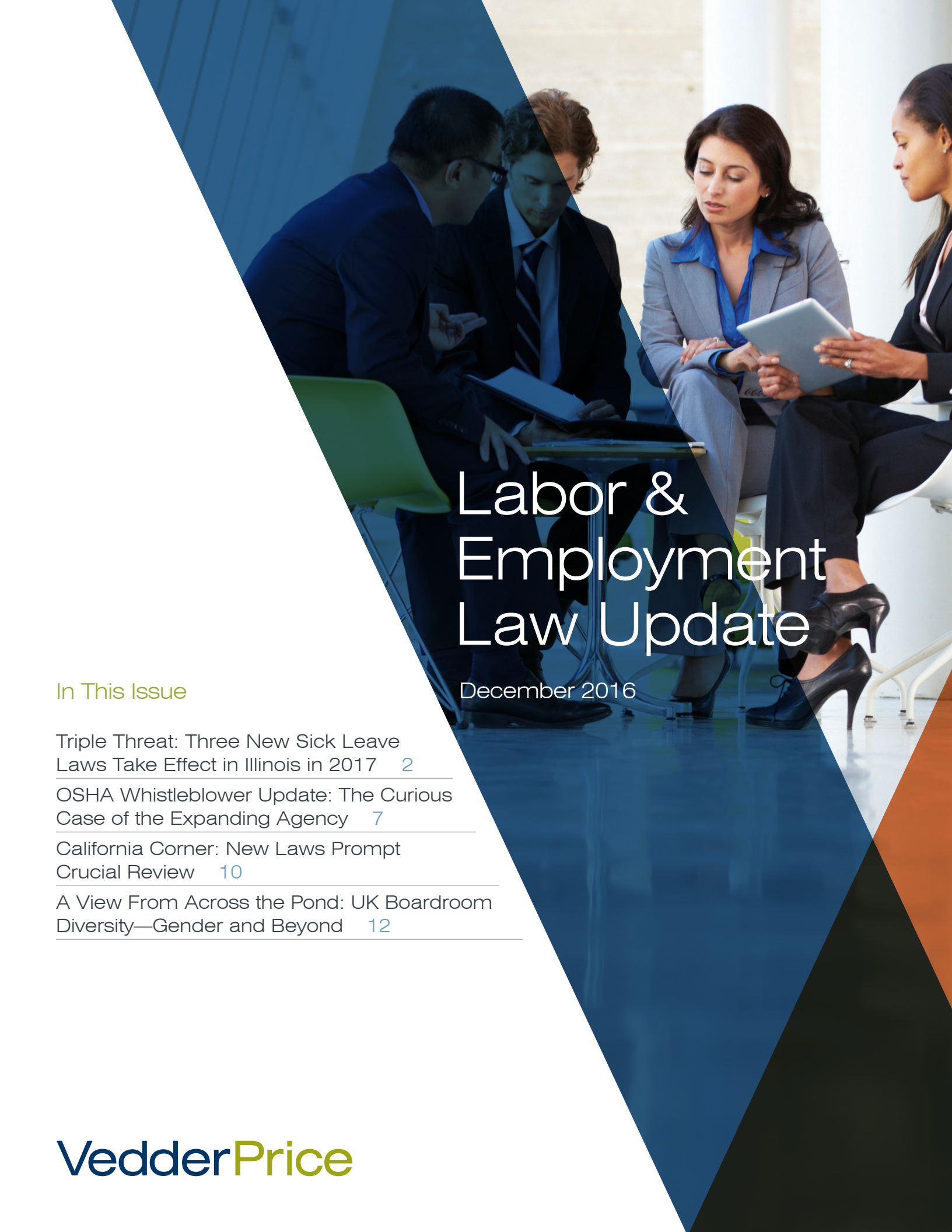

Labor & Employment Law Update

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In This Issue

VedderPrice

Triple Threat: Three New Sick Leave Laws Take Effect in Illinois in 2017

Chicagoland employers are bracing for a recurring bout of compliance-related headaches as three new laws—the Chicago Paid Sick Leave Ordinance, the Cook County Earned Paid Sick Leave Ordinance and the Illinois Employee Sick Leave Act—go into effect in 2017. These laws create considerable uncertainty given the extent of their coverage, eligibility criteria and the various requirements they impose. Regardless of whether or not an employer operates in Chicago, Cook County or elsewhere in the State of Illinois, now is the time to take stock of each new law to determine whether it applies to your organization and what obligations it imposes.

Chicago Paid Sick Leave Ordinance

Regardless of whether or not an employer operates in Chicago, Cook County or elsewhere in the State of Illinois, now is the time to take stock of each new law to determine whether it applies to your organization and what obligations it imposes.

The Chicago Paid Sick Leave Ordinance (SLO) takes effect on July 1, 2017. It amends the existing Minimum Wage Ordinance to mandate Chicago employers provide the following:

- 40 hours of paid sick leave for every 12-month period of employment.
- A carryover of 20 unused paid sick leave hours to the following 12-month period.
- An additional carryover of 40 hours to be used for FMLA qualifying purposes.

Covered Employers: Employers are covered by the SLO if: (1) they maintain a business facility within the geographic boundaries of the City of Chicago or are subject to at least one of Chicago's licensing requirements and (2) have at least one covered employee. A covered employee is an employee that works at least two hours during any two-week period within the City of Chicago. This includes employees that may travel for deliveries or sales calls, but it does not include uncompensated time spent driving through the city.

Eligible Employees: Employees are eligible for paid sick leave once they have worked 80 hours within a 120-day period. Employers do not have to permit an employee to use paid sick leave until the employee has been employed for 180 days.

Grounds for Leave: Employees may use sick time for an employee's own illness or injury or to receive medical care, treatment, diagnosis or preventative medical care. Additionally, the paid sick leave may be used for the same purposes for a

member of an employee's family. The SLO further provides that paid sick leave may be used when the employee or an employee's family member is a victim of domestic violence or sexual abuse, or when a business is closed due to a public health emergency. "Family" is defined broadly and includes any individual related by blood or whose close association with the employee is the equivalent of a family relationship, such as foster parents and step-relationships.

Certification: If an employee takes more than three days of paid sick leave, the employer may require a physician's certification confirming that the leave was permitted under the SLO. An employer may not require that the documentation specify the nature of the illness, injury or condition for which the employee used the leave, whether his or her own condition, or the condition of a family member. Employers may not delay payment while awaiting certification. For victims of domestic or sexual abuse, a variety of forms can certify, but no more than one form may be requested.

Effect on Existing Policies and Agreements: The law applies to salaried and hourly employees. Special rules apply to union employees subject to a collective bargaining agreement. Employees taking leave covered by the SLO may not be disciplined for that time, even under a no-fault attendance policy.

Accrual must be calculated in one-hour increments—fractional accrual is not allowed. Notably, employers are not required to pay for unused paid sick leave upon termination.

Notice Requirements: Employees must provide at least seven days' notice when the employees know that they will be utilizing paid sick leave. When use of such time is not reasonably foreseeable, an employee must notify the employer as soon as practicable. E-mail, text and phone calls are specifically permissible for notification.

Potential Damages: The SLO creates a private right of action. Damages are three times the full amount of unpaid sick time denied or lost by reason of the violation, the interest on that amount, and costs and reasonable attorneys' fees. There are also employee notice requirements, including a posting and a notice to be distributed with the first paycheck following the SLO's effective date or an employee's first paycheck if hired after that date. The City's Commissioner of Business Affairs and Consumer Protection will prepare both the posting and the notice to be distributed with paychecks.

Takeaways: Employers should be familiar with the steps that they need to take to prepare for the SLO, including:

- Evaluating whether they meet the definition of a covered employer.
- Assessing whether existing leave policies are compliant with the SLO as of July 1, 2017.
- Developing a system to track paid sick leave accrual and usage.
- Posting and distributing the necessary notices.
- Keeping in mind the effective date of the SLO in collective bargaining negotiations.
- Understanding when employees may use paid sick leave.
- Reviewing current reporting and certification procedures.
- Training human resources and supervisory personnel.

Cook County Earned Paid Sick Leave Ordinance

The Cook County Earned Paid Sick Leave Ordinance (County SLO) mirrors its Chicago equivalent, but covers the entirety of Cook County. Passed shortly after the Chicago SLO, the County SLO also goes into effect on July 1, 2017. The County SLO is expected to cover 442,000 workers outside the City of Chicago.

Same Provisions: The County SLO contains the same substantive mandates of the Chicago SLO: a covered employee must be allowed to accrue up to 40 hours of paid sick leave during the course of a 12-month period. Employees can begin to use paid sick leave time no later than 180 days after the start of employment. The coverage, carryover and reasons to take leave are also copied from the Chicago ordinance.

Future Ordinances: The County SLO may prompt some municipalities to try pass legislation to avoid coverage under the law. The Illinois Constitution mandates that municipal ordinances prevail when there is a conflict between county and municipal ordinances. Several municipalities are already taking aim on opting out of the County SLO. Palatine, Barrington and Mount Prospect have suggested that

they will push for passing ordinances to nullify the paid sick leave requirements. Unincorporated areas in Cook County will fall under the County SLO.

Takeaways: Employers in Cook County need to take the same measures that Chicago employers do. Additionally, Cook County employers located in other municipalities should track any ordinances that may exempt their worksites from the County SLO.

Illinois Employee Sick Leave Act

The Illinois Employee Sick Leave Act takes effect on January 1, 2017. The name of the Act is a bit of a misnomer; unlike the Chicago or Cook County ordinances, the Act does not actually mandate that employers provide sick leave. Rather, it expands the reasons that employees can use paid sick leave where paid sick leave is already provided by an employer.

Unlike the Chicago or Cook County ordinances, the Illinois Employee Sick Leave Act does not actually mandate that employers provide sick leave. Rather, it expands the reasons that employees can use paid sick leave where paid sick leave is already provided by an employer.

Expansive Coverage: Under the Act, employees may use paid sick leave for absences due to an illness, injury or medical appointment of the employee's child, spouse, sibling, parent, mother-in-law, father-in-law, grandchild, grandparent or stepparent, for reasonable periods of time as the employee's attendance may be necessary, on the same terms upon which the employee is able to use sick leave benefits for the employee's own illness or injury. It does not expand benefits provided by the FMLA.

Takeaways: Illinois employers not covered by the Chicago or Cook County ordinances should be aware that if they provide paid sick leave, employees have a broad range of reasons to utilize the leave. Employers should update existing policies to comply with the breadth of the Act.

Piecing It All Together

The following chart is a starting point for employers seeking to understand the basics of paid sick leave in Illinois. For questions, contact Thomas G. Hancuch, Elliot G. Cole or any Vedder Price attorney with whom you have worked.

	Chicago **Paid Sick Leave Ordinance**	Cook County **Earned Paid Sick Leave Ordinance**	Illinois **Employee Sick Leave Act**
Effective Date	July 1, 2017	July 1, 2017	January 1, 2017
Who is Covered	Employees that work 80 hours within a 120-day period	Employees that work 80 hours within a 120-day period	Illinois employees of employers that provide paid sick leave
When Employee May Begin Using Sick Leave	180 days after start of employment	180 days after start of employment	Employer Policy Governs
Required Rate of Accrual	One hour for every 40 hours worked	One hour for every 40 hours worked	Employer Policy Governs
Minimum Total Hours Accrued Annually	40 hours	40 hours	Employer Policy Governs
Required Carryover	20 hours	20 hours	Employer Policy Governs
Additional Carryover for FMLA Purposes	40 hours	40 hours	N/A
Advance Notice Requirement	7 days or as soon as practicable	7 days or as soon as practicable	Employer Policy Governs

Thomas G. Hancuch
Shareholder
+1 (312) 609 7824
thancuch@vedderprice.com

Elliot G. Cole
Associate
+1 (312) 609 7590
ecole@vedderprice.com

OSHA Whistleblower Update: The Curious Case of the Expanding Agency

Did you know that the Occupational Safety and Health Administration (OSHA) enforces and investigates claims under 22 different federal whistleblower laws, ranging from Section 11(c) of the OSH Act to the Clean Air Act, the Consumer Financial Protection Act of 2010, the Safe Drinking Water Act, Sarbanes-Oxley and the Surface Transportation Assistance Act? Given the number of laws that fall within OSHA's purview, it should come as no surprise that the agency has sought to expand its reach of late in ways that may leave employers scrambling to understand the risks and obligations they face when a whistleblower comes forward.

Whistles Blowing Louder

If an employee does not want to file a charge at all, OSHA can still pursue the employer under the new rule.

In 2009, OSHA awarded $13.25 million in damages from whistleblower complaints. By 2013, that number exceeded $25 million – an 89% increase. In fiscal year 2016, the awards have been eye-popping: a Michigan janitor was awarded $193,139, an Alaskan aviation company was ordered to pay a pilot over $500,000 and a railroad conductor received over $250,000 in punitive damages alone.

Between 2009 and 2015, OSHA increased the number of completed investigations from 1,943 to over 3,300. The number of determinations categorized as a "Positive Outcome for Complainant" nearly doubled, from 450 to 843. The disproportionate uptick in these "Positive" cases suggests that OSHA is emphasizing investigative methods that favor complainants.

That number is likely to increase after the agency issued, in February 2016, new standards for investigators that reduce the showing necessary to find a violation from a "preponderance of the evidence" to mere "reasonable cause." The more lenient standard means that more charges will likely survive the initial screening phase of an investigation, resulting in an increased likelihood of burdensome investigations.

Pilot Programs Cause Turbulence for Employers

In 2016, OSHA launched two pilot programs that should be on your radar. For Iowa, Missouri, Kansas and Nebraska, OSHA announced the Whistleblower-Severe Violator Enforcement Program. This program creates a public and widely distributed log of employers that have been found by the agency as having had "significant whistleblower cases."

This program, like OSHA's original Severe Violator Enforcement Program (SVEP), poses a series of concerns from a procedural fairness standpoint, as employers can and will be added to the list before a final determination is made on the merits. In other words, an employer may find itself having been labeled as a "severe violator" before even having their day in court. This would be akin to the U.S. Equal Employment Opportunity Commission adding an employer to its Severe Discriminator list after a substantial evidence finding—before the agency even files a lawsuit in federal court accusing the employer of discrimination. While an employer can contest placement on the list, this takes place only after the employer has been placed on the list, meaning that reputational damage has likely already occurred.

Meanwhile, in August, OSHA's Region 9 – covering mostly western states – rolled out the Expedited Case Processing Pilot. If certain criteria are met, the program allows OSHA to bypass an investigative finding and submit the case file directly to an administrative law judge for further determination. This sets up a possible conflict: a complainant's urge to expedite the process may be at odds with an employer's interest in developing a full record or attempting to secure a settlement.

Keeping Records : From 11(c) to §1904.35

Almost 60% of whistleblower charges filed with OSHA fall under Section 11(c) of the OSH Act, which covers most complaints regarding occupational safety and health. Despite making up the majority of all charges, Section 11(c) also has the shortest statute of limitations of any law administered by OSHA's whistleblower division: a mere 30 days after the retaliatory action.

This window is poised to remain open for a good deal longer as OSHA prepares to commence enforcement of 29 C.F.R. §1904.35, part of the new recordkeeping requirements rule. The rule prohibits employers from creating any policy that would "discourage or deter" an employee from reporting a workplace injury or illness. The rule further states that employers are "prohibited from discharging or in any manner discriminating" against employees who report, mirroring the purpose of 11(c).

This marks a fundamental change in how OSHA can pursue some whistleblower investigations. Claims can now be brought under either 11(c) or §1904.35. This has some significant ramifications for employers:

- Section 11(c) required a complainant to file a complaint. Under §1904.35, OSHA may cite an employer for a whistleblower violation, with or without the employee filing.

- The statute of limitations could be expanded from 30 days to six months. Unlike the 30 days permissible for Section 11(c), OSHA has six months to issue a citation under §1094.35.

- Section 11(c) is limited to make-whole remedies (generally, back pay). However, §1094.35 includes both make-whole remedies and the cost of citations. Employers could be liable for up to $12,600 in citations for a single violation.

OSHA now has the flexibility to pick and choose how to pursue whistleblower claims relating to injury reporting. Should a charge be filed too late to fall under Section 11(c), OSHA can simply classify it as a §1904.35 violation. If an employee does not want to file a charge at all, OSHA can still pursue the employer under the new rule. Employers may, in essence, find themselves having ended up out of the frying pan and into the fire. To reduce the risk of retaliation claims, employers should evaluate all policies on injury and illness reporting for compliance with the requirements of §1094.35. While some or all of the rules and/or initiatives may be rescinded or scaled back under President Trump, it remains to be seen what will change and when.

If you have questions regarding the issues in this article, please contact Aaron R. Gelb, Elliot G. Cole or any Vedder Price attorney with whom you have worked.

Aaron R. Gelb
Shareholder
+1 (312) 609 7844
agelb@vedderprice.com

Elliot G. Cole
Associate
+1 (312) 609 7590
ecole@vedderprice.com

California Corner: New Laws Prompt Crucial Review

The California legislature has been busy of late, passing a series of new laws that will likely prompt employers to review and revise their employment agreements, reassess their strategies with respect to sexual harassment claim litigation and reevaluate certain pay practices.

Contractual Choice of Law Provisions Restricted

On September 25, 2016, Governor Jerry Brown signed Senate Bill 1241 (to be enacted as Labor Code §925), which may require certain employers to amend their standard employment and arbitration agreements.

Applying to all employment contracts entered into, modified or extended on or after January 1, 2017 regarding employees who primarily reside and work in California, this law prohibits employers from requiring as a condition of employment that an employee agree to a forum-selection or choice-of-law provision that would require the employee to adjudicate a claim either outside of California ('forum selection") or pursuant to the law of another jurisdiction ("choice of law"). Such provisions are voidable by the employee. In addition to injunctive relief, a court may award attorneys' fees to any employee who is enforcing his or her rights under this law. Only employees individually represented by counsel in negotiating the terms of the employment agreement are excluded from the purview of this law.

It is not uncommon for employers with headquarters in other states to include choice of law provisions in employment agreements for individuals working in California. While enforcing choice-of-law and forum-selection provisions was already an uphill battle in California courts, this law now bars such provisions. Except for choice-of-law and forum-selection clauses negotiated with an employee "individually represented by legal counsel" such provisions will be unenforceable if included in any agreement executed, modified or extended after January 1, 2017. Employers should review the various types of agreements typically required as a condition of employment to ensure compliance with the new legislation.

If your company is considering settlement of a sexual harassment claim, keep in mind that California law prohibits confidential settlement agreements in civil actions with a factual foundation establishing a cause of action that may be prosecuted as a felony sex offense.

Settlement Agreements Concerning Certain Sexual Harassment Claims

If your company is considering settlement of a sexual harassment claim, keep in mind that California law prohibits confidential settlement agreements in civil actions with a factual foundation establishing a cause of action that may be prosecuted as a felony sex offense. While this law provided that the prohibition on confidentiality did not affect a party's ability to enter into settlement agreements requiring the nondisclosure of an amount paid to settle the claim, that is changing. On September 30, 2016, Governor Jerry Brown signed into law Assembly Bill 1682, which repeals the carve-out for the nondisclosure of settlement amounts. Employers wary of public dissemination of their past settlement amounts should assess how this legislation impacts their litigation and resolution strategy in sexual harassment lawsuits.

Wage Equality Act of 2016

On September 30, 2016, Governor Brown signed into law Senate Bill 1063 (amending Labor Code §1197.5 and §1199.5), which extends the Fair Pay Act's requirements to race and ethnicity in a manner nearly verbatim to those in the Act between male and female employees. Under the new law, California employers are barred from paying their employees a wage rate less than the rate paid to workers who are a different race or ethnicity for "substantially similar work" unless an employer can prove the different wage is due to one or more specified bona fide circumstances. That same day, Governor Brown also signed Assembly Bill 1676 (amending Labor Code §1197.5), which prohibits an employer from justifying any disparity in compensation under the bona fide factor exception by citing to an employee's prior salary alone. Employers should consider undertaking those efforts launched in response to last year's Fair Pay Act, including, but not limited to, auditing pay records, updating their employee handbooks and providing supervisory training.

If you have questions regarding the issues in this article, please contact Brendan G. Dolan, Christopher A. Braham or any Vedder Price attorney with whom you have worked.

Brendan G. Dolan
Shareholder
+1 (415) 749 9530
bdolan@vedderprice.com

Thomas H. Petrides
Shareholder
+1 (424) 204 7756
tpetrides@vedderprice.com

Heather M. Sager
Shareholder
+1 (415) 749 9510
hsager@vedderprice.com

Christopher A. Braham
Associate
+1 (424) 204 7759
cbraham@vedderprice.com

Ayse Kuzucuoglu
Associate
+1 (415) 749 9512
akuzucuoglu@vedderprice.com

Lucky Meinz
Associate
+1 (415) 749 9532
lmeinz@vedderprice.com

Brittany A. Sachs
Associate
+1 (415) 749 9525
bsachs@vedderprice.com

A View From Across the Pond: UK Boardroom Diversity—Gender and Beyond

GlaxoSmithKline's recent announcement of Emma Walmsley as CEO, making her the seventh female FTSE 100 CEO, has focused greater attention on the merits of diversity at board level and how to achieve same. Indeed, GSK's chairman Sir Philip Hampton is leading a government review of efforts to increase the number of women in senior executive roles, and he has taken Ms Walmsley's appointment as an opportunity to challenge whether government reviews and initiatives will be able to bring about meaningful and sustained change in this area.

The European Commission is openly concerned about the number of women on company boards, and on 1 March 2011, it called on publicly listed EU companies to sign a pledge to increase the presence of women on corporate boards to 30% by 2015 and 40% by 2020, by actively recruiting qualified women to replace outgoing male board members

The UK currently favours a voluntary, business-led approach to improving female board representation; there is no minimum legal quota for women on boards. In 2011, however, it was recommended that FTSE 100 companies aim for a minimum of 25% of female board representation by 2015 with one-third of new appointments being women. In 2015, a report commissioned by the UK Government found that women held 26.1% of board positions in those companies (compared to 12.5% in February 2011). The target now is for female board representation in the FTSE 350 of 33% by 2020. Listed companies are also required to establish a policy on boardroom diversity, including gender, and including measurable objectives for implementing it. A summary of the policy should be disclosed annually, together with details of the progress made in reaching the objectives.

Other EU countries have addressed the issue differently. The European Commission is openly concerned about the number of women on company boards, and on 1 March 2011, it called on publicly listed EU companies to sign a pledge to increase the presence of women on corporate boards to 30% by 2015 and 40% by 2020, by actively recruiting qualified women to replace outgoing male board members. There are also currently proposals for an EU Directive to impose a mandatory quota system for female non-executive directors. In the meantime, several countries, including Spain, Iceland and Norway, have imposed quotas, with Norway reaching 40% representation of women on its boards.

Employers wanting to implement diversity initiatives are advised to do so in a nuanced way, and in one which suits their business and their industry. If they are to be effective, initiatives promoting diversity need to be part only of a broader approach, one which will need a significant period of time to bear fruit and will likely

depend on practical leadership from the top. Other areas to consider could include how to increase the pool of talent; adapting recruitment processes (including, for example, targeting equal numbers of male and female graduates and scrutinising the gender profile of candidate lists); offering flexible working to all and looking at issues of so-called “work-life” balance creatively; coaching, supporting and mentoring women at each and every stage of their career and developing the female talent pipeline; creating accountability for bringing about changes; and reviewing career paths and opportunities for promotion (with targets in place for male-to-female ratios). An important first step for employers includes monitoring the workforce profile and tracking the information needed to evaluate the workforce.

Equally important is that implementation of any such initiatives does not run afoul of employment law, in particular, anti-discrimination laws, which in the UK in general do not allow for positive discrimination or affirmative action. Discrimination can also arise from unconscious bias and stereotypical thinking, which underline the importance of robust and objective decision-making and the need for a holistic approach here, rather than a focus solely on percentage targets. To that end, employers with at least 250 employees will likely face mandatory gender pay gap reporting beginning April 2017.

The debate about gender composition of boards and the role of diversity in corporate governance more broadly is sure to continue. A wider view of diversity argues that boards can be enriched not only by members of different genders, but also by variety in a broad sense -- experience, culture, age and background. Added to this are significant corporate governance initiatives recently announced by the UK’s new Prime Minister as the UK prepares for leaving the EU. Ms. May’s proposals include having a worker’s representative on the board. This will be a novel and potentially significant change. Watch this space!

If you have questions regarding the issues in this article, please contact Jonathan Maude, Esther Langdon or any Vedder Price attorney with whom you have worked.

Jonathan Maude
Partner
+44 (0)20 3667 2860
jmaude@vedderprice.com

Esther Langdon
Solicitor
+44 (0)20 3667 2863
elangdon@vedderprice.com

Recent Accomplishments

John C. Cleary, Jonathan A. Wexler and **Marc B. Schlesinger** obtained a defense verdict after a five-day trial in the Southern District of New York in a religious discrimination failure-to-promote claim.

Blythe E. Lovinger obtained summary judgment in the U.S. District Court for the Eastern District of New York on behalf of a major New York newspaper. The plaintiff, a Black-Hispanic male, asserted that the defendant discriminated against him on the basis of his race and retaliated against him for filing administrative complaints of employment discrimination with the New York State Division of Human Rights. The plaintiff alleged violations of the New York State Human Rights Law, Executive Law 296, et seq. (NYSHRL); Title VII of the Civil Rights Act of 1964 (Title VII); and §1981 of the Civil Rights Act of 1866 (§1981). The court granted summary judgment in its entirety, and all of the plaintiff's claims were dismissed.

Nicholas Anaclerio and **J. Kevin Hennessy** won motions to compel arbitration of employment-related claims against national food distributor clients in Florida and in Nebraska. The Florida ruling came despite the plaintiff's alleged lack of recollection that he signed any pre-employment arbitration agreement. Vedder Price won the favorable Nebraska ruling despite a Nebraska statute purporting to invalidate agreements to arbitrate the employment liability claims the plaintiff had brought against our client.

Thomas M. Wilde and **Emily C. Fess** obtained summary judgment on behalf of a national manufacturing company in the U.S. District Court for the Northern District of Ohio. A former employee claimed she was harassed, denied a promotion and constructively discharged due to her gender.

J. Kevin Hennessy obtained a favorable labor arbitration ruling for a national manufacturer of electrical products in a contested case involving automation of production machines. The arbitrator agreed with Mr. Hennessy's argument that the company has the right to run its automated machines through lunch breaks and overnight without the need for an operator in attendance. The arbitrator also confirmed the company's right to assign machine operators to work in other machining cells when they are not otherwise occupied.

Labor & Employment Law Group Members

Chicago

Thomas M. Wilde (Chair) ... +1 (312) 609 7821
Aaron R. Gelb (Editor) ..... +1 (312) 609 7844
Thomas G. Abram ..... +1 (312) 609 7760
Bruce R. Alper ..... +1 (312) 609 7890
Nicholas Anaclerio ..... +1 (312) 609 7538
Mark I. Bogart ..... +1 (312) 609 7878
Steven P. Cohn ..... +1 (312) 609 4596
Elliot G. Cole ..... +1 (312) 609 7590
Christopher T. Collins ..... +1 (312) 609 7706
Jennifer B. Cook ..... +1 (312) 609 7882
Thomas P. Desmond ..... +1 (312) 609 7647
Emily C. Fess ..... +1 (312) 609 7572
Elizabeth N. Hall ..... +1 (312) 609 7795
Thomas G. Hancuch ..... +1 (312) 609 7824
Benjamin A. Hartsock ..... +1 (312) 609 7922
J. Kevin Hennessy ..... +1 (312) 609 7868
John J. Jacobsen, Jr. ..... +1 (312) 609 7680
Edward C. Jepson, Jr. ..... +1 (312) 609 7582
Philip L. Mowery ..... +1 (312) 609 7642
Joseph K. Mulherin ..... +1 (312) 609 7725
Margo Wolf O'Donnell ..... +1 (312) 609 7609
Caralyn M. Olie ..... +1 (312) 609 7796
Michelle T. Olson ..... +1 (312) 609 7569
Cara J. Ottenweller ..... +1 (312) 609 7735
Robert F. Simon ..... +1 (312) 609 7550
Patrick W. Spangler ..... +1 (312) 609 7797
Kenneth F. Sparks ..... +1 (312) 609 7877
Kelly A. Starr ..... +1 (312) 609 7768
Mark L. Stolzenburg ..... +1 (312) 609 7512
Jessica L. Winski ..... +1 (312) 609 7678
Charles B. Wolf ..... +1 (312) 609 7888

New York

Daniel C. Green ..... +1 (212) 407 7735
Ashley B. Huddleston ..... +1 (212) 407 7793
Neal I. Korval ..... +1 (212) 407 7780
Daniel J. LaRose ..... +1 (212) 407 6989
Blythe E. Lovinger ..... +1 (212) 407 7770
Marc B. Schlesinger ..... +1 (212) 407 6935
Jonathan A. Wexler ..... +1 (212) 407 7732

Washington, DC

Amy L. Bess ..... +1 (202) 312 3361
Margaret G. Inomata ..... +1 (202) 312 3374
Sadina Montani ..... +1 (202) 312 3363

London

Esther Langdon ..... +44 (0)20 3667 2863
Jonathan Maude ..... +44 (0)20 3667 2860

San Francisco

Brendan G. Dolan ..... +1 (415) 749 9530
Ayse Kuzucuoglu ..... +1 (415) 749 9512
Lucky Meinz ..... +1 (415) 749 9532
Brittany A. Sachs ..... +1 (415) 749 9525
Heather M. Sager ..... +1 (415) 749 9510

Los Angeles

Christopher A. Braham ..... +1 (424) 204 7759
Thomas H. Petrides ..... +1 (424) 204 7756

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Vedder Price aligns workforces for better performance. We've been a leader in the field since our founding in 1952. Today, 50+ professionals are dedicated solely to workplace law and are consistently ranked as top-performing lawyers.

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