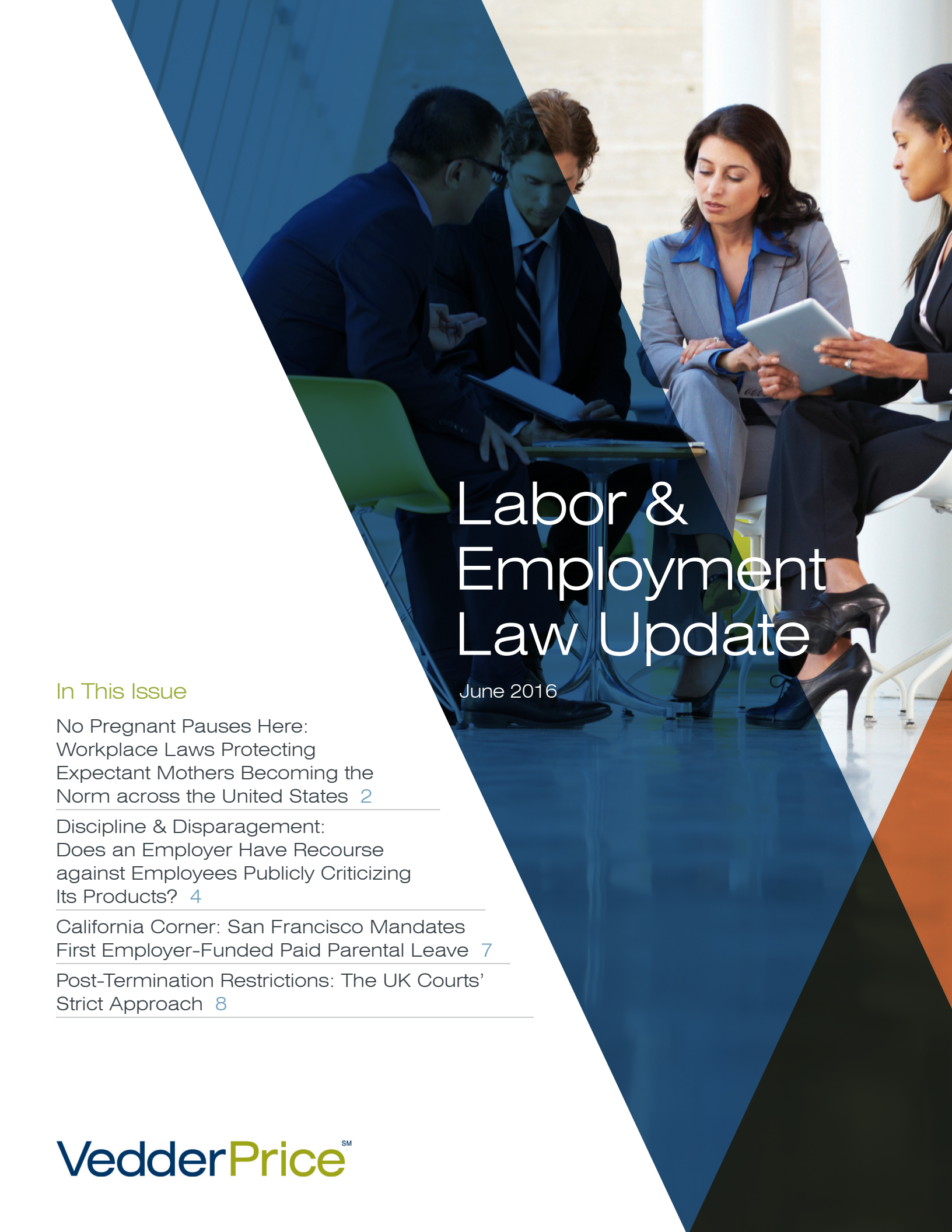

Labor & Employment Law Update

June 2016

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VedderPrice℠

No Pregnant Pauses Here: Workplace Laws Protecting Expectant Mothers Becoming the Norm across the United States

In *Young v. United Parcel Service, Inc.* (2015), the Supreme Court held that employers covered by Title VII are to treat pregnant employees the same as other employees who are similarly situated in their ability to work. In the 13-plus months since the Supreme Court's ruling, we have seen continued momentum building to provide more robust legal protections for pregnant women in the workplace.

Employers with personnel in just one or in multiple jurisdictions are encouraged not only to review their anti-discrimination and anti-harassment policies, but also to ensure that their reasonable accommodation practices take into account, where appropriate, the unique requirements of the states and cities in which their employees work.

For example, nearly all the states and the District of Columbia have laws prohibiting discrimination against employees on the basis of pregnancy. Many states, and a growing number of cities also, have some form of a pregnancy accommodation law, requiring employers to provide pregnant employees (or those recovering from childbirth) with reasonable accommodations and, in some cases, prohibiting them from requiring a pregnant employee to take leave. Often, the employer's obligation to accommodate is not limited to circumstances in which the need for an accommodation arises out of a "disability" caused by pregnancy. And many of these laws prohibit an employer from mandating that an employee take leave while pregnant or accept the employer's preferred accommodation option. Almost all require that an employer post specific notices outlining employee rights under the laws, and some require the inclusion of related language in the employer's handbook.

As previously discussed in our March 2015 webcast,[1] "Illinois Pregnancy Accommodation Law," Illinois introduced its own pregnancy accommodation law—which requires, among other things, accommodation of "common conditions" related to pregnancy and childbirth. In November 2015, the Illinois Department of Human Rights issued its own rules on the topic, which outline the agency's expectations concerning the interactive process and related employer and employee duties, among other things, including when an employer may request

[1] *See* http://www.vedderprice.com/illinois-pregnancy-accommodation-law-2015/

medical information regarding the requested accommodation. In addition, in January 2016, the New York State Human Rights Law was amended to confirm that employers must accommodate as a temporary disability the "pregnancy-related conditions" of an employee or applicant, including those that may not constitute a "disability" under that law but that nonetheless inhibit a normal bodily function or that are demonstrable by medically accepted clinical or laboratory diagnostic techniques. And, on May 6, 2016, the New York City Commission on Human Rights issued enforcement guidance on the New York City Human Rights Law's protections against discrimination and for reasonable accommodations based on pregnancy, childbirth or related medical conditions. California, meanwhile, has required accommodation for pregnancy-related medical conditions for years, separate and apart from that state's distinct pregnancy disability leave requirement.

Employers with personnel in just one or in multiple jurisdictions are encouraged not only to review their anti-discrimination and anti-harassment policies, but also to ensure that their reasonable accommodation practices take into account, where appropriate, the unique requirements of the states and cities in which their employees work. They should also be mindful of the EEOC's pregnancy discrimination–related guidelines, which issued in June of 2015 and touch on a variety of topics—including the types of parental leave policies the EEOC considers acceptable, and those that it does not. Employers should also consider whether training their human resources and management personnel is appropriate on a company-wide basis, and whether separate training may be called for where a specific jurisdiction requires "more" in terms of accommodating pregnancies. Your Vedder Price attorney can assist you with addressing these questions to keep on top of this rapidly progressing area of the law.

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Discipline & Disparagement: Does an Employer Have Recourse against Employees Publicly Criticizing Its Products?

What's an employer to do when employees publicly criticize its products and/or services in consumer-facing forums, such as social media? While most employers assume that they have unfettered discretion to punish disloyal employees, a Jimmy John's franchisee, MikLin Enterprises (MikLin), recently learned the hard way that its ability to punish—let alone put a stop to—such conduct is more limited than it realized.

Before taking action against employees who are publicly criticizing your company's products or services—by posting negative comments to social media sites or on actual bulletin boards as in the case of *MikLin Enterprises*—employers should pause and, whenever possible, consult legal counsel.

In March 2016, the Eighth Circuit affirmed a National Labor Relations Board (NLRB) decision against MikLin, finding that the company committed an unfair labor practice by terminating employees responsible for posting signs near entrances and on bulletin boards in its restaurants that included photos of its sandwiches with captions stating that they may have been made by "sick employees." *MikLin Enters. v. NLRB*, 2016 U.S. App. LEXIS 5586 (8th Cir. Mar. 25, 2016).

The decision, which calls into question an employer's ability to act when faced with public criticism of its products by employees, turned on the determination that the posters claiming employees weren't allowed to call in sick were not "maliciously false" enough, given the employer's very strictly worded policy preventing call-offs without replacements.

So, how did we get here? Recognizing an employer's legitimate interest in preventing disparagement of its products by its own employees, the U.S. Supreme Court held in *NLRB v. Electrical Workers Local 1229*, 346 U.S. 464 (1953) (*Jefferson Standard*), that "product disparagement unconnected to the labor dispute, breach of important confidences, and threats of violence are clearly unreasonable ways to pursue…labor dispute[s]."

Since *Jefferson Standard*, however, the NLRB has found the following statements and acts, particularly when tied to a labor dispute, to be protected speech and/or conduct:

- An airline mechanic sent a letter to an employer's customers, commercial airlines, informing them of lax safety practices. *Allied Aviation Serv. Co. of N.J., Inc.*, 248 NLRB 229, *enforced mem*., 636 F.2d 1210 (3d Cir. 1980).
- Housekeeping employees sent letters to clients stating that the quality of cleaning was "deteriorating" because their employer was diluting cleaning products and the building was not actually really being cleaned. *Prof'l Porter & Window Cleaning Co.*, 263 NLRB 136, 139 (1982), *enforced mem*., 742 F.2d 1438 (2d Cir. 1983).
- An employee told the company's client, a general contractor, that his employer, a subcontractor, never paid its bills, was "no damn good," and could not finish the job. *Emarco, Inc*., 284 NLRB 91 (1987).
- A group of employees accused their employer on local, live television of instructing employees to lie to customers. *MasTec Advanced Tech.*, 357 NLRB 17 (2011).

In each of these cases, the NLRB found the discipline imposed by the employer constituted an unfair labor practice, primarily because the statements at issue were made in the context of a labor dispute and were either not so "either maliciously untrue" or not "intended to undermine [the employer's] reputation" so as to warrant a loss of protection by the Act.

Before taking action against employees who are publicly criticizing your company's products or services—by posting negative comments to social media sites or on actual bulletin boards as in the case of *MikLin Enterprises*—employers should pause and, whenever possible, consult legal counsel.

Before disciplining or discharging anyone, consider the following:

• *Is there an ongoing labor dispute in your workforce?*

If the comments are made in the midst of, or in the wake of, a labor dispute, the NLRB may be more likely to find the speech protected by the Act.

• *Is anything the employees are saying true?*

In *MikLin*, the Eighth Circuit agreed that, because the posters in question had shreds of truth regarding very strict call-off policies, the comments were not "maliciously false" enough to lose protection of the Act.

• *Are the comments tied to the employee's working conditions, such as employee leave, hours, pay, etc.?*

Comments directed solely toward product quality, without reference toward working conditions, are less likely to be considered protected. In 2007, the NLRB upheld an employer's decision not to hire several individuals who published disparaging letters about the company, unrelated to a labor dispute or any relevant working conditions, while finding it to be an unfair labor practice that the company chose not to hire other activists who referenced relevant labor disputes and conditions of employment in similar letters. *Five Star Transp.,* 349 NLRB 42, 45 (2007).

In sum, if the criticism of your products or services is in any way related to the company's treatment of its employees, it's best to think twice before moving forward. When in doubt, contact a Vedder Price attorney to identify any risks associated with your planned course of action.

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California Corner: San Francisco Mandates First Employer-Funded Paid Parental Leave

On April 21, 2016, San Francisco Mayor Ed Lee signed a new ordinance making San Francisco the first municipality in the United States to require employers to provide fully paid leave for new mothers and fathers to bond with their newborn or newly adopted child. The law becomes effective January 1, 2017.

California's preexisting Paid Family Leave (PFL) law allows employees to receive 55 percent of their pay for up to six weeks through a state insurance program to bond with a new child. PFL is a partial wage replacement benefit provided by the state; it does not create leave rights for employees, nor does it confer reinstatement rights or job protection.

Employers with 50 or more employees, regardless of the employees' location, are required to comply with the new law by January 1, 2017; employers with 35 to 49 employees must comply by July 1, 2017 and employers with 20 to 34 workers have until January 1, 2018.

The new Paid Parental Leave Ordinance significantly increases the rights of new parents, guaranteeing them six weeks of fully paid leave, and requiring employers to make up the remaining 45 percent of a parent's full pay for the additional six weeks that isn't covered by PFL. While the PFL does not guarantee an employee the right to reinstatement upon his or her return from parental leave, the San Francisco measure ensures job protection and makes it illegal to retaliate against an employee for taking parental leave. The Ordinance tracks recent updates to unpaid leave legislation in California by imposing a rebuttable presumption of retaliation. Therefore, employers who deny employees paid leave may be subject to sanctions and penalties including restitution, liquidated damages and injunctive relief, and attorneys' fees, unless they can rebut the presumption of retaliation by clear and convincing evidence.

To be eligible for the new paid leave, employees must (1) have been employed at least 90 days prior to starting leave; (2) be eligible to receive PFL benefits; (3) work at least eight hours per week for the employer within the city of San Francisco; and (4) spend at least 40 percent of their total weekly work hours within the city of San Francisco. Part-time and temporary employees and employees of staffing agencies are expressly

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covered by the Ordinance. The employer may, in its discretion, apply up to two weeks of the employee's unused vacation leave toward the employee's supplemental compensation for parental leave.

Employers with 50 or more employees, regardless of the employees' location, are required to comply with the new law by January 1, 2017; employers with 35 to 49 employees must comply by July 1, 2017 and employers with 20 to 34 workers have until January 1, 2018. The Ordinance does not apply to federal, state or other municipal governments.

Employers that have employees in San Francisco should check their existing parental leave policies to ensure compliance with the Ordinance; and those that do not have any such leave policy should implement one by the applicable deadline. Given the national dialogue about paid leave, and the history of California legislation serving as a bellwether for trends in this arena, it is likely we will see similar referenda elsewhere on the horizon in the near future.

Post-Termination Restrictions: The UK Courts' Strict Approach

Employers contemplating placing post-employment restrictions on their employees in the UK should consider a series of recent court opinions adopting a narrow review of such limitations. As these opinions have made clear, it falls to the employer to ensure that the restrictions protect its legitimate business interests. If the restrictions go too far, are unclear or are not appropriately tailored to the circumstances, the employer seeking enforcement will likely find little relief in the courts, leaving the employee free to compete, interacting with former customers and clients, subject, of course, to confidentiality obligations.

In *Bartholomews Agri Food Ltd. v. Thornton*,[1] the High Court in London followed this strict approach, reminding employers that restrictions must be considered at the time they were entered into, not the time that they

[1] [2016] EWHC 648 (QB).

are invoked. Bartholomews, an agricultural merchant, hired Mr. Thornton as a trainee agronomist in 1997. The employment contract signed at hire included terms and conditions common to all employees, including a post-termination restriction, which sought to prevent Mr. Thornton from dealing with a wide range of clients for six months after his employment ended. It also included a provision—unusual under English law—that Bartholomews would continue to pay Mr. Thornton his full remuneration for the duration of this restriction even if he had started a new job.

This case reminds us that it is a good idea to audit terms of employment regularly (annually is suggested), and certainly when employees are promoted, change roles or take on new duties.

The High Court said the restriction was not enforceable because:

- It had to be assessed at the time it was entered into—1997—when Mr. Thornton was a trainee agronomist with no experience and no customer contacts. The restriction was thus "manifestly inappropriate" for such a junior employee.
- It was far broader than reasonably necessary to protect legitimate business interests as it applied to "all customers" of the Bartholomews Group, regardless of whether Mr. Thornton had knowledge of those customers or worked for them. Scrutinizing the Group's client base, the Court noted that Mr. Thornton was responsible for just over 1 percent of the Group's turnover and should not be restricted from dealing with the other 98-plus percent.
- The provision that Bartholomews would continue to pay Mr. Thornton during the restricted period did not save it. Indeed, the judge stated that it was contrary to public policy to purchase a restraint; there is a public interest also in competition and the proper use of an employee's skills.

What should Bartholomews have done? They should have:

- Tailored the restrictions to Mr. Thornton, and not relied on common terms applying across the board, from junior trainees upwards.
- Regularly reviewed Mr. Thornton's post-termination restrictions, assessing what risks Mr. Thornton could pose to the business.
- Ensured the restrictions were absolutely clear given that any ambiguity

will typically be construed against the employer. Here, for example, the Court was critical of the failure to define "confidential information" properly, or to limit the group of restricted customers.

- Ensured that the restrictions went no further than necessary to protect legitimate business interests, analyzing, for example, what information Mr. Thornton had access to, how quickly it would become "stale," which customers he dealt with, and in what geographical area.

- Avoided additional payment for the restrictions, which can offend public policy in the UK.

This case reminds us that it is a good idea to audit terms of employment regularly (annually is suggested), and certainly when employees are promoted, change roles or take on new duties. Usually, the safest route is to ask the employee to sign a new contract. If an employee embarks on a project that entails access to a high level of confidential information and clients, this may call for additional agreements dealing specifically with confidentiality, intellectual property and/or post-termination restrictions, carefully tailored to cover the individual employee, the situation and the risks. Employers who fail to do this do so at their peril.

If you have any questions about this article or any matters in relation to employment law in the UK or EU, please contact a member of our London Labor & Employment group.

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Recent Accomplishments

Aaron R. Gelb won an appeal in the Seventh Circuit Court of Appeals on behalf of a hotel client. The Seventh Circuit affirmed the district court's dismissal of the plaintiff's failure to accommodate and discrimination claims under the Americans with Disabilities Act.

Patrick W. Spangler successfully resolved a multimillion-dollar executive compensation and indemnity dispute on behalf of a financial services client.

Aaron R. Gelb secured the complete withdrawal of an OSHA citation (and accompanying fines) issued to a client that operates a series of distribution centers and warehouses. Mr. Gelb appeared with the employer at an informal settlement conference with the OSHA Area Director, filed a notice of contest when the agency's proposal was deemed unacceptable to the employer, and then litigated the matter before the Occupational Safety and Health Review Commission until the agency agreed to withdraw the citation entirely in exchange for reasonable safety enhancements.

Patrick W. Spangler successfully defeated claims brought by an options trader against a proprietary trading firm before a six-person arbitration panel at CME Group, Inc. The claims challenged the firm's discretionary bonus program. The victory also resulted in the withdrawal of claims brought by another trader at the same firm.

On March 17, **Elizabeth N. Hall** was elected to Shareholder in the firm's Labor & Employment practice group. Libby is an accomplished trial lawyer and also advises clients on compliance with the full range of federal, state and local employment laws.

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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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