienced in auditing employer wage and hour practices and defending against FLSA collective actions and related state class actions, having successfully challenged both at all stages of litigation. If you have any questions about the FLSA or state wage and hour laws, have received notice that an employee is suing under the FLSA or state law, or have questions about class actions in general, please call Joe Mulherin (312/609-7725), Dick Schnadig (312/609-7810), Mike Cleveland (312/609-7860), or any other Vedder Price attorney with whom you have worked.

Cost Provisions May Jeopardize the Enforceability of Agreements to Arbitrate Employment Disputes

It is established law that an agreement between employer and employee to arbitrate employment disputes, including discrimination claims, is enforceable and precludes state or federal court litigation of such disputes. However, the courts are still wrestling with the issue of whether

provisions for sharing or shifting the costs of arbitration can invalidate an arbitration agreement because they may saddle the plaintiff employee with prohibitive expenses. Unfortunately, decisions on the matter are less than clear-cut. The U.S. Supreme Court has held that an agreement silent on the subject of costs is enforceable unless the party seeking to invalidate the agreement can show that arbitration would be prohibitively expensive.

In 2002, the Seventh Circuit Court of Appeals reviewed a case where the employee, as a condition of continued employment, had agreed to arbitrate his employment disputes, and that each party would bear his own legal fees and costs in any ensuing arbitration, regardless of the outcome. *McCaskill v. Management Corp.*, 298 F.3d 677. The key issue was whether the plaintiff's waiver of his right to recover his attorneys' fees, if he won, made the agreement unenforceable, and therefore allowed him to sue his employer in court for employment discrimination. The court held 2–1 that the arbitration agreement was unenforceable, but did so in divergent opinions, making the decision unhelpful to employers seeking direction on how to write their arbitration agreements.

Recently, a federal district court in Chicago tackled the issue in *Gillispie v. Village of Franklin Park*, 405 F. Supp. 2d 904 (N.D. Ill. 2005). Gillispie and his employer, the Village of Franklin Park, had settled a lawsuit in which Gillispie had complained of discrimination and racial harassment. The settlement agreement provided that all future claims related to his employment would be subject to arbitration governed by the rules of the American Arbitration Association, and that the prevailing party would receive his costs *exclusive of attorneys' fees*.

Gillispie then sued the Village again, this time alleging a hostile work environment and retaliation in violation of federal law. He argued that the arbitration clause in the settlement agreement was unenforceable because it did not allow him to recover attorneys' fees that would be available if he brought a claim and prevailed in court.

After analyzing the *McCaskill* decision and the cost provision in Gillispie's agreement, the court found that the agreement was enforceable. Unlike the agreement in *McCaskill*, Gillispie's agreement provided that any arbitration would be governed by the rules of the American Arbitration Association. The AAA rules provide that an arbitrator may grant any equitable relief, including remedies available in court, such as an award of attorneys' fees. The court therefore construed the agreement to mean that the costs of arbitration, exclusive of legal fees, would be borne by the loser, while an award of legal fees could be granted at the arbitrator's discretion. The court ordered Gillispie to proceed to arbitration if he wished to pursue his claims.

It is still unclear under what circumstances the Seventh Circuit would uphold or invalidate an agreement to arbitrate workplace disputes that bars an award of attorneys' fees. Consequently, employers should exercise care in drafting the cost provisions of such agreements.

If you have any questions about this subject or would like to have an arbitration agreement prepared or reviewed by counsel, please call Bruce Alper (312/609-7890), Elizabeth Noonan (312/609-7795) or any other Vedder Price attorney with whom you have worked.

NY/NJ

NY Court Voids City Law Requiring Contractors to Provide Domestic Partner Benefits

On February 14, 2006, the New York Court of Appeals held, in a 4–3 decision, that the New York City Equal Benefits Law, which prohibited city agencies from entering into contracts with firms that do not provide dependent benefits to employees' domestic partners, is preempted by both state and federal law. The decision ends a legal dispute between Mayor Bloomberg and the New York City Council over the law, which had been enacted by the Council over the Mayor's veto in 2004.

In its opinion, *In re Council of the City of New York v. Bloomberg*, the Court of Appeals held that the Equal Benefits Law impermissibly conflicts with the competitive bidding structure for municipal contracts mandated by New York State General Municipal

Law section 103. That law requires municipalities to award certain contracts to the "lowest responsible bidder." The court held that the Equal Benefits Law violated this requirement by excluding from public contracting any responsible bidder that does not provide equal benefits to domestic partners and spouses. The court also held that, to the extent the Equal Benefits Law related to self-insured employee benefits plans, it was preempted by the Federal Employee Retirement Income Security Act (ERISA), which expressly supersedes all state laws that relate to plans of that type.

Though the Equal Benefits Law has been invalidated by the Court of Appeals' decision, domestic partnership status remains protected under the New York City Human Rights Law, which, among other things, prohibits discrimination in employment.

If you have any questions about the decision or the New York City Human Rights law in general, please contact Dan Hollman (212/407-7764), Justin Patrick (212/407-7734) or any Vedder Price attorney with whom you have worked.

NJ Court Extends Whistleblower Protection to Certain Contract Workers

The Appellate Division of the Superior Court of New Jersey has held that contract workers may be entitled to the protection afforded regular employees under New Jersey's whistleblower statute—the Conscientious Employee Protection Act ("CEPA"). *D'Annunzio v. Prudential Ins. Co*., N.J. Super. Ct. App. Div., Docket No. A-2544-04T1 (Feb. 23, 2006).

The court's holding is based on CEPA's social goal of encouraging employees to disclose the unlawful activities of employers or coworkers, and on the Act's definition of "employee," which is broader than the definition found in New Jersey common law or other statutes. CEPA defines an employee as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration." N.J.S.A. 34:19-2(b). The court noted that the definition does not exclude independent contractors, as it does in other legislation.

The court ruled that the control-and-direction test should be liberally applied in deciding whether an individual is an employee under CEPA. Plaintiff D'Annunzio had alleged that Prudential controlled all aspects of his job. He had to work in a cubicle on the employer's premises, and had been given specialized training on the employer's systems and policies. His hours were dictated and he had received disciplinary counseling. The court found this sufficient to deny Prudential's motion for summary judgment.

Employers increasingly are adding contract employees to the workforce. A New Jersey employer who controls and directs such workers should anticipate that they now have the protection of CEPA.

If you have any questions about these matters, please call Charles Caranicas (212/407-7712) or any other Vedder Price attorney with whom you have worked.

Employees Who Delete Computer Data without Authorization Risk Prosecution under the Computer Fraud and Abuse Act

The U.S. Court of Appeals for the Seventh Circuit has ruled that employers may pursue charges under the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030 et seq. ("CFAA"), against employees who permanently delete information from company-provided computers without authorization.

In *International Airport Centers, L.L.C. v. Citrin*, Case No. 05-1522, 2006 U.S. App. LEXIS 5772 (Mar. 8, 2006), the company lent Citrin a laptop computer for business use. In breach of his employment contract, Citrin resigned to form a competing business. Before returning the laptop, however, Citrin used a "secure eraser" program to permanently scrub files containing information that was company property, and that would have revealed improper conduct on Citrin's part prior to his resignation.

The company sued Citrin alleging that he had violated the CFAA, which, in pertinent part, provides that whoever

"knowingly causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer" violates the Act. 18 U.S.C. § 1030(a)(5)(A)(i). Citrin argued that erasing a file from a computer is not a "transmission." The court disagreed.

The court acknowledged that "transmission" probably meant something more than merely pressing a delete or erase key, even though that would transmit a command to the computer. However, Citrin had caused damage to the computer (impairing the availability of data) to be transmitted electronically by his use of a secure-erasure program that he had either downloaded from the Internet or inserted into the computer's disk drive. The court noted that, in enacting the CFAA, Congress was concerned not only with outsider virus attacks but with insider attacks "by disgruntled programmers who decide to trash the employer's data system on the way out or threaten to do so to extort payments."

An employer who suffers damage or loss due to an employee's violation of the CFAA may maintain a civil action against the employee to obtain compensatory damages and injunctive relief.

The court further found that by deleting files after he had decided to quit in order to hide evidence of his prior misconduct, Citrin had also violated the CFAA's prohibition against intentionally accessing a protected computer without authorization and recklessly causing damage. The court dismissed Citrin's argument that his employment contract authorized him to "return or destroy" data in the laptop when his employment ended, stating that "it is unlikely, to say the least, that the [contract] provision was intended to authorize him to destroy data that he knew the company had no duplicates of and would have wanted to have."

An employer who suffers damage or loss due to an employee's violation of the CFAA may maintain a civil action against the employee to obtain compensatory damages and injunctive relief. The CFAA also provides for criminal penalties. If you have any questions about the CFAA, please call Bruce R. Alper (312/609-7890), Jenny Friedman Koerth (312/609-7786), or any other Vedder Price attorney with whom you have worked.

HIPAA Compliance Reminders

Privacy Notice Reminder

The HIPAA Privacy Rule requires employers who sponsor a group health plan to notify plan participants at least once every three years of the availability of the plan's Notice of Privacy Practices ("Privacy Notice") and of how to obtain a copy of the Privacy Notice.

An employer who sponsors a *large* group health plan (annual gross receipts of at least $5 million) must remind participants of the availability of the plan's Privacy Notice by April 14, 2006. The Department of Health and Human Services advises that this requirement can be satisfied by (1) resending to participants a copy of the original or updated Privacy Notice, (2) mailing to participants a reminder that the Privacy Notice is available and information on how to obtain a copy, or (3) including a reminder in a plan newsletter.

An employer who sponsors a *small* group health plan (annual gross receipts of less than $5 million) does not have to comply with the reminder requirement until April 14, 2007. To satisfy this requirement, sponsors of small group health plans should consider including the reminder in their 2006 open enrollment materials.

Please note that if a group health plan, large or small, is fully insured and the employer sponsor receives no protected health information, the insurer and not the employer sponsor is responsible for providing participants a reminder of the Privacy Notice.

Security Reminder

Employers who sponsor small group health plans must comply with the HIPAA Security Rule by April 20, 2006. For more information regarding such compliance, please refer to our April 21, 2005 Employee Benefits Briefing (www.vedderprice.com/employee-benefits-briefing/).

If you have any questions about or need assistance complying with the HIPAA Privacy Rule or Security Rule, contact Phil Mowery (312/609-7642), Chris Collins (312/609-7706) or any other member of the Vedder Price employee benefits group.

Q & A

Our workforce is represented by a union, but many employees are dissatisfied. One employee has asked for information about filing a decertification petition. What can we tell him and how much assistance can we provide?

Although it is unlawful for an employer to initiate a decertification petition, you may provide minimal assistance, and this includes passing on information. Here is a sampling of what the National Labor Relations Board has said on the subject:

> It is unlawful for an employer to initiate a decertification petition, solicit signatures for the petition, or lend more than minimal support and approval to the securing of signatures and the filing of the petition. In addition, while an employer does not violate the Act by rendering what has been termed "ministerial aid," its actions must occur in a situational context free of coercive conduct. *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985).

> An employer's actions are permissible if limited to aiding the employees in the exercise of their predetermined efforts. *Poly Ultra Plastics*, 231 NLRB 787, 790 (1977).

> The essential inquiry is whether the preparation, circulation, and signing of the petition constitutes the free and uncoerced act of the employees concerned. *KONO-TV-Mission Telecasting*, 163 NLRB 1005, 1006 (1967).

With these and other Board cases in mind, we offer the following guidance.

You may . . .

You may tell the employee that decertification requires a majority vote of the bargaining unit in an election conducted by the National Labor Relations Board, and that he may file a petition with the Board for such an election. You may advise the employee that a decertification petition must be supported by the signatures of at least 30 percent of the employees in the bargaining unit, and you may provide an estimate of the minimum number of signatures needed.

The Board has a contract-bar rule that allows the filing of a decertification petition only during a 30-day "open period." Thus, you may (and should) caution the employee that when a labor contract of up to three years' duration is in effect, the petition will not be processed by the Board unless it is filed between 90 and 60 days before the contract's termination date. (The open period for health care institutions is 120 to 90 days before termination.) The petition also may be filed after the contract's termination date (unless a new contract is in effect) or after the contract's third year if the contract is for more than three years.

. . . you may encourage decertification through separate company communications, as long as you don't threaten reprisals if the union is retained, or promise benefits for voting the union out.

You may also give the employee the telephone number and address of the Board's Regional Office where the petition is to be filed, and you may (and should) encourage the employee to call that office for more information on how to file the petition.

You may not . . .

You may not assist the employee in obtaining signatures to support the petition, or waive compliance (or ignore noncompliance) with your no-solicitation/no-distribution policy. Nor may you question eligible voters about whether they support decertification.

If an election is scheduled by the Board, you may not generate or underwrite the cost of campaign literature or paraphernalia for use by employees spearheading the decertification effort. However, you may encourage decertification through separate company communciations, as long as you don't threaten reprisals if the union is retained, or promise benefits for voting the union out.

A timely filed decertification petition may coincide with the start of negotiations over a new contract. As a general rule, the mere filing of the petition will not affect your obligation to bargain. However, agreement on a new contract prior to a scheduled election will be nullified if the election results in decertification.

Board law applicable to decertification petitions and elections can be complex. If you have any questions or would like more advice on these matters, please call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

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About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national full-service law firm with approximately 225 attorneys in Chicago, New York and Roseland, New Jersey. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, and health care, trade and professional association, and not-for-profit law.

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