VEDDER PRICE

Labor Law

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

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TWO-WAY STREET: EMPLOYER MAY REVOKE SEPARATION PACKAGE BEFORE OLDER EMPLOYEE ACCEPTS IT

Your company decides to terminate an employee over age 40. Rather than risk potentially costly litigation, the company decides to offer the employee a generous severance package. One week after the package is delivered to the employee, the company learns that the employee has been making defamatory statements about one of the company's executives to its customers. Now your CEO does not want to pay the original separation benefits. Can the company revoke its offer before the employee accepts it? According to the Eighth Circuit Court of Appeals, the answer is yes.

The Older Workers Benefit Protection Act ("OWBPA") governs the form of releases that will be considered effective to waive age discrimination claims as part of early retirement and other separation agreements. One of its requirements is that an employee be given at least 21 days to consider the separation proposal. Another provision permits an employee to revoke his acceptance within seven days after signing an agreement. The purpose in both cases is to ensure that the employee's release of his rights under ADEA is knowing and voluntary.

In *Ellison v. Premier Salons International Inc.*, Ellison was offered a separation package which included a waiver of his ADEA rights. However, before Ellison had accepted the package, the company learned that he had made defamatory statements about the company and its president. The company told Ellison that it was revoking its first offer and replacing it with a less generous package. Ellison signed the original agreement and sued to enforce it. He argued that OWBPA creates a right of acceptance on behalf of the employee for 21 days that may not be revoked or rejected by the employer. The Court of Appeals disagreed, stating that OWBPA does not require employees to wait the full 21 days before accepting or rejecting the offer; it is designed to give them sufficient time to make an informed and voluntary decision. As such, the Court held that OWBPA is concerned only with the validity of waivers, and does not affect the established principle which permits an offeror to revoke an offer before its acceptance.

The Court did not discuss whether the agreement must contain language entitling the employer to revoke its offer before the employee accepts it. However, there was no such language in the *Ellison* agreement. Nor did the Court say whether an employer has the same right as the employee to revoke the agreement within seven days after the employee accepts it. Because the latter is not a traditional contract law right, it is unlikely that an employer would have such a right unless the agreement specifically contained language to that effect. But *Ellison* suggests that such language, if included, would be enforceable as a freely negotiated contract term.

If you have any questions about the *Ellison* decision, or separation agreements in general, please call Bruce Alper (312/609-7890), Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

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LOWER COURTS INTERPRET SUPREME COURT'S SEX HARASSMENT DEFENSE STANDARDS

As discussed in our July 1998 newsletter, the U.S. Supreme Court in *Ellerth v. Burlington Industries* and *Faragher v. City of Boca Raton* established that an employer can avoid liability for its supervisor's sexual harassment by showing: 1) it has taken reasonable care to prevent and promptly correct sexual harassment; and 2) the employee unreasonably failed to take advantage of the preventive or corrective opportunities provided. Two recent lower court cases with opposite results illustrate how courts are applying the new standard.

In *Corcoran v. Shoney's Colonial, Inc.*, a federal district court in Virginia found Shoney's liable for harassment by an assistant manager who made numerous unwelcome remarks, repeatedly touched the plaintiff and even exposed himself to her. The Court first concluded that the harasser qualified as a "supervisor" (not defined in the Supreme Court cases) because he took actions "that could only be taken by one acting in a supervisory role."

Applying *Ellerth* and *Faragher*, the Court next found that the employer met the first affirmative defense requirement because, within seven days after being informed of the harassment, the general manager of the restaurant investigated and confronted the harasser with the allegations. The harasser resigned two hours later. The Court also approved of Shoney's measures to prevent sexual harassment, noting that an express policy prohibiting such harassment was posted in all Shoney's locations.

Nevertheless, the Court found Shoney's liable for the harassment because it failed to establish the second element of the defense – that the plaintiff had unreasonably failed to take advantage of corrective measures available to her. Shoney's argued that the plaintiff should have complained when the supervisor first made improper remarks to her, rather than waiting until the harassment resumed and escalated some eight months later. The Court noted that neither *Ellerth* nor *Faragher* "attempt to provide guidance as to what constitutes an unreasonable failure to take advantage of any preventive or corrective opportunities." But, observing that "it is far from uncommon for those subjected to such remarks to ignore them when they are first made," the Court found that the plaintiff was not unreasonable in failing to complain after the first, verbal incidents of harassment.

In contrast, the Eleventh Circuit Court of Appeals found the employer successfully established the affirmative defense and therefore avoided liability in *Coates v. Sundor Brands, Inc.* There, the Court focused on the adequacy of the notice to Sundor and the reasonableness of the employer's response. As in *Shoney's Colonial,* the Eleventh Circuit first found the employer exercised reasonable care in preventing sexual harassment by adopting a "user-friendly" policy.

The Court next reviewed several encounters between the plaintiff and her supervisors to determine whether the plaintiff had "reasonably availed herself of the avenues created by the policy to put Sundor on notice of the ongoing harassment." Of four conversations the plaintiff had with supervisors in which the subject of the harassment was allegedly raised, the Court found that only two adequately put those individuals – and therefore the employer – on notice. Following those two conversations, the Court found prompt and effective measures were taken to address the problem. For example, after the plaintiff complained the second time, the harasser was immediately suspended without pay and resigned the same day. The Court found two of the discussions inadequate because, although the plaintiff had asked to speak to a supervisor who was too busy to have a lengthy conversation at the time, in neither instance did the plaintiff make it known that she wished to lodge a sexual harassment complaint.

These cases indicate that courts will read *Ellerth* and *Faragher* to mean that it is not enough to show that preventive measures are in place to prevent harassment, and that formal complaints are followed by prompt, effective responses. The questions of what constitutes a complaint, whether delay in complaining is "unreasonable," and whether the offending individual is a "supervisor" are still open for review in each case.

If you have questions about these decisions, please call Bruce R. Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

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ADEQUATE MEDICAL DATA REQUIRED WHEN SEEKING ACCOMMODATIONS OR LEAVES

Employment laws give sick and disabled employees special rights. Thus, the Americans with Disabilities Act ("ADA") and its state law counterparts require that employers accommodate the special needs of disabled employees if doing so would not constitute an undue hardship on the employer. The Family and Medical Leave Act ("FMLA") requires that employers give employees time off if they or their immediate family members are seriously ill. Under both laws, the employer can discharge its legal obligations only if it has enough information about the employee's condition to assess those obligations and make informed decisions. However, in many cases the employee does not disclose sufficient information for that process to occur.

Interpreting the ADA, the courts say that employer and employee must engage in an "interactive process" when deciding whether and to what extent an accommodation must be provided. By definition, this process assumes that employer and employee will work together, sharing information, in an attempt to arrive at a mutually agreeable solution. The employer may be expected to provide the employee and his physician with information about the employee's job duties and working conditions. For his part, the employee must provide sufficient medical information for the employer to make an informed decision. In the landmark decision of *Beck v. University of Wisconsin Board of Regents*, the Court of Appeals in Chicago stated that "where the missing information is of the type that can only be provided by one of the parties, failure to provide the information may be the cause of the breakdown and the party withholding the information may be found to have obstructed the [interactive] process." Two recent decisions have applied this rule, holding that an employee's failure to provide needed information releases the employer from its obligations under the ADA and FMLA.

In *Steffes v. Stepan Company*, the Seventh Circuit was asked to review a judgment in favor of an employer that had terminated an employee when she failed to clarify the nature and extent of her medical restrictions. Steffes had worked in the company's warehouse until she was bumped from her position by a more senior union member. Before being reassigned, Steffes informed the company that she had chronic obstructive pulmonary disease, and provided a doctor's note stating that she must avoid chemical exposure.

When another warehouse position became available, the company offered it to Steffes on the condition that her physician clarify the extent of her restrictions. The company provided a list of the chemicals to which she might be exposed and requested her physician's certification that she could safely work in those conditions. Steffes responded with a doctor's note clearing her to return to work in the store room on the assumption that the identified chemicals were kept in sealed containers. The physician cautioned that Steffes would experience respiratory problems if exposed to chemical spills in which vaporization occured. The company did not consider this to be an adequate response and sent Steffes another letter explaining its concerns and the need for further information. The company explained that the physician wrongly assumed that the store room was self-contained; in fact, it was adjacent to areas in which welding and spray painting occurred. Moreover, the chemicals in the area were not always kept in sealed containers. When Steffes did not respond with any additional information, the company withdrew the offered position and terminated her. The Court of Appeals upheld summary judgment for the company, explaining that it could not be liable for failing to provide reasonable accommodation because Steffes "failed to hold up her end of the interactive process by clarifying the extent of her medical restrictions." Significantly, the Court explained that Steffes had it within her power to explain the nature of her job to the doctor and obtain a more comprehensive release letter.

A similarly non-compliant employee was deemed responsible for the breakdown of the interactive process in *Templeton v. Neodata Services, Inc*. After suffering severe head and neck injuries in an automobile accident, Templeton requested and received short-term disability leave from her employer. Templeton's physician sent a letter to the company's insurance carrier stating that although she had serious doubts that Templeton could return to work, she could not make that assessment until she had reviewed a detailed job description. In response, the company's benefits manager sent a job description to the doctor, along with a request for an updated medical certification because of Templeton's failure to return to work on the date last given by the physician.

The employee did not respond. She later admitted that she had instructed her doctor not to release the information because she believed the company was preparing to place her on medical leave against her wishes. The company sent another letter to Templeton seeking an updated medical certification, this time warning that failure to respond would constitute job abandonment. When Templeton did not respond, she was terminated. Like the Seventh Circuit in *Steffes*, the Tenth Circuit held that Templeton's failure to provide the information necessary to the interactive process released the company from liability under the ADA. The Court stated that "an employer cannot be expected to propose reasonable accommodation absent critical information on the employee's medical condition and the limitations it imposes."

A similar principle was invoked to defeat an FMLA claim in *Satterfield v. Wal-Mart Stores, Inc*. Satterfield failed to report for work one day. Unable to reach a telephone, she had her mother deliver a note to her manager stating she could not work because of a pain in her side and that she would like to "make up" the time on one of her off days. Subsequently, Satterfield's mother, who also worked at the store, told a manager that her daughter was "sick." When Satterfield failed to report to work or call in on the following three work days, Wal-Mart terminated her employment. Satterfield subsequently brought suit, alleging that her communications effectively placed Wal-Mart on notice that she was suffering from a "serious health condition," thereby entitling her to leave under the FMLA.

The Court rejected her claim, explaining that while an employer may have a duty to determine whether an employee's absence is due to an FMLA qualifying illness, "the employer is not required to be clairvoyant." Particularly significant to the Court's analysis was the fact that Satterfield had been absent without excuse prior to this episode and had demonstrated an understanding of the company's leave policies by requesting and receiving leave on two prior occasions.

If you have any questions about these decisions, or about how to properly respond to an employee's request for accommodation or time off, please call Bruce Alper (312/609-7890), Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

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ADMINISTRATIVE "MISTAKE" COSTS EMPLOYER SUMMARY JUDGMENT

The Seventh Circuit Court of Appeals recently ruled that a question of fact existed as to the accuracy of a "mistaken" organizational chart, defeating the employer's motion for summary judgment in an age discrimination case. In *Janiuk v. TCG/Trump Company*, a revised organizational chart showed a younger employee replacing an older worker in a position allegedly eliminated during a reduction in force. The employer asserted the chart was an administrative error, and that no such replacement occurred. Nevertheless, relying on the chart and the testimony of the chart's creator, the Seventh Circuit reversed the lower court's grant of summary judgment for the employer.

At the time of his termination, Plaintiff Janiuk was a 45-year-old sales manager for Trump, a food brokerage business. In January 1995, Trump lost three of its accounts, including one of its largest. In response to these losses, Trump eliminated five positions, including Janiuk's.

Within a few days after Janiuk's termination, a new organizational chart was created, showing a younger employee, Kalk, in the position formerly held by Janiuk. Trump argued that the chart was erroneous: Kalk did not replace the plaintiff, but merely assumed a few of his duties, as did other employees. Robert Prater, Trump's vice-president of sales, explained in his deposition that he had asked an employee in the marketing department to create a new chart after the plaintiff's termination, but that he never directed her to elevate Kalk to the sales manager's slot. Prater further testified that the employee must have made the assumption on her own, and that when he discovered the error, it was immediately corrected. However, Trump never produced a corrected version in the course of litigation.

The marketing employee, on the other hand, said that Prater himself made the changes on the chart and never asked her to correct it, and that the chart remained in effect for 10 months. The court also noted that Prater himself had made use of the chart with Kalk, in sales meetings and with a potential customer. The court held that a jury could reasonably conclude on this evidence that Janiuk's position was not really eliminated. Consequently, summary judgment was denied.

While credibility issues were central in reversing summary judgment in this case, the court's focus on the accuracy of the organizational chart points up the importance of reliable documentation in defending against discrimination lawsuits.

If you have questions regarding *Janiuk v. TCG/Trump* or the ADEA in general, please contact Vedder Price (312/609-7500).

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NLRB MAY MAKE UNION ORGANIZING EASIER

The NLRB's General Counsel shapes Board law by advising Regional Directors whether to issue complaints on unfair labor practice charges that raise novel questions. The General Counsel periodically identifies legal issues which have been approved for hearing by the Board. The following three cases in the General Counsel's most recent report signal his intent to make it easier for unions or their employee supporters to communicate with employees during an organizing drive, such as by using the employer's own e-mail, showing pro-union videos in the employer's lunch room, or getting an employee address list from the employer during the organizing campaign.

You Have Mail

The Board will decide whether an employer can ban all nonbusiness use of its computers, including employee e-mail messages to fellow workers about union organizing. The employees involved are professionals and technicals who spend most of their working time on computers and who communicate primarily by e-mail. Although the company's written policy prohibits the use of its computers for nonbusiness, unauthorized or personal purposes, employees regularly send each other personal messages, humorous stories and other nonbusiness e-mail. A charge was filed after several employees active in organizing were disciplined for using their employer's computers to e-mail union messages and download information from the union's web page.

As a general rule, an employer may prohibit union solicitation on its premises only during working time; a rule barring such activity during nonworking time is presumptively invalid. The distribution of written materials may be further restricted to nonwork areas, such as a cafeteria or parking lot. In either case, the prohibition may not be discriminatorily applied so as to block the exchange of union material while permitting other communications. Here, the General Counsel concluded that the employer had discriminatorily enforced its policy on computer use against union messages. However, an additional issue was whether the policy against all nonbusiness e-mail was, even if uniformly applied, facially unlawful because it had the effect of prohibiting union-related communications. Resolving this issue required an assessment of whether e-mail messages are solicitation or distribution, and whether the computers and computer networks used by employees are work areas.

As the General Counsel reports, some e-mail may be akin to printed documents and fairly classified as distribution material. Just as flyers and pamphlets can clutter work areas, e-mail can take up computer space and affect the performance of an employer's computer network. Moreover, the employer's computers obviously are work areas since they are integral to the physical space occupied by employees and the virtual space employees access on the network to perform their jobs. Thus, a rule barring the use of computers to distribute nonbusiness material, including union communications, would seem valid on its face.

In the General Counsel's view, however, some e-mail also warrants treatment as oral solicitation, which can be barred only during working time. Citing a Congressional discussion of e-mail under the Electronic Communications Privacy Act of 1986, the General Counsel notes that e-mail is interactive in nature and can involve virtually instantaneous conversations like a telephone communication. In other words, e-mail messages can be a substitute for direct oral conversation. Thus (the General Counsel reports), "we decided to argue that the Employer's rule, prohibiting all non-business use of e-mail, including solicitation messages protected by Section 7, was overbroad and therefore facially unlawful."

Because the rule in question prohibits all nonbusiness computer usage, a finding that it is facially invalid will leave unanswered questions sure to arise as management attempts to fashion a valid rule. For example, what use of a computer to compose, send and read or print union messages constitutes *distribution*, which apparently can be banned since the typing and transmission of e-mail messages on an employer's computer is work-area activity? On the other hand, to the extent such activity represents *solicitation*, how does an employer effectively prevent the reading during work time of e-mail messages composed and forwarded during the sender's break time?

Whatever computer usage or e-mail rules eventually receive the Board's stamp of approval, they still must be uniformly enforced. Even a facially valid rule will be struck down if it is loosely applied to allow exceptions deemed acceptable by the employer.

Video Arcade

In the second case, the General Counsel will challenge an employer's refusal to allow union supporters to show a pro-union video in the employee cafeteria during lunch and break periods. The union had made a written request to show the video, offering to provide the necessary equipment and to pay for the electricity. The company allows employees to distribute literature, apparently including videocassettes, in nonwork areas during nonwork time, but denied the union's request because the cafeteria was provided to afford employees an opportunity to relax, and because showing the video might create dissension.

As in the e-mail case, the General Counsel's analysis turns on whether showing a video is solicitation or distribution. He concludes that a union video is a "modern-day equivalent of campaign literature," and that refusing to allow it to be shown in a nonwork area during nonwork time "is the equivalent of a prohibition on the distribution of union literature." However, the General Counsel also deems showing the video "to be the equivalent of solicitation, in that it is an oral transmission of a message." Thus, the General Counsel believes that the employer's refusal violated the Act either way. As to the company's argument that the showing of a union video might create conflict, the General Counsel blithely observed that the employer had not seen fit to regulate other lunchroom activity having the potential for conflict "such as discussion of politics, religion or the Union itself."

Home Alone

The third case involves a union's unsuccessful attempt to reach approximately 300 home care employees dispatched by telephone to work at clients' homes. Unable to contact these employees at the employer's office, and after getting few responses to radio announcements and newspaper ads, the union asked the employer for a list of employee names and addresses. The employer declined, stating that it did not provide anyone with employee names and addresses.

It is established Board law that after a union files a representation petition and an election is directed by the Regional Director, the employer must timely submit an "Excelsior" list of eligible employees with their full names and mailing addresses. This requirement dates from 1966 when the Board decided *Excelsior Underwear*, 156 NLRB 1236. Since then, no Board decision has held that employee names and addresses must be supplied *prior* to the filing of a petition. However, the General Counsel believes the Board is now ready to require such disclosure in situations where the union has no alternative means of reaching employees and the employer has no legitimate overriding interest in keeping employee names and addresses confidential.

Here, the report notes, the union had no means of communicating its organizational message to the employees, who rarely appeared in the employer's offices. The report also observes the trend toward employees working from their homes on personal computers, and communicating with their workplace by telephone or computer modem. Accordingly, the General Counsel concludes, "we decided to argue that the Board should require an employer to disclose employee names and addresses upon the request of a union where that union has no reasonable means of reaching employees with its message of self-organization. Unions possessing such a list will then be able to communicate their message to employees through telephone calls, mailings of literature, or home visits."

The General Counsel's full report (48 pages) is available at www.nlrb.gov/press/r2310.html. If you have any questions about e-mail policies or union organizing in general, call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

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OFCCP ISSUES FINAL RULE ON AFFIRMATIVE ACTION OBLIGATIONS REGARDING CERTAIN VETERANS

On November 4, 1998, the United States Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") issued a final rule revising its earlier proposed regulations implementing the affirmative action provisions of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("VEVRAA"). VEVRAA generally requires employers awarded a government contract or subcontract of $10,000 or more to "take affirmative action to employ and advance in employment qualified special disabled veterans and veterans of the Vietnam era." 38 U.S.C 4212.

OFCCP designed and revised its regulations to mirror those implementing Section 503 of the Rehabilitation Act of 1973 ("Section 503") and the Americans with Disabilities Act ("ADA"). The final rule, similar to current Section 503 regulations, adopts the standards in the ADA regulations regarding disability discrimination, but applies these standards with respect to special disabled veterans and, to a more limited extent, to veterans of the Vietnam era.

The final rule, 41 C.F.R. Part 60-250, consists of five subparts and a New Appendix:

- Subpart A revises the definitions of "veteran of the Vietnam era" and "special disabled veteran." The revised definition of "veteran of the Vietnam era" now extends the Vietnam era from February 28, 1961 through May 7, 1975 for veterans who served in the Republic of Vietnam during that period, and from August 5, 1964 through May 7, 1975 in all other cases. The revised definition of "special disabled veteran" removes two proposed exclusions from VEVRAA's protection, for special disabled or Vietnam-era veterans who were alcoholics that could not perform essential job functions or were infected with a contagious disease and consequently posed a direct threat to co-workers. Accordingly, these individuals are now protected under VEVRAA, although not under Section 503. Additionally, the requirement that contractors immediately list their employment openings at an appropriate office of the state employment service system may now be satisfied by listing job openings in the Department of Labor's America's Job Bank (at http://www.ajb.dni.us), or with the Veteran's Employment and Training Service. But the final rule requires contractors to post *every* job opening except

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, "executive and top management" jobs that meet a stringent five-part test.

- Subpart B, which specifies the employment actions that constitute prohibited discrimination under VEVRAA, is substantially identical to the parallel provisions in the Section 503 final rule.

- Subpart C, which applies only to government contractors with 50 or more employees and contracts of $50,000 or more, addresses the written affirmative action program requirement. Subpart C also contains provisions on self-identification for each group covered under VEVRAA. For special disabled veterans, invitations to self-identify are now limited to the post-offer stage unless the contractor is specifically undertaking affirmative action for that group. For Vietnam-era veterans, the invitation may be made at any time before the applicant begins employment.

- Subpart D covers general enforcement and complaint procedures. The final rule extends the filing period for a complaint from 180 days to 300 days.

- Subpart E includes revised provisions on recordkeeping, such as extension of the current one-year record retention period to two years for contractors with 150 or more employees and contracts of $150,000 or more, and conforms the scope of record retention to the EEOC's requirements under the ADA and the OFCCP's requirements under Section 503.

- The new Appendix sets out guidelines on the duty to provide reasonable accommodation under VEVRAA. The Appendix is similar to Section 503's appendix and the EEOC's ADA appendix known as Interpretative Guidance on Title I of the ADA. Accordingly, the EEOC appendix may be relied on for guidance with respect to parallel provisions of this final rule.

When OFCCP sent this final rule to the Federal Register for publication, both houses of Congress had passed the Veterans Employment Opportunity Act of 1998, but the bill had not yet been signed into law. If the bill becomes

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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law, it will require additional changes to VEVRAA regulations, to increase the coverage threshold from a contract of $10,000 or more to a contract of $25,000 or more, and to add to the class of individuals protected under the law "veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized." OFCCP has already begun work on an additional regulatory document that would address the new legislation and expects to publish that document in the near future.

If you have questions about the new final rule, please contact Vedder Price (312/609-7500).

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BENEFIT PLANS

This column frequently points out pitfalls or traps for the unwary employee benefit plan administrator. To start the new year off on a positive note, we'll highlight some success stories in the area of benefit plan administration.

In the cases described below, the careful efforts of plan administrators and other fiduciaries paid off. These cases are examples of how the plan sponsor's efforts to master and implement the rules for benefit plans resulted in a successful outcome. Good things really can happen in employee benefits! So savor these cases and keep them in mind when the going gets rough.

A QDRO Determination That Ends the Controversy

Qualified Domestic Relations Orders ("QDROs") were meant to be a solution to the issue of how to divide benefits in divorce situations. But they have ended up being one of the biggest headaches for plan administrators. Former spouses and their domestic relations attorneys by inadvertence or otherwise almost never seem to get the rules right. As a result, the plan official often feels as if he or she is in the middle of the underlying domestic dispute. That's sometimes true even if the plan administrator provides "fill in the blank" forms.

You can imagine the plan administrator's frustration in the case of *Blue v. UAL Corporation* (7th Cir. 1998). A pilot's spouse submitted seven state court divorce orders to the plan. The plan reviewed them all and followed the terms of those that were true QDROs.

But even after this extended process, the pilot-employee objected. He conceded the plan had followed all the required steps for determining a QDRO under ERISA. Yet he asserted that the state court divorce judge got the underlying state court order wrong. The state court judge, he claimed, improperly interpreted state law to include his former wife's attorneys' fees in the amounts contained in one of the orders that the plan had determined to be a QDRO. He wanted the plan to rectify the state court judge's action. When it refused, the pilot filed a claim in federal court against the plan.

The federal court reviewing the ERISA claim rejected the pilot's argument. The Court held that it was immaterial (to the plan) whether the state court judge got the attorneys' fees issue right. A QDRO must be followed, and the plan administrator is not required or permitted to look beneath the surface of the order. "Administrators are entitled to implement what the forms say, rather than what the signatories meant to convey," the Court stated.

That's comforting language. Keep it in mind when a plan administrator is asked to add additional requirements to those imposed by the statute and regulations.

Mergers, Acquisitions, Spinoffs – A Plan Sponsor's Legitimate Split Personality

A company that sponsors an employee benefit plan is usually a fiduciary of that plan. As a result, the courts have struggled to determine whether every action the plan sponsor takes with regard to the plan is a fiduciary action. The problem is obvious. If every action the plan sponsor took were in the fiduciary category, the plan sponsor would never be able to take an action adverse to plan participants, *e.g.,* reduce future benefits or limit plan participation. As a result, the courts have developed what is colloquially called the two-hat theory. The first hat is the settlor hat. When the plan sponsor sets up the plan's terms (whether initially, by amendment or by ending the plan), it is not a fiduciary. The second hat is the fiduciary hat. When the plan sponsor operates the plan (carries out its terms), then it does act in a fiduciary capacity. Each situation involving the two-hat theory obviously requires a facts and circumstances analysis. In real life, whether you are setting up or operating a plan isn't always an easy distinction to make. But the willingness of the courts to draw a clear line has provided an important level of protection to plan sponsors over the years.

A recent case demonstrates the application of the two-hat theory. *Systems Counsel EM-3 v. AT&T Corporation* (D.C. Cir. 1998). In that case, AT&T and Lucent agreed on a method to calculate the split-up of the assets for the defined benefit pension plan that would be divided between separate plans for each corporation. After those calculations, any surplus assets would be divided equally between the two plans.

Certain participants and unions argued that the decision had breached AT&T's fiduciary duty. In particular, they argued that the split-up formula unfairly benefited AT&T. Since AT&T was clearly a fiduciary of the plans, they argued, it was a breach of fiduciary duty to select the split-up formula in question rather than a pro rata formula.

The Court rejected their argument, stating that it can no longer be "seriously disputed" that the plan sponsor is subject to the fiduciary standards only when it acts in a fiduciary capacity. The Court reviewed the rules on the split-up of plan assets and pointed out that there were certain requirements that AT&T was required to follow. Once these requirements were met, the parties were free to reach an agreement as to how the surplus assets would be divided between the two plans.

Thus, courts today readily accept the two-hat theory in ERISA cases. The important thing for plan sponsors to remember is that whenever they enter into benefit plan transactions that also provide a corporate benefit, they must clearly distinguish when they are carrying out their fiduciary responsibilities and when they are fulfilling their general corporate responsibilities.

Employer Discretion In Plan Operation

An employer often seeks to retain some discretion in the implementation of employee benefit plans because it is difficult to anticipate all fact situations which may arise. However, use of that discretion is often challenged by the individuals who did not benefit. Such a challenge was recently rejected by the Seventh Circuit. *McNab v. General Motors Corporation* (7th Cir. 1998).

In *McNab*, General Motors had established an early retirement window program, but it reserved the right to choose those eligible in accordance with "GM's best interests." In making the selection, GM accepted a wide variety of participants. Certain people participated in the program because of an ill wife, hypertension and various other factors. The plaintiffs argued that the decisions were not strictly in accordance with the inverse rankings of employee performance and therefore were not permitted. The Court rejected the argument.

The Court stated that ERISA permits a system to give a plan administrator discretion as long as that discretion does not violate any express rule in the statute or regulations.

The plaintiffs argued that the different decision-makers at the local plants had made inconsistent decisions as to what was in GM's best interests, which amounted to "cronyism." The Court rejected that argument, refusing to engage in second-guessing the employer's otherwise legal exercises of discretion. Otherwise, said the Seventh Circuit, the courts would become "early retirement czars."

In short, plans providing for employer discretion can be a benefit to employees, and the fact that an employer is generous to some employees provides no automatic basis for a complaint by other employees.

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

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ODDs & Ends

Union Workforce Share Still Shrinking

The U.S. Bureau of Labor Statistics recently released 1998 union membership data, and the percentage of unionized American workers continues its two-decade decline. Of the overall 1998 workforce, unions represented 13.9 percent, down from 14.1 percent in 1997 (and 34.7 percent in 1954). Among private sector employees, only 9.5 percent were covered by union contracts in 1998, compared with 9.7 percent in 1997. Looking for a silver lining in this glum news, the AFL-CIO noted that 400,000 workers were newly organized in 1998, but also admitted that only about half of these employees had reached a first contract by year-end.

Coffee, Tea or Lice?

In a February decision, labor arbitrator Daniel Brent ruled that Tower Air had violated its bargaining agreement with the Association of Flight Attendants by housing its attendants on Tel Aviv layovers in a dirty, thin-walled hotel with poor security and bed lice. Although the AFA contract didn't match the pilots' union contract provision for "luxury" layover accommodations, arbitrator Brent held the attendants were entitled to safe, decent and clean housing under their agreement.

Latest "Duh" Survey: Pay Raise Is a Good Retention Tool

In a recent telephone survey of 660 workers asking what would motivate them to continue with their current employer, Market Facts, Inc. found the most popular answer (43 percent) was – you guessed it – a pay raise. The runner-up response? Better benefits (with 23.1 percent). Receiving fewer votes were more flexible work schedules (14.1 percent), stock options (8.6 percent) and better training (4.7 percent).

BARGAINING TABLE FABLES

"...and that concludes the union's reasonable economic demands."

Candy Is Dandy, but $20 Million Shows Jury's Fury

After four Wal-Mart Store clerks were fired for eating candy and nuts from damaged packages, they sued their former employer in Kentucky state court for wrongful discharge, intentional infliction of emotional distress, slander and invasion of privacy. In January, following a three-day trial, the jury awarded each plaintiff five million dollars in punitive and compensatory damages. The fired employees had not asked the jury for any specific amount, but argued that injury to their reputation and dignity had resulted when they were subjected to accusatory interviews, confronted with illegally taped worker conversations and paraded through the store to the exit, as well as when management later used videotapes of their snack-munching for in-house company training. Needless to say, Wal-Mart plans to appeal.

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