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# Labor and Employment Law

## NLRB Proposes Significant Overhaul of Rules Governing Union Elections

On February 5, 2014, the National Labor Relations Board (NLRB) announced its latest attempt to overhaul union election rules to make organizing faster and easier. The proposed rules are another attempt to push through changes that a federal court invalidated in May 2012 on procedural grounds.

The goal of the rules is to give employers less time to campaign and give unions more information sooner about the employees who will be voting, including their job classifications, personal telephone numbers and e-mail addresses. The rules also limit challenges and postpone the resolution of disputes regarding who may vote. These changes will impact how employers campaign and how unions organize employees.

The NLRB will expedite consideration of the new rules and is expected to issue final rules later this year.

Some of the more significant proposed changes include:

- Employers must provide more information about voting employees sooner. Shortly after a petition is filed, the new rules require employees to provide the NLRB and union with the names of potential voters plus each person's job classification, work location and shift. Employers must also provide the NLRB phone numbers and e-mail addresses. A final list that includes all this information, including phone numbers and addresses, is then given to the union two days after an election is directed. This is in addition to existing requirements that the union receive employee home addresses and names. Bottom line? More direct union access to your employees. In anticipation of final rules, employers should make certain that their existing cell phone, e-mail and electronic communications policies are up to date.
- Employers will have to identify issues before hearings or risk waiving them. Pre-Election hearings will now be held within seven days of the petition in most cases and post-election hearings 14 days after the tally of ballots issued at the close of voting. No later than the start of any hearing, an employer will have to identify all the issues it intends to raise and make an offer of proof regarding its evidence. Employers would be barred from raising additional issues later on. At the close of the hearing, an employer will no longer have the right to brief the issues. It is now up to the NLRB to determine if briefs are appropriate. This will make it critical to identify and investigate unit and other issues as soon as a petition is received.
- Employers will no longer be entitled to a hearing to determine who votes. Under current rules, the parties have a right to a pre-election determination on significant voter eligibility issues. Under the new rules, employers may not litigate before the vote unless those issues involve 20 percent or more of the voting unit. Instead, these employees are forced to vote under challenge and the issues are reserved for decision after the election. In

In this issue...

practice, this means some employees will not know if their votes will count. That can discourage turnout, particularly among pro-Company voters. There also is a risk of abuse. A union can have the best of both worlds – excluding voters after the fact where their votes would prevent unionization and including them over their objection where their votes are not outcome determinative. In a close election, a union (but not an employer) could even go back to challenged voters and question them about how they voted so as to determine which issues to litigate.

The two Republican members of the NLRB dissented. They argued that because eligibility issues are resolved after an election, both employers and employees do not know (i) who may vote, (ii) which voters will be excluded from the bargaining unit, (iii) whether employees are actually supervisors (whose actions bind employers) or employees, and (iv) in the event that the union wins the election, the parties might still be litigating who is in the unit at the same time they are bargaining.

On their face, the proposed rule amendments do not shorten the NLRB's internal practice of trying to schedule stipulated elections within 42 days from the petition. But by shortening the time targets at each step, the NLRB appears to be trying to shorten the overall time to an election. Certainly Members Johnson and Miscimarra read the proposed changes this way. Keep in mind that the current 42-day target is not codified in the existing rules. It is an informal rule that may be modified after changing the underlying procedures without further rulemaking.

At bottom, the shifting election landscape will require employers to react faster to election petitions and do more to prepare for (and hopefully prevent) election petitions before they are filed.

If you have any questions about these or other issues, please reach out to **J. Kevin Hennessy** at +1 (312) 609 7868, **Kenneth F. Sparks** at +1 (312) 609 7877, **Mark L. Stolzenburg** at +1 (312) 609 7512 or any other Vedder Price attorney with whom you work.



## Separation Agreements Continue to Generate Litigation

It is common for employers to assume that frequently used agreements contain legal boilerplate that needs no review or revision. They are wrong. In yet another case challenging the legality of a separation agreement, the EEOC recently filed suit in federal court in Chicago against national retailer CVS Caremark, alleging that CVS violated Title VII by including in its separation agreement terms that many employers take for granted. The EEOC alleges that the release, cooperation, confidential information and non-disparagement provisions in the company's widely used separation agreement unlawfully interfere with an individual's rights under Title VII. The EEOC has brought the case as a systemic action, seeking to reopen hundreds of agreements that have been signed.

This is one more in a series of cases brought by the EEOC or private plaintiffs challenging the enforceability of separation agreements. Prior cases typically have challenged separation agreements as noncompliant with the vague and complex requirements under the Older Workers Benefit Protection Act. This recent case significantly expands employer exposure by applying the nonretaliation provisions of Title VII to provisions frequently found in separation agreements. This is not to say that all such provisions are subject to challenge. Many can be drafted in a way that would not be vulnerable to EEOC challenge. The irony in the case against CVS is that an agreement designed to eliminate liability from individual claims has itself spawned a broader and costlier litigation. Employers should take this lesson to heart by subjecting their employment-related agreements to careful and professional review on an ongoing basis.

Vedder Price's employment attorneys are well equipped to assist employers in this area. Please contact **Bruce R. Alper** at +1 (312) 609 7890, **Michael G. Cleveland** at +1 (312) 609 7860 or any other Vedder Price attorney with whom you have worked if you have any questions.

## Win for Employers Still Has Ramifications: While Arbitration Agreements Might Be Valid, Charges of Unfair Labor Practices Loom

On December 3, 2013, the U.S. Court of Appeals for the Fifth Circuit handed down its decision in *D.R. Horton v. National Labor Relations Board*, reversing the finding of the National Labor Relations Board (NLRB). The Board held that D.R. Horton's employee arbitration agreement, entered into as a condition of employment, violated the National Labor Relations Act. The agreement required employees to voluntarily waive all rights to trial before a judge or jury on claims arising from the employment relationship. Claims were to be resolved exclusively through final and binding arbitration. It also prohibited an arbitrator from treating employee claims or the arbitration as a class or collective action, and from awarding relief on a class or group basis. The agreement left employment disputes to individual resolution.

The Board found the agreement unlawfully restricted employees' Section 7 rights to engage in concerted activity. In its January 2, 2012, decision, it noted the agreement barred employees from pursuing claims in any forum except arbitration, where collective action was prohibited. On appeal, the Fifth Circuit overturned the Board's decision. The Court found that the Board did not give proper weight to the Federal Arbitration Act (FAA) in issuing its decision. Under the FAA, arbitration agreements must be enforced according to their terms unless the agreement violates the FAA's savings clause or application of the FAA is precluded by congressional mandate. The Fifth Circuit found that neither of these exceptions applied. With its ruling, the Fifth Circuit joined the Ninth, Eighth and Second Circuits which have similarly held that arbitration agreements containing class action waivers are enforceable.

The Board also found the agreement to be an unfair labor practice under Section 8 of the Act because it stated that *all* disputes would be resolved by arbitration without making exception for unfair labor practice charges. The Board concluded that an employee could reasonably read the agreement as a preclusion to filing charges with the NLRB. The Fifth Circuit enforced the Board's order on this point.

The Fifth Circuit's decision is a boon for employers; however, the NLRB made it clear the fight is not yet over. Despite the Fifth Circuit's ruling, Administrative Law Judge Thompson issued a decision in *Leslie's Poolmart, Inc.*, finding a mandatory and binding employment arbitration clause violated the NLRA. Specifically, Judge Thompson noted that the U.S. Supreme Court has not expressly overruled *D.R. Horton*. Recently in *Haynes Bldg. Servs., LLP*, Administrative Law Judge Locke found an arbitration clause to violate Section 8 (a)(1) but recommended to the Board that it dismiss the allegations addressing the respondent requiring its employees sign the arbitration agreement as a condition of employment. On January 28, the Board filed an unopposed motion requesting a 45-day window to petition the Fifth Circuit for rehearing or for rehearing en banc regarding its decision.

As the NLRB continues to expand Section 7 rights, employers must be mindful of the legal landscape to avoid violating the NLRA.

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## Employer Domestic Partner Policies: Legal Risk or Employee Relations Reward

As the tide begins to rise with state same-sex marriage laws, employers must continue to monitor the potential impact on their personnel policies; more specifically, employee benefits and leave policies. In the last half of 2013, there was also a surge of activity affecting same-sex couples and their employers in the federal courts and administrative agencies that will likely continue into 2014. This article summarizes that law and the effect that an increasing crop of state laws allowing for same-sex marriage may have on employers' benefits policies.

On June 26, 2013, the U.S. Supreme Court decided that limiting the terms "marriage" and "spouse" to heterosexual couples is unconstitutional in

*U.S. v. Windsor*. Thus, it struck down the section of the Defense of Marriage Act (DOMA) that limited marriage to unions between a man and a woman under federal law. The Court, however, did not go so far as to require states in which same-sex marriage is banned to recognize same-sex marriages that occurred outside of their states.

As a result of the decision, federal agencies began to issue guidance on the subject. Different federal agencies decided to employ different standards to the question of whether same-sex couples should be recognized for purposes of federal law.

The IRS issued guidance that same-sex couples would be treated as "married" for federal tax purposes if they were legally married in the place that the marriage was celebrated—otherwise known as the "place of celebration" standard. The U.S. Department of Labor, on the other hand, used a "place of residence" standard for Family Medical Leave Act purposes. That is, the law of the state in which the employee resides dictates whether he/she is eligible for FMLA benefits for a same-sex spouse. If the state in which an employee resides does not recognize same-sex marriage, then even if the couple was legally married in another state, they would not be eligible for FMLA leave in order to care for their same-sex partner.

And, to further complicate the issue, many employers have their own domestic partner benefit policies. The intersection of the *Windsor* case, the federal agency guidance that followed, state same-sex marriage laws and employer-established domestic partner policies has the potential to cause major headaches for employers and employees alike when it comes to certain employee benefits.

One key issue is that many domestic partner policies were drafted with the idea that same-sex couples were not allowed to be married. Because of this, the policies specified that only same-sex couples were eligible (because opposite-sex couples were allowed to get married). Now, as states are beginning to legalize and recognize same-sex marriages, unmarried heterosexual couples may have claims of unlawful discrimination on the basis of sexual orientation. The rationale is that in order to receive the benefits, heterosexual couples would have to get married, whereas same-sex couples would not. Now that same-sex couples may get married in some states, and potentially have federal benefits recognized in many additional states, is there a need for domestic partner benefit policies still? Domestic partner policies that were aimed at leveling the playing field five years ago may come back to haunt employers today.

In order to avoid potential litigation, employers have a few options. First, they could simply offer the domestic partner benefits to all employees, regardless of the sex of their significant other. This is the option that many large employers have taken, but could come with greater administrative costs such as creating rules and verifying which relationships qualify and which do not. A second option is to remove the policies completely and allow only married employees to have these benefits. The downside to this option, however, is that domestic partner benefits have become a popular recruiting tool, particularly with younger employees.

In any event, employers should pay close attention as the IRS and DOL continue to issue guidance that might affect benefits and leave policies. Additionally, it is important to know where state laws stand on allowing same-sex marriage. This evolving issue directly affects the employer's need to have domestic partner benefits policies, and, perhaps more importantly, whether continuing to employ these policies may result in litigation.

Please contact **Amy L. Bess** at +1 (202) 312 3361, **Thomas G. Hancuch** at +1 (312) 609 7824 or **Brandon L. Dixon** at +1 (312) 609 7852 with any questions regarding same-sex marriage laws and how they impact your company policies.

## USERRA: 'Escalating' Employer Risk for Discretionary Promotions

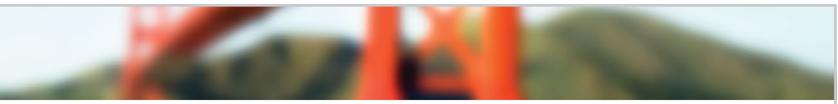
As the United States' various engagements in the Middle East wind down, military servicemembers are returning home in growing numbers. According to the Equal Employment Opportunity Commission, three million veterans have returned from military service over the past ten years, and another million are expected to return to civilian life over the next five years. Many of these returning servicemembers will be joining, or rejoining, the civilian workforce.

### *Uniformed Services Employment and Reemployment Rights Act (USERRA)*

Most employers are now familiar with the Uniformed Services Employment and Reemployment Rights Act (USERRA), which prohibits employers from discriminating against job applicants or employees on the basis of their military status or military obligations and provides job restoration rights to servicemembers. Many employers, however, do not realize that USERRA also mandates that returning servicemembers be placed in positions they would have achieved had it not been for their absence due to military service.

Under USERRA's "escalator principle," employers are required to re-employ a returning service member to the following: (1) the status that he or she would have acquired by virtue of continued employment if it had not been for his or her absence during military service; and

# California Corner



## Employers Face New Heat for Missed Recovery Periods

Effective January 1, 2014, SB 435 expanded the scope of Cal. Labor Code Section 226.7 (known for providing premium pay for missed meal and rest periods) to require employers of outdoor workers to provide premium pay to employees who missed "recovery periods." A recovery period is defined as a "cooldown period afforded to employee to prevent heat illness."

Under the new Labor Code Section 226.7, an employee is entitled to one additional hour of pay for each workday during which his or her employer has failed to provide a recovery period in accordance with a state law, including, but not limited to, an applicable statute or applicable regulation, standard, or order of the Industrial Welfare Commission, the Occupational Safety and Health Standards Board, or the Division of Occupational Safety and Health.

For years, Cal/OSHA regulations have required California employers to protect outdoor employees (e.g., employees in construction, agriculture, landscaping) from the hazard of heat illness. Among other things, the regulations require employers to provide employees access to drinking water and shade areas. Employees must also be allowed and encouraged to take a cool-down rest in the shade for a period of no less than five minutes at a time. Employees are permitted to take this rest at their discretion whenever they feel the need to do so to protect themselves from overheating.

Although SB 435 does not explicitly reference the Cal/OSHA regulations, plaintiffs' lawyers may attempt to use the Cal/OSHA regulations as the standard by which to determine liability under the new law. Because SB 435 is vague as to when recovery periods must be taken, a liberal reading of SB 435 and Cal/OSHA regulations together could suggest that an employee may request and must be granted any number of recovery periods during a work shift. If the employer fails to provide even one recovery period, it may be liable for one hour of pay for that day.

This new premium pay law for recovery periods will strengthen the trend of class action litigation against employers for missed break periods. California employers with employees who work outdoors should review their heat illness prevention programs to ensure compliance with Cal/OSHA regulations, including the requirement that such programs be in writing. Employers should also consider revising their employee handbooks and timekeeping requirements to reflect their policy regarding providing and recording recovery periods.

If you have any questions about this, or any other California matter, please contact:

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## IRS Final Rule on ACA Play or Pay Mandate Allows Employers to Finalize Compliance Plans

The IRS issued final regulations on the employer shared responsibility provisions of the Patient Protection and Affordable Care Act on February 9, 2014. With the issuance of the final regulations, employers and their legal advisors now have the information they need to finalize and implement a strategy for complying with the law's employer shared responsibility provisions.

Visit http://www.vedderprice.com/irs-final-rule-play-or-pay-mandate/ for more information and an overview of key aspects of the final regulations.

(2) the position that he or she would have attained with “reasonable certainty” if not for the absence. However, the “escalator principle” does not apply only to promotions. It “may cause an employee to be re-employed in a higher or lower position, laid off, or even terminated.”

Federal courts have traditionally interpreted USERRA’s “escalator principle” to mandate that returning servicemembers be placed in positions they would have achieved due to non-discretionary promotions. However, a recent court of appeals decision fundamentally alters this interpretation, holding that the “escalator principle” requires employers to also consider ***discretionary*** promotions when placing returning servicemembers into positions.

### Facts of the Case

In *Rivera-Melendez v. Pfizer Pharmaceuticals, LLC*, Luis Rivera-Melendez, a U.S. Naval Reserve member who had been called to active duty in Iraq between December 2008 and October 2009 sued his employer, Pfizer, because he had not been considered for promotion to a team leadership position that had been created and filled while he was away on active duty. The promotion to a team leadership position was discretionary and there were only seven available positions, for which sixteen to seventeen people applied.

In addition, while Rivera-Melendez was on active duty, Pfizer eliminated his previous position. As a result, upon Rivera-Melendez’s return Pfizer appointed him to a position that had fewer job responsibilities than his previous position. In turn, Rivera-Melendez sued Pfizer, alleging USERRA violations.

The district court granted summary judgment to Pfizer, holding that USERRA entitles servicemembers to positions they would have received due to automatic promotions. However, on appeal, the First Circuit Court of Appeals reversed, concluding that USERRA’s “escalator principle” is not limited to automatic promotions.

### Employer Takeaway

USERRA’s protections provide broad entitlements and remedies to servicemembers returning to the workforce. Now, employers may need to take into account discretionary, non-mandatory promotions when determining in which position to re-employ the returning servicemember. In addition, *Rivera-Melendez* teaches employers three other important lessons: First, USERRA will be construed broadly in favor of military servicemembers. Second, the U.S. government will not hesitate to weigh in on behalf of a servicemember employee in an appropriate case (in *Rivera-Melendez* the government filed an amicus brief in support of the plaintiff). Third, avoiding a trial on disputed re-employment claims will likely be difficult in the years to come.

If you have any questions about this decision or USERRA’s implications for your organization’s hiring practices, please contact **Aaron R. Gelb** at +1 (312) 609 7844, **Andrew Oppenheimer** at +1 (312) 609 7664 or any other Vedder Price attorney with whom you have worked.

## Contact Preferences

In an effort to conserve resources, please let us know if you would prefer to only receive this publication electronically. To do so, please e-mail info@vedderprice.com and include your contact information.

## Recent Accomplishments

**Chad A. Schiefelbein**, **Joseph K. Mulherin** and **Benjamin A. Hartsock** prevailed in the Illinois First District Appellate Court, as the appellate court upheld the Circuit Court of Cook County’s ruling on summary judgment that the Illinois Sales Representative Act did not apply to a construction company’s independent sales representatives. In a published decision, the appellate court rejected the plaintiff’s request to expand the scope of the Act when a company predominantly provides services. The decision will provide clearer direction as to the applicability of the Act for employers that use independent sales representatives. The reported decision is *Johnson v. Safeguard Construction Co.*, — N.E.2d —, 2013 IL App (1st) 123616 (Dec. 30, 2013).

On behalf of a cable television contractor, **Lyle S. Zuckerman** and **Michael Goettig** obtained dismissal of claims asserted by former employees in two separate actions. In the first, summary judgment was entered on behalf of the company on claims that the former employee was discriminated against on the basis of his race and criminal conviction history. The plaintiff, who had been transferred after allegedly assaulting a customer, argued that his transfer and the subsequent termination of his employment was related to the fact that a background check revealed he had been arrested for an unrelated assault several months prior to his transfer. Upon a finding that it had proffered legitimate, nondiscriminatory reasons for its employment decisions, the court entered summary judgment in the employer’s favor.

In the second action, the plaintiff asserted that, for reasons related to his national origin, he was afforded vacation time and paid an hourly wage at variance with the controlling collective bargaining agreement. Mr. Zuckerman and Mr. Goettig argued that, because the claims asserted would necessarily require the court to interpret the terms of the collective bargaining agreement, Section 301 of the Labor-Management Relations Act precluded the plaintiff from asserting those claims in state court. The court dismissed the complaint in its entirety.

**J. Kevin Hennessy** won a motion to dismiss a lawsuit filed by a forklift driver who claimed that his termination from a beverage distributor for testing positive for alcohol was in violation of the Illinois Right to Privacy Act, since he claimed to be using a "lawful product."

**J. Kevin Hennessy** obtained a favorable arbitration award, securing a large engine manufacturer the right to force mandatory overtime in skilled trades in a plant of over 2,000 workers.

**Aaron R. Gelb** has been selected to serve as a member on *Law360*'s Hospitality Editorial Advisory Board.

**Heather M. Sager** was recently quoted in the *Compliance Week* article "New California Laws Expand Whistleblower Protections." In the article, Ms. Sager discusses the impact of the expanded whistleblower and anti-retaliation protections extended by the passage of several new laws in California to both employees working in the state of California and companies employing workers in the state of California.

**Thomas M. Wilde** and **Emily C. Fess** won summary judgment in the Northern District of Illinois for a national manufacturing company. The plaintiff asserted discrimination, harassment and retaliation claims.

**Thomas M. Wilde** and **Emily C. Fess** achieved early dismissal of a race discrimination case filed against a national manufacturing company in the Central District of Illinois.

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## Labor & Employment Law Group

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