

Labor and Employment Law

Can Anything Be Done to Stop the Avalanche of Wage and Hour Litigation? A Few Class Action Avoidance Options

It is no secret that state and federal wage and hour class actions have exploded over the last ten or so years, becoming the largest and fastest growing area of employment litigation. Unfortunately, the plaintiffs' bar is showing no signs of letting up as plaintiffs continue to garner multi-million-dollar settlements and jury awards. In 2009, the top ten private wage and hour settlements under the Fair Labor Standards Act totaled \$363.6 million, a 44% increase from 2008.

Wage and hour lawsuits can challenge a variety of policies and practices including the classification of employees as exempt, meal and rest breaks, off-the-clock work such as donning and doffing and travel time, expense reimbursements and tip pools. With the increased focus by plaintiffs' attorneys on these claims, odds are that most employers have been or will be drawn into some type of wage and hour litigation or dispute. Smart employers are not sitting idle. Rather, they are proactively auditing wage and hour practices and implementing policies and procedures to prepare for and prevent wage and hour claims (including class actions) before those claims are filed.

What Can Employers Do to Combat This Epidemic?

A. Wage and Hour Compliance Initiative

The most effective way to avoid wage and hour lawsuits is to enact and enforce policies that comply with state and federal wage and hour law. This sounds simple, we know. Nevertheless, employers should strive to reach a level of compliance with state and federal law that reduces the likelihood of litigation. At a minimum, we recommend that employers undertake the following preventive measures:

1. **Ensure compliance with state and federal law.** Employers should, with the help of counsel, periodically examine their policies and practices, including, but not limited to:
 - whether employees are correctly classified as exempt or nonexempt for minimum wage and overtime purposes;

In this issue...

Can Anything Be Done to Stop the Avalanche of Wage and Hour Litigation? A Few Class Action Avoidance Options.....	1
FTC's New "Endorsement" Rules Highlight the Need for Employers to Adopt Appropriate Social Media Policies.....	3
Recent Case Underscores Importance of Harassment Training	4
Health Care Reform Act Requires Breaks for Nursing Mothers.....	5
Check Your State Law Before Credit-Checking Your Employees.....	6
New York Employers Have Heightened Obligation to Engage in Interactive Process with Disabled Individuals	7
EEOC Proposes Guidance on ADEA Defense	9
Vedder Price Adds New Attorney to the Labor Group	10
Recent Vedder Price Accomplishments.....	10

- whether the employer has adopted a valid “safe harbor” policy to prevent improper deductions from ruining a perfectly good exemption;
 - whether nonexempt employees are being paid for all compensable work time, including time spent working at home, traveling, training, on-call, waiting, etc.;
 - whether overtime for nonexempt employees is being calculated correctly, including whether bonuses and commissions are being included in the employees’ regular rate of pay;
 - whether the employer is in compliance with all applicable state and federal meal and rest break laws;
 - whether the employer is in compliance with all applicable state wage payment statutes regarding the payment of earned vacation and wages at termination, and whether wages are being improperly withheld from employees’ paychecks; and
 - whether the employer has properly classified individuals as independent contractors.
2. **Audit and update record keeping practices:** The successful defense of any class action wage and hour lawsuit is contingent on accurate and detailed record keeping. An audit of an employer’s record keeping practices is necessary to ensure that records are being maintained correctly and for the appropriate period of time.
 3. **Provide wage and hour training for human resources, supervisors and employees:** Supervisors in particular should be trained regularly on employer wage and hour policies. Many wage and hour lawsuits arise after supervisors interpret and apply employer policies in an individualized and inconsistent manner.
 4. **Implement an effective “open door” wage and hour complaint reporting system:** Frequently, the most cost-effective way to resolve wage and hour

issues is to address the employee’s concerns directly. Employers should consider implementing a complaint reporting system that invites discussion about these issues and provides for a timely and fair resolution of employee concerns.

B. Mandatory Arbitration

A more aggressive approach to avoiding class action litigation is to implement a mandatory arbitration system, under which all employees are required to sign an arbitration agreement that explicitly waives their right to bring or participate in any collective or class action. Under such programs, any wage and hour claims must be arbitrated as individual claims in arbitration instead of court, where individual actions can morph into class actions. Arbitration can also provide other benefits such as:

- maintaining confidentiality of the proceedings, thus shielding the company from bad publicity;
- providing input into which arbitrators will resolve the dispute;
- eliminating sympathetic juries and unsupported damage awards;
- reducing litigation costs;
- assuring that disputes are resolved using a nationally uniform set of procedures; and
- providing savings on cost of appeals.

Mandatory arbitration programs are not advisable for all employers. Mandatory arbitration programs can be costly and time consuming to design. Such programs may not make sense for a small

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organization where class action litigation is unlikely due to the number of employees and the disparate responsibilities of those employees. In contrast,

Can Anything Be Done to Stop the Avalanche?
continued from page 2

mandatory arbitration programs may be worth serious consideration by large employers that are more often targeted with class action litigation.

Also, the extent to which an employer may enforce a mandatory arbitration provision and compel arbitration depends on the jurisdiction. For example, federal district courts in the Southern District of New York and Connecticut recently affirmed arbitration provisions where wage and hour class litigation was precluded. However, some state legislatures and courts, including the California Supreme Court, have found arbitration clauses that preclude the right of employees to participate in any collective or class actions to be unconscionable and therefore unenforceable. So, consideration must be given to whether an employer may implement a mandatory arbitration system companywide or whether certain locations must be excluded. Employers must also determine whether certain types of claims must be excluded from the mandatory arbitration provision due to statutory provisions or case law. In light of this, counsel must be involved in designing and implementing a mandatory arbitration program.

Complicating matters further, a bill (called the "Arbitration Fairness Act") has been reintroduced in Congress that would bar all mandatory arbitration provisions that require employees to arbitrate employment-related claims. Congress recently passed legislation known as the "Franken Amendment" (after Minnesota Senator Al Franken) that bars defense contractors with government contracts exceeding \$1 million from implementing new or enforcing current mandatory arbitration agreements for employees or independent contractors. This was a significant win for the plaintiff's bar, which has long sought to ban mandatory arbitration provisions.

Vedder Price frequently counsels and aids clients in conducting wage and hour audits, and is adept at determining the feasibility of and implementing mandatory arbitration programs. If you have any questions about state and/or federal wage and hour laws or mandatory arbitration systems, please call **Thomas M. Wilde** (312-609-7821), **Jonathan A. Wexler** (212-407-7732), **Joseph K. Mulherin** (312-609-7725), **Katherine A. Christy** (312-609-7588) or any other Vedder Price attorney with whom you have worked. ■

FTC's New "Endorsement" Rules Highlight the Need for Employers to Adopt Appropriate Social Media Policies

Internet sites that provide the opportunity for individuals to share with the world their thoughts on any subject have exploded both in number and popularity. Employers have always been concerned that employee criticism of their products and services being publicized via social media websites and in the blogosphere could have a negative impact on business. Now, due to recent federal regulations, employers have something new to worry about: they may be liable for unauthorized positive statements made by their employees about their products on social media websites.

New FTC Guidelines

Effective December 1, 2009, the FTC implemented new guidelines concerning endorsements and testimonials in advertising. Although at first glance, the regulations appear to relate to statements made by consumers, experts, organizations and celebrities,

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employers must be mindful of the section addressing employee blogging. In a nutshell, if an employee makes a statement on a social media website such as Facebook or a blog concerning his or her employer's products or services, the employer may ultimately be held liable for damages a consumer suffers if the consumer claims to have detrimentally relied upon that employee's statement in purchasing the company's products or services.

- An "endorsement" is defined as "any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser, even if the views expressed by that party are identical to those of the sponsoring advertiser."

- "Endorsers" and companies must fully disclose any connection between them "that might materially affect the weight or credibility of the endorsement."
- If a blogger posts a statement about his or her employer's product or service, the FTC has taken the position that a person "should clearly disclose her relationship to the manufacturer to members and readers of the message board," on the theory that a consumer's understanding of the "poster's employment likely would affect the credibility of her endorsement."
- In the absence of the disclosure of such a "material connection," an employer could find itself liable for damages suffered by a consumer who relied upon an inaccurate, inappropriate statement by one of its employees.

Potentially, the aggrieved consumer might turn the claim into a class action. The FTC guidelines state, however, that employers who have established appropriate procedures governing employees' endorsements on blogs and the like would be less likely to be prosecuted by the FTC in an enforcement action. The FTC has also stated that it would not likely prosecute employers for the actions of "rogue employees." But there is no guarantee that employers would be completely insulated from liability as a result of the actions of "rogue employees" either from FTC enforcement or from consumer litigants.

Social Media Policy Needed

Employers should consider implementing and enforcing a social media policy (and provide training to their employees with respect to the policy) that either prohibits employees from making comments on-line concerning the employer's goods and services, or requires employees to disclose their employment relationship when publishing any such on-line commentary. If you have any questions about this article, please contact **Laura Sack** (212-407-6960), **Bruce R. Alper** (312-609-7890), **Roy P. Salins** (212-407-6965) or any other Vedder Price attorney with whom you have worked. ■

Recent Case Underscores Importance of Harassment Training

A recent decision by the Second Circuit Court of Appeals (the circuit covering New York, Connecticut, and Vermont) has underscored the need to provide periodic harassment training to supervisors to ensure that they know (and remember!) that they must take action in response to harassment complaints, even in the absence of a formal complaint or details from the complaining employee. In *Duch v. Jakubek*, 07-cv-3503 (Dec. 4, 2009), the Second Circuit reversed a lower court's dismissal of a sexual harassment complaint after it concluded that a supervisor should have known his subordinate was complaining about sexual harassment and should have taken action in response.

Relevant Facts of the Case

The female plaintiff (Duch) engaged in a single consensual sexual encounter with a male coworker (Kohn), after which she told him the encounter had been a mistake that she did not wish to repeat. Kohn nonetheless made a series of sexual advances towards Duch in the ensuing months, including unwanted physical contact, sexually graphic language, and physical gestures. On one occasion when Duch was scheduled to work alone with Kohn on a Saturday, she asked her supervisor (Jakubek) to change her schedule so she would not have to work that day. Jakubek asked Kohn why Duch would be uncomfortable working with him. In response Kohn said, "[M]aybe I did something or said something that I should not have." Jakubek (who was aware that Kohn had engaged in sex-related misconduct toward women in the past) told Kohn to "cut it out, to grow up." Jakubek then asked Duch if she had a problem working with Kohn. She became emotional and said, "I can't talk about it." He responded, "That's good because I don't want to know what happened." Jakubek changed Duch's schedule as she requested, and he did not schedule her to work alone with Kohn on any other occasions. Nonetheless, according to Duch, Kohn's harassment persisted and escalated in the months that followed. Management investigated her complaint months later, after she complained to others about Kohn's sexual harassment.

Recent Case Underscores Importance
continued from page 4

When is the Employer Liable for Coworker Harassment?

Liability for harassment will be imputed to an employer where the plaintiff can demonstrate either that the employer knew about the harassment, or in the exercise of reasonable care should have known about the harassment and failed to act promptly to stop it. The trial court in *Duch* concluded that liability for Kohn's harassment could not be imputed to the defendants (including the employer and Jakubek individually), in part because Jakubek "was never told of, and did not witness, the alleged harassment." But the Second Circuit disagreed, and sent the case back for trial, based on its conclusion that Jakubek had "constructive knowledge" that Kohn was sexually harassing Duch. The Court explained that, based on the information he had, "a jury could reasonably find that Jakubek strongly suspected that it was sexual harassment [that caused Duch to avoid working alone with Kohn], that Jakubek knew the issue was ongoing," and that he had a duty to act. Specifically, "Jakubek had a duty to make at least a minimal effort to discover whether Kohn had engaged in sexual harassment." Instead, Jakubek actively discouraged Duch from revealing the issue by telling her he didn't want to know what happened.

Implications of the Duch Decision

The *Duch* case serves as a reminder and a warning that supervisory "ostrich syndrome" is no defense to a harassment claim (i.e., a supervisor may not willfully ignore signs that harassment may have occurred). As the Second Circuit explained, "when an employee's complaint raises the specter of sexual harassment, a supervisor's purposeful

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ignorance of the nature of the problem . . . will not shield an employer from liability under Title VII." Instead, the supervisor has an affirmative duty to act in response to information that suggests harassment may have occurred.

In light of *Duch*, employers should ensure, through periodic training, that supervisors clearly understand that they are not at liberty to ignore or

avoid signs of harassment. Supervisors must be taught that even if they are not among the designated "go-to" people in the employer's harassment policy, they still have a legal obligation to take action in response to harassment that they knew, or *reasonably should have known*, was occurring. Supervisors must also be trained on the kinds of behaviors that could be construed as harassment, because they have a duty to act when such conduct occurs even in the absence of any formal "complaint" from an employee. Employers must also ensure that supervisors are educated (again, through periodic training) as to the specific steps they are expected to take when confronted with information that suggests harassment may have occurred. In most workplaces, the supervisor is expected to promptly notify Human Resources that harassment may have occurred—at which point the Human Resources Department will commence an investigation. (Supervisors typically lack the time, the training and experience, and sometimes the actual or perceived neutrality, to effectively investigate harassment issues themselves.)

If you have questions or would like to schedule supervisory harassment training, please contact **Laura Sack** (212-407-6960), **Amy L. Bess** (202-312-3361), **Edward C. Jepson, Jr.** (312-609-7582), **Valerie J. Bluth** (212-407-7739) or any other Vedder Price attorney with whom you have worked. ■

Health Care Reform Act Requires Breaks for Nursing Mothers

Buried in the recently enacted Patient Protection and Affordable Care Act is a provision requiring employers to provide "a reasonable break time" for nursing mothers to express breast milk. The legislation also requires employers to provide "a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk."

The law, which takes the form of an Amendment to the Fair Labor Standards Act, does not require employers to compensate employees for such breaks. Additionally, employers with fewer than 50 employees are exempt from these requirements, provided the employer can show that compliance would impose an undue hardship.

These new federal requirements became effective March 23, 2010, the date of the law's enactment.

Employers are advised to ensure that their nursing break practices comply with this new federal law and any applicable state law. More than 20 states, including California, Illinois and New York, as well as the District of Columbia, also have laws protecting nursing mothers in the workplace.

If you have any questions about the workplace laws concerning nursing mothers, please call **Thomas G. Hancuch** (312-609-7824), **Neal I. Korval** (212-407-7780), **Amy L. Bess** (202-312-3361), **Benjamin A. Hartsock** (312-609-7922) or any other Vedder Price attorney with whom you have worked. ■

Check Your State Law Before Credit-Checking Your Employees

If the Illinois State House of Representatives has its way, Illinois will join a small but growing number of states prohibiting employers from inquiring about or using an employee's or applicant's credit score in employment decisions. As employers increasingly rely on credit checks to manage workforces, they should be mindful of existing and emerging restrictions like the ones being considered in Illinois.

An increasing number of employers are conducting credit and background checks on candidates for employment. A recent survey by the Society for Human Resource Management found that of the employers asked, 60 percent said they run credit checks on at least some job applicants. That's up from less than 43 percent in a similar 2006 survey.

Historically, employer credit checks had been subject to federal but not state regulation. Under the federal Fair Credit Reporting Act ("FCRA"), employers must make certain disclosures and must obtain authorization from applicants or employees before obtaining credit reports from consumer reporting agencies. Employers cannot refuse to hire a person who has filed or intends to file for bankruptcy. Under the FCRA, however, an employee or applicant's poor credit history can be used as a basis for an employment decision so long as the employee receives a copy of the credit report, the name of the agency providing the report, and an explanation of his or her rights under the FCRA.

With an unprecedented number of people looking for work (many with credit troubles), state legislators are concerned that employment discrimination based on credit history traps people who get into debt when they lose their job: if their financial problems preclude them from being hired, then their continued unemployment aggravates their already troubled financial situation. Thus, on March 25, 2010, the Illinois House passed H.B. 4658, known as the Employee Credit Privacy Act. As amended, the bill would prevent employers from inquiring about or using an employee's or prospective employee's credit history as a basis for hiring, recruitment, discharge, or compensation. Employers would also be prohibited from retaliating or discriminating against a person who opposes a violation of the Act or participates in the investigation of the violation. Excluded from the Act's coverage would be financial institutions, public safety agencies and government agencies that otherwise require use of the employee's or applicant's credit score. The bill is now being considered in the Illinois Senate.

According to the National Conference of State Legislatures, Illinois and New York are just two of at least 19 states across the country that are considering legislation to ban or limit credit checks on job applicants. Hawaii and Washington state have already adopted laws that ban credit checks on most job applicants. In March, the Oregon legislature sent its governor a bill that similarly restricted the practice, and comparable legislation has been introduced in New Jersey. Needless to say, the volume of legislative activity in this area should be a harbinger to those using such practices, and they should continue to pay attention to developments.

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While Vedder Price will continue to monitor this evolving legislative landscape, employers may want to take the opportunity now to review their practices and ensure compliance with all federal and state requirements. Along with the above-discussed changes at the state level, federal legislation has

Check Your State Law
continued from page 6

also been proposed to ban employers from disqualifying job applicants based on their credit. In addition, the EEOC has recently undertaken an initiative reviewing whether policies or practices based on credit or criminal histories have an adverse impact on racial minorities. This initiative has resulted in increased litigation, including a recently filed lawsuit against a nationwide convention services firm on the basis that it used credit reports to unfairly discriminate against black, Hispanic and male job applicants.

With its vast experience in counseling employers on background checks, Vedder Price is well equipped to assist any client with its use of credit histories or scores. If you would like more information or have any questions, please contact **Laura Sack** (212-407-6960), **Christopher L. Nybo** (312-609-7729) or any other Vedder Price attorney with whom you have worked. ■

New York Employers Have Heightened Obligation to Engage in Interactive Process with Disabled Individuals

A recent New York State appellate decision clarifies employers' obligation to engage in an interactive process to accommodate disabled individuals. This decision, *Phillips v. City of New York*, is further proof that the scope of New York's state and city anti-discrimination laws are significantly broader than their federal counterparts. The appellate court in *Phillips* reversed the trial court's dismissal of a disability discrimination complaint on the grounds that the employer had not adequately participated in the interactive process required by state and city anti-discrimination law, despite the fact that the employee had been granted twelve weeks of medical leave pursuant to the Family Medical Leave Act (the "FMLA").

Facts

The plaintiff in *Phillips* was an employee of the City's Department of Homeless Services ("DHS"). In July 2006, after she was diagnosed with breast cancer, she requested a one-year medical leave of absence. DHS denied that request, but informed her that she was entitled to twelve weeks of FMLA leave. The DHS further explained to the plaintiff that, like all other similarly situated employees, she was

ineligible for additional unpaid time off, and that her continued absence beyond those twelve weeks would subject her to disciplinary action.

Phillips used the last day of her twelve-week FLSA leave period on October 30, 2006. On October 27, 2006, she asked DHS if she could obtain any extension of her medical leave. The DHS again denied her request, and terminated her employment when she failed to return to work at the end of her twelve-week FMLA leave.

Procedural History and Summary of the Appellate Court's Decision

Following her termination, Phillips filed a lawsuit in which she alleged that the defendants (DHS and the City of New York) had violated the New York State and New York City Human Rights Laws by denying her the reasonable accommodation of an extended medical leave and by terminating her employment when she was medically unable to return to work at the expiration of her FMLA leave. The defendants moved to dismiss the complaint for failure to state a claim, arguing that (i) DHS had a uniform policy denying extended unpaid medical leave to employees in the plaintiff's job category; (ii) the one year of medical leave that the plaintiff had requested was not a reasonable accommodation, and (iii) the plaintiff was unable to perform her job functions either with or without a reasonable accommodation. The trial court granted the motion to dismiss and the plaintiff appealed.

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The appellate court reversed, concluding that DHS "failed to engage in the required individualized process when considering plaintiff's request for extended medical leave, i.e., for reasonable accommodations." 66 A.D.3d at 174-75. The Court went on to hold that, under the State and City Human Rights Laws, "engagement in an interactive process is itself an accommodation, and the failure to so engage is an unlawful failure to make a reasonable accommodation." 66 A.D.3d at 176. The Court also found that an employer's failure to consider the employee's requested accommodation is a violation of state and city law. The fact that the DHS had a

uniform policy that precluded certain categories of employees from obtaining extended medical leaves did not relieve DHS of the obligation to engage in an interactive process with the plaintiff, including consideration of the feasibility of her request for extended unpaid medical leave.

The Court did note that “in a great many cases,” a request for a one-year leave is not a reasonable accommodation, but it declined to hold that such a request can never be a reasonable accommodation. 66 A.D.3d at 179.

New York City and State Anti-Discrimination Laws Are Broader than Their Federal Counterparts

As the *Phillips* ruling illustrates, both the state and city anti-discrimination laws are more expansive than their federal counterpart, the ADA. Foremost among the distinctions between the city, state and federal laws are the respective statutory definitions of the word “disability.” While the federal law defines a disability as an impairment that substantially limits a major life activity, the state and city laws are much broader. The state law defines a disability as any impairment that may be identified by medically acceptable diagnostic techniques. The New York City law is even more expansive, defining a disability as “any physical, medical, mental or psychological impairment.”

Historically, courts in New York have looked to judicial treatment of the ADA for guidance in their application of the state and city laws. The *Phillips* court represents a growing trend in New York case law that interprets the state and city laws to impose more onerous requirements upon employers than their federal counterpart. In 2005, the New York City Council passed the Local Civil Rights Restoration Act (the “LCRRA”), which emphasized that the city law “required independent construction to accomplish the law’s uniquely broad purposes.” In the years immediately following passage of the LCRRA, courts generally continued to interpret city anti-discrimination laws in tandem with their state and federal counterparts; however, *Phillips* illustrates the fact that courts have gradually acknowledged that a plaintiff may fail to state a claim under federal law, but nevertheless successfully state a claim of discrimination under the city law, based upon the same set of facts.

Implications for Employers

Because the definitions of a disability under the state and city anti-discrimination laws are so broad as to encompass virtually any medical condition (including, for example, the common cold), the implications of the *Phillips* opinion for New York employers are far-reaching. As that case makes clear, any time an individual requests a workplace accommodation (such as a modification to or exemption from an existing work rule) for medical reasons, the employer is required by New York State and City law to engage in a dialogue with the individual to determine what, if any, reasonable accommodations can be made that will enable the individual to perform his or her job functions; *and* the employer is also required to at least *consider* the feasibility of any specific accommodation requested by the employee.

In light of this decision, employers may also elect to revise their employee handbooks to emphasize that, while all employees are expected to comply with the standards and policies set forth in the handbooks (include those that relate to attendance, for example), the employer is committed to accommodating those individuals with disabilities, as defined under applicable federal, state and city laws in accordance with requirements of those laws. Human Resources staff and managers should also be educated that “no fault” attendance policies are no shield against a claim under New York law that the employer failed to engage in the interactive process. Before discharging an employee who is medically unable to return to work at the expiration of an approved medical leave, the employer must consider, on a case-by-case basis, the feasibility of extending that leave or providing some other reasonable accommodation that will enable the individual to perform his or her job.

If you have any questions about the *Phillips* decision, its implications for employers, or any other disability discrimination issue, please contact **Alan M. Koral** (212-407-7750), **Michael Goettig** (212-407-7781) or any other Vedder Price attorney with whom you have worked. ■

EEOC Proposes Guidance on ADEA Defense

In the wake of two recent U.S. Supreme Court decisions, the Equal Employment Opportunity Commission (EEOC) has proposed regulations to address the scope of the “reasonable factors other than age” (RFOA) defense available to employers under the Age Discrimination in Employment Act (ADEA).

Under the ADEA, employers may legally “take any action” that the ADEA would otherwise prohibit if “the differentiation is based on reasonable factors other than age.” In *Smith v. Jackson* and *Meacham v. Knolls Atomic Power Lab.*, the Supreme Court held that the RFOA defense acts as a complete bar to disparate impact liability where an employer demonstrates that its facially neutral policy or practice, which had a disparate impact on older workers, was based on a reasonable factor other than age. The EEOC’s proposed regulations—published in the February 18, 2010 Federal Register—aim to clarify what “reasonable” means for purposes of asserting that defense.

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Looking to tort law for guidance, the proposed regulations explain that “a reasonable factor is one that is objectively reasonable when viewed from the position of a reasonable employer (i.e., a prudent employer mindful of its responsibilities under the ADEA) under like circumstances.” Thus, “a reasonable factor is one that an employer exercising reasonable care to avoid limiting the employment opportunities of older persons would use.”

To establish the RFOA defense, an employer would need to show that the employment practice was both (1) reasonably designed to further or achieve a legitimate business purpose; and (2) administered in a manner that reasonably achieves that purpose in light of the particular facts and circumstances that were known, or that should

have been known, to the employer at the time. The EEOC’s proposed regulations include six non-exhaustive factors that should be considered in determining whether an employment practice is reasonable:

- Whether the employment practice and the manner of its implementation are common business practices;
- The extent to which the factor is related to the employer’s stated business goal;
- The extent to which the employer took steps to define the factor accurately and to apply the factor fairly and accurately (e.g., training, guidance, instruction of managers);
- The extent to which the employer took steps to assess the adverse impact of its employment practice on older workers;
- The severity of the harm to individuals within the protected age group, in terms of both the degree of injury and the numbers of persons adversely affected, and the extent to which the employer took preventive or corrective steps to minimize the severity of the harm, in light of the burden of undertaking such steps; and
- Whether other options were available and the reasons the employer selected the option it did.

In a section of the proposed regulations that may prove to be the most practically significant, the EEOC cautions employers against giving supervisors “unchecked discretion to engage in subjective decision making,” since disparate impact may result if supervisors act on the basis of conscious or unconscious age-based stereotypes in making personnel decisions. In determining whether a criterion or practice is age-related or not, the EEOC says in the proposed regulations that it will look at the extent to which supervisors are:

- Given unchecked discretion to assess employees subjectively;
- Asked to evaluate employees based on factors known to be subject to age-based stereotypes; and
- Given guidance or training about how to apply the factors and avoid discrimination.

While the proposed regulations are not final, it is unlikely that significant changes will be made before the EEOC adopts final regulations. Prudent employers can act now to ensure that their current practices will pass muster under the proposed

RFOA test. Employers may want to give extra attention to any formulaic procedures or systems for testing, hiring, determining compensation and promotions, and conducting reductions in force. Employers should take steps now to (i) clarify subjective criteria; (ii) train supervisors on avoiding age-based stereotyping when they make personnel decisions; and (iii) ensure that significant decisions are properly reviewed.

If you have any questions about the EEOC's proposed regulations or the ADEA, please contact **Laura Sack** (212-407-6960), **Christopher L. Nybo** (312-609-7729) or any other Vedder Price attorney with whom you have worked. ■

Vedder Price Adds New Attorney to the Labor Group

We are pleased to announce that **Amy L. Bess**, formerly at Sonnenschein Nath & Rosenthal LLP, has joined the firm's Washington, D.C. office as a Shareholder in our Labor and Employment Law Group.

Ms. Bess has first-chair bench trial, jury trial and arbitration experience and is regularly involved in mediations. Her employment litigation experience includes the representation of employers before state and federal courts and administrative agencies, defending against claims of race, sex, disability and age discrimination, sexual harassment, whistleblowing, restrictive covenant disputes, wrongful termination and wage and hour violations. She regularly counsels employer clients in all of these areas, drafts and negotiates employment and severance agreements, conducts on-site workplace investigations, presents training seminars and speaks to employer groups on avoiding workplace problems. ■

Vedder Price is a founding member of the Employment Law Alliance—A network of more than 2,000 employment and labor lawyers “counseling and representing employers worldwide.”

Recent Vedder Price Accomplishments

- **Kevin Hennessy** assisted in winning four union organizing elections in the past three months. Two were with different national distribution clients involving the Teamsters. One of those was in Massachusetts. The third was a victory over the Engineers Union at a community hospital in Chicago. The fourth was a Teamsters campaign involving a leading U.S. distributor of natural and specialty food products.
- **Laura Sack** and **Roy P. Salins** prevailed on a motion for summary judgment in the United States District Court for the Western District of New York on behalf of a national retailer of women's apparel, accessories, jewelry, and gift items that was sued by a former Store Manager for FMLA retaliation and FMLA interference. The victory resulted in the dismissal of the plaintiff's Complaint in its entirety.
- **Thomas M. Wilde** and **Valerie J. Bluth** prevailed on a motion to dismiss in New Jersey Superior Court on behalf of a national home improvement company. The motion resulted in dismissal of seven statutory and common law claims brought by a current employee.
- **James A. Spizzo** advised a client in the financial services industry concerning a complex, nationwide closure and cessation of employment covering in excess of 400 employees. Job modifications in light of federal regulatory concerns, severance issues, and asset preservation were among the issues successfully resolved.
- **Neal I. Korval** and **Jonathan A. Wexler** secured final approval by the federal district court of the Southern District of New York of a highly favorable settlement of an FLSA collective action/NYS Labor Law class action involving claims against a catering company for overtime pay and tips.
- **Timothy J. Tommaso** successfully defended a consulting firm in a claim filed by a former employee alleging he was owed over \$31,000 in unpaid wages. After a hearing at the Illinois Department of Labor, the Department found the employee was only owed \$923.

SAVE THE DATE!

Annual Employment Law Update

Vedder Price will offer practical advice for in-house counsel and HR and Benefits professionals at the firm's Employment Law Conferences on the following dates:

Chicago
Tuesday, May 4, 2010

The Standard Club
320 South Plymouth Court
Chicago, Illinois

Rosemont
Thursday, May 6, 2010

Rosemont Hotel
(formerly the Sofitel Chicago O'Hare)
5550 North River Road
Rosemont, Illinois

DISCUSSION TOPICS

- ◆ Navigating the Bermuda Triangle of ADA, FMLA and Workers' Compensation Leaves of Absence
- ◆ Wage & Hour Update: Threat Level Raised to Orange
- ◆ Best Practices to Promote and Maintain a Union-Free Workplace
- ◆ Healthcare Reform: What Employers Need to Know Now
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