VEDDER PRICE

Labor Law

A newsletter designed to keep clients and other friends informed on labor and employment law matters

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INS REVISES I-9 DOCUMENT "LIST A"

Effective September 30, 1997, the Immigration and Naturalization Service of the Department of Justice (the "INS") changed the list of documents employers may use to verify employment eligibility. This so-called "Interim Rule" effectuates portions of the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996 (the "IIRIRA") passed by Congress last year and governs employer conduct until the INS drafts final guidelines.

The crux of the Interim Rule is as follows: employers should continue to use the I-9 forms they currently have, the most recent version of which is edition 11-21-91. *But*, employers may no longer use all the items in "List A" on the I-9. Specifically, Certificates of United States Citizenship and Certificates of Naturalization (items 2 and 3 from List A) have been stricken. Further, although employers may continue to accept foreign passports (item 4), those passports must have an I-551 stamp or be accompanied by a current, unexpired I-94 form with authorization to work for a specific employer. At this time, Lists B and C remain untouched (although use of birth certificates on List C is likely to be limited or eliminated in the future).

In addition, the Interim Rule clarifies employers' use of receipts for work-eligible individuals unable to present the required documents. Under the prior rule, individuals who did not have required documents at the time of their hire could present a receipt showing application for replacement documents. Those individuals then had 90 days to present replacement documents. The Interim Rule reiterates that employers must accept receipts in lieu of most required documents where those receipts appear to be genuine, unless the employer has knowledge that the individual presenting a receipt is not eligible to work. The Interim Rule also extends the receipt rule to allow employers to accept receipts to prove reverification. But, an employer now may *not* accept receipts for: (a) an application for initial work authorization or (b) an extension of expiring work authorization. Moreover, receipts may *not* be used in lieu of actual documents where the individual has been hired for less than three business days.

Employers should know, however, that the Interim Rule does not have much bite — until further notice, the INS has decided to forgo civil penalties against employers for violations based upon changes made by the Interim Rule. The INS plans to issue new guidelines, new I-9 forms and final regulations in the next six months, at which time penalties will likely go back into effect. The INS will send those new guidelines and forms to employers directly.

If you have any questions about the INS Interim Rule or the IIRIRA in general, please call Ed Jepson (312/609-7582) or any other Vedder Price attorney with whom you have worked.

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APPEALS COURT CLARIFIES EMPLOYER LIABILITY FOR SEX HARASSMENT

When is an employer liable for sexual harassment by its supervisor? It is fairly settled that the supervisor cannot be held personally liable under Title VII. But the standards for holding the employer responsible remain unresolved by the Supreme Court. The issue is complicated by the fact that sexual harassment comes in two varieties: *quid pro quo* harassment, when employment decisions turn on the granting or withholding of sexual favors, and hostile work environment harassment, when an employee's work environment is pervaded by sexually offensive conduct or comment without tangible economic effect. The standards for employer liability may differ depending on which type of harassment is alleged.

In *Meritor Savings Bank v. Vinson* (1986), the U.S. Supreme Court did not offer much guidance when it said that "traditional agency principles" should control that issue. Since then the federal district and appellate courts have been trying, often with inconsistent results and rationales, to determine employer liability in harassment cases.

The latest and most extensive discussion of this issue is found in a recent decision of the Seventh Circuit Court of Appeals in Chicago. *Jansen v. Packaging Corp. of America* (Aug. 12, 1997). With the entire 12-member court deciding a pair of cases, the result was a 200-page decision containing almost as many separate concurring and dissenting opinions as there are judges. The decision hardly provides a clear roadmap for employers, employees and practitioners. But the court did try to summarize those issues in which there was majority consensus.

Quid Pro Quo Harassment

The court decided to hold employers strictly liable. Thus, an employer is liable when its supervisors extort or threaten to extort sexual favors from employees in exchange for favorable treatment, whether it be granting an employment benefit (*e.g.*, a promotion, a raise) or not taking adverse employment action (*e.g.*, discipline, termination). It was the majority view that regardless of the employer's genuine effort through policy and deed to eliminate sexual harassment, it should still be held accountable if supervisors obtained sexual favors through the mantle of their supervisory authority. Moreover, there is strict liability even if the supervisor does not make good on his promise or threat.

Hostile Work Environment Harassment

The standard here is negligence. An employer is liable if it knows or should have known that its supervisors (or non-supervisors) are engaging in such harassment and it fails to respond appropriately. Stated differently, the court will decide whether a company has taken due care to prevent harassment and to respond effectively if and when a complaint is made. Due care will turn on the facts, but critical in all cases undoubtedly will be whether the employer has adopted and communicated an effective anti-harassment policy and whether an effective response follows when the policy is invoked. It can and will be argued that an employer who has no such policy, or only pays it lip service, is not taking sufficient action to detect and prevent harassment.

The Seventh Circuit Court of Appeals includes only Illinois, Indiana and Wisconsin. So the *Jansen* decision is technically of limited application. However, the Seventh Circuit is a well-regarded court, and the *Jansen* majority holdings are consistent with the views of most other courts. Until Supreme Court guidance is provided, which does not appear to be imminent, *Jansen* represents the most current and comprehensive treatment of this thorny issue.

If you have any questions about the *Jansen* case or sexual harassment law in general, call Bruce Alper (312/609-7890), or any other Vedder Price attorney with whom you have worked.

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NEW REPORTING REQUIREMENT FOR ILLINOIS EMPLOYERS AS OF OCTOBER 1

To help locate missing parents and collect delinquent child support payments, an amendment to the Illinois Unemployment Insurance Act creates a "Directory of New Hires." Effective October 1, 1997, Illinois employers must begin filing reports with the Department of Employment Security providing the name, address and social security number of each newly hired employee, along with the employer's name, address and federal identification number. Information from the directory may be used in "locating an absent parent or that parent's employer, establishing paternity or establishing, modifying, or enforcing child support orders."

Reports must be on an IRS Form W-4 or an equivalent form and may be transmitted by mail, telefax, magnetically or electronically. Mailed or faxed reports must be filed not later than 20 days after date of hire. Reports transmitted magnetically or electronically must be sent twice monthly not less than 12 or more than 16 days apart. An Illinois employer which also has employees in another state may report new hires magnetically or electronically to a single designated state after so notifying the Secretary of the U.S. Department of Health and Human Services.

An employer which knowingly fails to comply with these reporting requirements is subject to a civil penalty of $15 for each new hire it fails to report. The Department is in the process of sending information and instructions to employers.

If you have any questions about these new reporting requirements, call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

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OFCCP FINAL RULE OVERHAULS AFFIRMATIVE ACTION ENFORCEMENT REQUIREMENTS

On August 18, 1997, the Department of Labor Office of Federal Contract Compliance Programs ("OFCCP") issued final regulations that made significant changes to contractors' affirmative action obligations and the manner in which the OFCCP enforces them. The final regulations, which became effective September 19, 1997, empower the OFCCP to investigate compliance by contractors and subcontractors in several different ways, clarify record retention and compliance evaluation obligations and expand the OFCCP's enforcement tools.

Compliance Evaluations

The OFCCP retains the power to conduct a full compliance review, which may consist of a desk audit, an on-site review and an off-site analysis. However, the regulations now allow less extensive audit procedures, which may spare some contractors this full-blown compliance review. The OFCCP may now choose to conduct only an off-site review of a contractor's records; a "compliance check," which is a visit to a contractor's facility to ensure that previously submitted documents are complete and that the contractor is complying with record retention requirements; or a "focused review," which is an on-site review limited to one part of the contractor's organization or one particular employment practice.

Document Retention

The final regulations clarify contractors' record retention obligations for personnel information and affirmative action plan ("AAP") documents. Contractors must retain personnel records for two years from the time the record is created or the underlying event occurs, whichever is later. This requirement is reduced to one year for those contractors with fewer than 150 employees or a contract of less than $150,000. If a contractor has notice that a complaint has been filed against it or that it will be the subject of an enforcement action or compliance evaluation, it must preserve all relevant personnel information until the final disposition of the action. The final regulations also clarify that contractors must retain both the current year's and the prior year's AAP documentation.

AAPs

AAP requirements did not change substantially as a result of the final regulations. The OFCCP rejected a proposal to decrease from 30 days to 15 days the period for a contractor to submit an AAP, and deleted the requirement that a contractor certify in writing that its facilities are not segregated. However, the final regulations add a prohibition against segregation based on sex, although they allow for separate bathrooms for men and women.

Perhaps the most significant new AAP provision states that failure to retain the current and prior years' AAPs and good faith documentation raises a rebuttable presumption that such information would be damaging to the contractor. A contractor may defeat the presumption by demonstrating that the information was lost due to circumstances beyond its control.

Access to Computerized Information

One of the new provisions that caused the most concern among contractors allows the OFCCP access to contractors' computerized records. Contractors must not only provide such information for on-site reviews, but also must allow the OFCCP to remove the information off-site for review. The OFCCP may not require contractors to reprogram their computers to provide information in a particular format. Although the regulations restrict the OFCCP's access to information that is relevant to its investigation and allow a contractor to protect confidential information by coding it as long as the contractor provides the OFCCP with the key to the code, many contractors expressed concern that they would be unable to limit the OFCCP's access to sensitive information unrelated to affirmative action. Nevertheless, the final regulations provide that refusal to provide requested information, including computerized information, may lead to debarment from government contracts.

Debarment

The final regulations give the OFCCP two options for debarment. The first is to debar a contractor from future contracts for an indefinite period of time. The commentary to the regulations makes it clear that "indefinite" does not mean "eternal," but an unspecified amount of time. The second option is debarment for a fixed period, which must be a minimum of six months.

The type of debarment determines a contractor's right to apply for reinstatement. A contractor subject to an indefinite debarment may apply for reinstatement immediately. A contractor debarred for a fixed period of time may not apply for reinstatement until 30 days prior to the end of the debarment period. In both circumstances, the contractor must present proof of compliance with affirmative action requirements, and the OFCCP has the discretion to conduct a compliance evaluation to determine eligibility for reinstatement.

Enforcement Proceedings

The final regulations give the OFCCP broad enforcement power. The agency may take action based on a complaint, a compliance evaluation, an on-site review, a contractor's refusal to provide or maintain required information or a contractor's alteration or falsification of records. The regulations also permit the OFCCP to refer cases to the Solicitor for the Department of Labor and/or the Department of Justice.

The OFCCP may still seek backpay and other "make-whole" relief for victims of discrimination. These individuals need not have filed a complaint with the OFCCP; as always, the agency may seek such relief based on a compliance evaluation as well.

Pre-Award Evaluation

The OFCCP rejected a proposal to eliminate pre-award compliance evaluations, but did raise the threshold contract amount for pre-award evaluations from $1 million to $10 million. This change recognizes the effects of inflation over the 30-year period Executive Order 11246 has been in effect.

Conclusion

The OFCCP's final regulations have broadened the agency's investigatory powers and clarified or added to contractors' affirmative action obligations. How the OFCCP will use these new tools remains to be seen.

If you have any questions about the OFCCP Final Rule Revising Affirmative Action Requirements for Federal Contractors, call Vedder Price (312/609-7500).

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BENEFIT PLANS: DON'T MISS THE SELF-CORRECTION DEADLINE

Benefit plan sponsors and administrators have their hands full as this year winds down. They need to analyze the relevant provisions of the newly enacted Taxpayer Relief Act of 1997. They also have to cope with the extensive regulations under the Health Insurance Portability and Accountability Act of 1996. Many of those regulations are effective for calendar year health plans as of January 1, 1998.

Despite these pressing concerns, there is one additional development that should not be overlooked in year-end planning. Earlier this year, the IRS issued a new policy for correcting administrative errors in qualified pension and profit-sharing plans. Under the policy, if corrective action is taken before the current plan year ends, corrections can be made even back to the prior plan year (and in some instances for earlier years if the violations are not significant).

The new policy is entitled the Administrative Policy Regarding Self-Correction ("APRSC"). Under the APRSC, all qualified plan sponsors can now resolve certain potentially disqualifying operational problems without a formal IRS filing. In fact, the correction can occur without any notice to the IRS at all. This is a first. Let's look at the details.

Eligibility for Formal APRSC

In effect, the Policy announces two ways of correcting defects. The first one we will call the formal APRSC. To be eligible for the formal APRSC, the following requirements must be satisfied:

- The violation must relate to "operational" error, a failure to follow the terms of the governing plan document. The program does not cover incorrect provisions in plan documents;

- You need to have in place practices and procedures (formal or informal) reasonably designed to prevent violations, even if those policies proved to be inadequate or were mistakenly applied;
- The violations must be corrected for all years in which they occur;
- The plan must have a current IRS favorable determination letter; and
- The plan must not be under IRS audit.

This policy is not available for situations involving misuse or diversion of plan assets relating to the rule that a plan must be maintained for the exclusive benefit of plan participants and beneficiaries. The IRS notes that those matters are also subject to action by the Department of Labor.

Conditions to Obtaining Formal APRSC Relief

If you meet the requirements listed above, you need to take certain actions. First, the corrections must be put in place by the end of the plan year following the plan year in which the error occurred. Thus, for calendar year plans, corrections for the 1996 year can still be made as long as they are made by December 31, 1997.

Second, the corrections must restore to affected participants, former participants and beneficiaries the benefits and rights they would have had, had the defect not occurred.

In many cases, it will be obvious what participants lost and how to correct it. In other cases it will not be as clear. However, the IRS has already provided guidance on similar corrections through its VCR and CAP Programs. Further, IRS officials have given presentations regarding methods of correction that are officially sanctioned. Finally, the IRS has indicated that additional guidance will be provided in the near future. If your situation is unusual and no apparent method of correction is available, then it may be advisable to file under the established VCR or CAP programs which result in an agreed-upon form of correction.

Benefits of the Self-Correction Policy

Many plan sponsors and administrators have long sought a program to correct operational defects so that they can proceed without worrying whether the draconian sanction of plan disqualification will be imposed. (A proposal has already surfaced suggesting that the Department of Labor consider a similar program for fiduciary violations.) This program provides such an avenue for clear-cut cases, and even less than clear-cut cases should be considered for participation in this program to buttress a substantial good faith argument in the event an issue later arises with the IRS.

Once the correction is made, a record should be kept in the file as to actions that have been taken. The program is expressly available for as many times as necessary. No limit exists on its use.

Informal APRSC Relief

The policy issued by the IRS also indicates that relief will be available for situations outside the formal APRSC policy for what are called "insignificant operational violations." We have called that the informal APRSC.

For example, insignificant violations can have occurred earlier than the preceding plan year and can even remain uncorrected until the time of an IRS audit. The key question, of course, is whether the defects are insignificant. Although this will be determined on a case-by-case basis, the IRS has listed seven factors that it will consider to decide whether a violation is insignificant. Those factors are listed below:

- The number of violations that occurred during the period being examined;
- The percentage of plan assets and contributions involved in the violation;
- The number of years the violations occurred;
- The relative number of participants affected relative to the total number of participants;
- The potential participants affected relative to the number of participants that could have been affected

by the violations;

- Whether corrections were made prior to examination; and
- The reason for the violations (*e.g.*, data errors, arithmetic errors).

No single factor is determinative. While not all factors need to be satisfied in each case, clearly the more that are satisfied, the easier it is to conclude that the violations are insignificant.

Conclusion

The APRSC represents a substantial initiative by the IRS. It provides a mechanism for plan sponsors to correct errors and provide effective relief on an ongoing basis without the cumbersome requirements attached to prior IRS programs. So, despite the crowded year-end schedule, we encourage you to conduct an annual review of the operations of your qualified plans in order to find and correct administrative errors which may be subject to this new policy.

If you have questions about APRSC or other benefit plan matters, contact John Jacobsen (312/609-7680) or any other Vedder Price attorney with whom you have worked.

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FEDERAL CONTRACTORS IN CHICAGO AREA MAY BE VISITED BY "TESTERS"

The U.S. Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") is testing some Chicago-area federal government contractors' compliance with federal anti-discrimination employment provisions through the use of "testers" posing as job applicants. The OFCCP enforces the executive order prohibiting discrimination by federal government contractors.

At its inception in January 1996, the tester program focused on the banking industry in Washington, D.C., and targeted discriminatory treatment of African-American males seeking entry-level jobs. Now the program is being expanded to other cities, beginning in Chicago with Hispanic applicants and in San Francisco focusing on women. Federal officials have said only that they will target "high-growth" industries in the Chicago area. Because the effort will focus on Hispanic applicants and there may be undocumented workers in the Chicago community, the program will also examine employers' compliance with U.S. Immigration and Naturalization Service ("INS") regulations.

In the "paired testing" program, two individuals with nearly identical qualifications but who are of different genders, races or ethnic backgrounds pose as applicants for the same position. If one applicant advances further in the hiring process than the other, the OFCCP may conduct a review to examine the employer's hiring practices. The Office's ultimate sanction can be to cancel the employer's government contract.

The OFCCP has announced it will expand its investigation in the future beyond hiring practices and examine discriminatory pay patterns. The testing program will be used to root out discrimination involving compensation, advancement, retention, stock options, expense accounts, use of company cars, housing allowances and other benefits and perquisites.

The program is modeled on efforts by local law enforcement officials to combat the sale of alcohol to minors by using underage testers to attempt to purchase alcohol. In addition, the Department of Housing and Urban Development has used testers to investigate discrimination in housing. The OFCCP has the potential to cast a wide net, as more than 200,000 companies and institutions (employing more than 25 million people) do business with the federal government.

Opponents of the program, including employers' groups such as the Equal Employment Advisory Council, charge that testers waste employers' resources and misrepresent their credentials.

If you have questions about the OFCCP testing program or about compliance with federal anti-discrimination laws, please contact Bruce R. Alper (312/609-7890), or any other Vedder Price attorney with whom you have worked.

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LIFETIME EMPLOYMENT PROMISES MUST BE IN WRITING

A highly desirable employee joins the company but things later go sour and he is terminated. The employee sues, claiming he was promised permanent or lifetime employment when he was recruited, and demanding hundreds of thousands of dollars he would have earned through retirement age. The company argues that the promise was not reduced to writing and so is unenforceable. Who wins?

In Illinois, at least, the company wins.

In *McInerney v. Charter Golf* (May 22, 1997), a salesman allegedly turned down a higher paying job with his employer's competitor when his employer orally offered him lifetime employment. The Illinois Supreme Court first held that relinquishing a job offer provides sufficient consideration in most cases to enforce a contract for lifetime employment. By the same reasoning, an employee who gives up one job to accept another offering lifetime employment would provide sufficient consideration to support a contract claim.

But the Supreme Court also held that contracts for permanent or lifetime employment must be in writing. Under a legal doctrine called the Statute of Frauds, a contract that cannot be performed within one year must be in writing to be enforceable. Courts in Illinois and other states have been reluctant to characterize a lifetime employment contract as that type of agreement because the contract theoretically could be performed in less than a year if the employee died. However, the Illinois Supreme Court found that view to be unrealistic. The Court also declined to apply any number of exceptions to the Statute of Frauds, making it likely that this ruling will knock out most Illinois lifetime employment claims not supported by a writing.

If you have any questions about the *Mclnerney* case or employment litigation in general, call Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

About Vedder Price

Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with 180 attorneys in Chicago, New York City and Livingston, New Jersey. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, public sector and school law, general litigation, corporate and business law, commercial finance and financial institutions, environmental law, securities and investment management, tax, real estate, intellectual property, estate planning and administration, and health care, trade and professional association, and not-for-profit law.

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COURT HOLDS THAT ILLNESS EFFECTIVELY CONTROLLED BY MEDICATION IS STILL A "DISABILITY"

In our July 1997 edition of the Newsletter (p. 10), we noted the EEOC's position that an illness successfully controlled by medication is nevertheless a protected disability under the Americans With Disabilities Act ("ADA"). A divided panel of the Sixth Circuit Court of Appeals recently endorsed that position, ruling that a paramedic's diabetes, even though controlled by medication, may constitute an ADA-covered disability, requiring his employer to reasonably accommodate him by transferring him to a less chaotic work environment. *Gilday v. Mecosta County.*

Although the plaintiff's diabetes did not substantially limit any major life activity because it was properly treated and controlled, the Court held that he still may be disabled. In so ruling, the Court adopted the EEOC's interpretive guidance, which is persuasive but not binding on the courts, that an impairment should be evaluated "without regard to mitigating measures such as medicines," etc. Accordingly, the relevant question was whether the plaintiff's diabetes in its *uncontrolled* state substantially limited a major life activity. The Court stressed that before he began treatment, the paramedic allegedly suffered from a variety of physical symptoms and that fluctuations in his blood-sugar levels caused him to be irritable and rude. Because getting along with co-workers and customers is necessary for most jobs, "to the extent that his fluctuating blood-sugar levels impair this," his diabetes may substantially limit his ability to work, a major life activity. Therefore, the court held that a jury could properly find that the employer must accommodate the plaintiff by moving him to a less hectic work station where he could better follow a diet regimen designed to stabilize his blood-sugar level.

If you have any questions about the *Gilday* case or the ADA, call Vedder Price (312/609-7500).

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COURT HOLDS THAT RULE REQUIRING DISCLOSURE OF PRESCRIPTION DRUG USE VIOLATES ADA

In a decision bound to have an impact on many employer drug policies, the Tenth Circuit Court of Appeals upheld a Colorado district court's ruling that requiring employees to disclose their prescription drug use, absent a showing of business necessity, violates the Americans with Disabilities Act ("ADA"). *Roe v. Cheyenne Mountain Conference Resort*. The employer's policy provided that "prescribed drugs may be used only to the extent that they have been reported and approved by an employee supervisor." The district court held that the policy impermissibly "makes inquiries of an employee as to whether such employee is an individual with a disability." Because the employer had not attempted to show that the policy was "job-related and consistent with business necessity," the court held that the policy was in direct violation of the ADA. Agreeing with the district court's ruling, the Tenth Circuit remanded the case for entry of an order enjoining the employer from enforcing this portion of its policy.

Employers who have similar policies should review them to ensure that any required disclosures are limited to that information necessary to meet a specific business or safety need. If you have questions, call Vedder Price (312/609-7500).

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COFFEE? TEA? NEW ELECTION?

During the three days before an election at which a majority of Circuit City employees would vote against union representation, a store manager reminded employees to vote while handing them coffee mugs labeled with their last names and bearing a "vote no" slogan. The manager did not ask the employees whether they wanted the mugs or inquire into their intentions on election day. Question: Did the manager coerce the employees into making an "observable choice" because accepting or refusing the mugs could be viewed as pro-management or pro-union?

The NLRB thought so. In a 2-1 decision in July, it found that the employees would reasonably believe that the manager could "identify union supporters by looking at whether the mugs were accepted by the employees, as well as whether they displayed or used them." Although there was no evidence that anyone actually kept track of the mugs, in the Board's majority view the employees would know management "had the potential to do so." Thus, the election results were set aside and a new election directed. We can't help but raise the following question: In advance of the new election, should the store manager tweak the union and the Board by asking employees to vote "no" while handing them personalized coffee mugs bearing only the slogan "Vote"?

If you have any questions about this case, or union elections in general, call Jim Petrie (312/609-7660), or any other Vedder Price attorney with whom you have worked.

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THE "TOTALLY DISABLED" ADA CLAIMANT: AN UPDATE

In our October 1996 newsletter (p. 6), we discussed the problem of an individual who claims to be totally disabled in order to qualify for social security or other disability benefits and who subsequently makes the ADA claim that he is a "qualified individual with a disability." Courts considering this question continue to reach varying conclusions, with a growing number of court decisions favoring employers but rejecting a *per se* disqualification rule.

The issue involves two different statutory schemes. To recover under the ADA, a plaintiff must first show he is a "qualified individual with a disability," that is, "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions" of his job.

In contrast, an individual is entitled to disability benefits under the Social Security Act ("SSA") if he is unable "to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment." The impairment must be so severe that the claimant is unable to do his previous job and cannot engage in any other kind of substantial gainful work which exists in the national economy. Thus, SSA requires an applicant for benefits to prove he is totally disabled and unable to work at all. Workers' compensation and many employers' own disability plans have similar standards.

Some Courts of Appeal (*e.g.*, the D.C. and First Circuits) have concluded that an employee can be disabled for purposes of qualifying for disability benefits and at the same time be a "qualified individual with a disability" and thus protected under the ADA. Others (*e.g.*, the Third Circuit) have barred subsequent ADA claims, ruling that a party may not assert a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. Still other courts (*e.g.*, the Fifth, Sixth and Ninth Circuits) have taken a middle position, stopping short of an absolute bar, but dismissing subsequent ADA claims based on an insufficiency of evidence to overcome the plaintiff's previous sworn statements to the SSA (or other tribunal) about his total disability. The Seventh Circuit is now in this last category.

Last August the Seventh Circuit Court of Appeals denied an ADA trial to a former employee, in *Weigel v. Target Stores*. The Seventh Circuit found that the plaintiff, a former cashier supervisor receiving disability benefits because of major depression, failed to show that a reasonable accommodation would have enabled her to return to work and perform the essential functions of her job. All of the evidence, including her physician's and her own statements to the Social Security Administration, supported the finding that the employee was totally disabled and unable to work at all. Because she failed to produce evidence showing she was a "qualified individual" under the ADA, the court dismissed her claim.

However, the Seventh Circuit explicitly declined to adopt a *per se* rule barring subsequent ADA claims. "It is because of the fundamental differences between the SSA's definition of disability and the ADA's definition of 'qualified individual with a disability,' that this Circuit declines to regard an SSA disability determination to be conclusive evidence as to whether one is entitled to protection under the ADA," the Court wrote. For example, the SSA does not consider whether a claimant can work with reasonable accommodation by the employer.

The Eighth Circuit Court of Appeals may be in yet another category: undecided. Confessing a lack of consistency, the Eighth Circuit noted last August that its approach to these cases has been "less than clear," and that because "it would be unwise at this juncture for us to attempt to reconcile these cases," it would not yet "authoritatively define our stance on the matter." *Dush v. Appleton Elec. Co.*

If you have questions about these cases or the ADA, pleae contact Bruce R. Alper (312/609-7890), or any other Vedder Price attorney with whom you have worked.

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NEW LAWS FOR ILLINOIS HEALTH-CARE EMPLOYERS

The Illinois Health Care Workers Background Check Act, which requires health-care employers to initiate criminal record checks on applicants and employees with duties involving direct patient care, has been amended effective January 1, 1998 to include additional criminal convictions for which a covered individual must be disqualified unless a waiver is granted by the state licensing agency. (We are enclosing 2 tables for our health-care clients and friends listing the disqualifying criminal convictions.) However, the amendment does not require an additional criminal background check on employees for whom checks were initiated during 1996 or 1997. Another amendment enables an employee suspended because of an inaccurate background check to recover backpay for the suspension period if the employer is the cause of the inaccuracy.

Also, the Illinois Medical Patient Rights Act has been amended effective January 1, 1998 to require that identification badges be worn by health-care facility employees and volunteers (including students) who examine or treat patients or residents. The badge must disclose the wearer's first name, licensure status, if any, and staff position.

If you have any questions about these recent amendments, call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

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Labor Board Throws Employer's Defense in the Trash

The Labor Board recently upheld a decision by an administrative law judge that a refuse hauling company had violated the National Labor Relations Act by mistreating an employee because he had filed a charge against the company and had testified for a union in an arbitration proceeding. The company argued to the Board that its actions didn't amount to "substantial changes in [the employee's] working conditions," but the Board disagreed. Specifically, the Board noted that the employer had threatened to kill the employee and his family, had shot him three times with a pellet gun and had locked him in the hopper of a garbage truck for two to three hours. The Board obviously assumed that these events were not part of the employee's normal working conditions. (With thanks to Tom Wilde for not letting this item go to waste.)

Cumpulsory Unionism for Kids and Their Nannies?

Last July, Teamsters Local 70 filed a grievance against Mills College in Oakland, California, protesting the College's subcontracting of brush-clearing work, which the union claimed fell under its maintenance unit bargaining agreement. The subcontractor was a company called "Goats R Us," which put a herd of 500 goats to work on poison ivy undergrowth on the College's campus. As a remedy, the union's grievance asked for either back pay to the maintenance workers who should have gotten the work, or that the 500 goats be required to join the union. Under the latter alternative, the goats would get $400,000 in back pay, of which some $25,000 would be due to the union for initiation fees and dues. The Teamsters warned, however, that unionized goats could not work in more than one classification at a time, so they would not be allowed "to eat and fertilize simultaneously." (For those who think we might be making this up, see [1997] Daily Lab. Rep. (BNA) No. 140, at A-2 (July 22, 1997)).

Union to Contribute to Republicans

On September 15, the president of the Service Employees International Union announced that it will begin making contributions to the Republican Party and to the Labor and New Parties, as well as to the Democratic Party. The SEIU president did not indicate whether its Republican contributions would be given with the head or tail side up. (In 1996, over 93 percent of all union political contributions went to Democrats.)

Picketers' Conduct Ruled "Trivial" Pursuit

An NLRB administrative law judge ruled on September 3 that Caterpillar Inc. violated the National Labor Relations Act by disciplining three East Peoria strikers in 1994 for a picket line incident the Judge found "trivial." Hourly employee Jerry Huffman was trying to enter the plant parking lot to go to work despite the UAW picket line. The company's investigation showed that one picket jumped on top of Huffman's car, a second picket opened the car door to threaten Huffman, and a third beat on the hood. The first two employees were fired and the third was suspended for ten days. The judge ordered Caterpillar to reinstate the discharged employees and to make all three strikers whole. As the judge saw it, the three picketers "momentarily blocked" Huffman's car to get him to stop, and when Huffman wouldn't stop, one jumped on the hood and hung on merely to avoid injury. Another picket opened Huffman's door just to demand that Huffman stop and allow the hood-riding employee to alight. While not holding that pickets have a right to stop vehicles of line-crossing employees, the judge concluded that a striker may not be discharged "merely" because he "momentarily" tries to do so. A Caterpillar spokesman said the company is "appalled" by the decision, which is appealable to the full National Labor Relations Board.

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