VEDDER PRICE

# Labor Law

Labor and employment law trends of interest to our clients and other friends.

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## CLASS ACTIONS ON THE RISE

Over the last several years there has been a very substantial increase in the number of employment class actions filed. In addition to employment discrimination class actions, class cases filed under ERISA, the Fair Labor Standards Act, and equivalent state laws are on the rise. Moreover, it is not only large employers that face exposure to class actions since a class case can be maintained with 20 or even fewer potential class members. Regardless of the size of the company, the stakes can be huge, with possible exposure easily reaching into the millions of dollars. Under most laws, an employer that loses a class case will also be liable for the class attorneys' fees, which alone can run into seven figures.

Vedder Price has a long history of success in all types of employment class action litigation. On many occasions, by aggressively litigating whether the requirements for a class case have been met, we have been able to defeat class action status at the certification stage. We have successfully taken class action cases to trial, as well. As reported in our November 2002 Issue (Vol. 22, No. 3), last year a Vedder Price trial team headed by Dick Schnadig and Mike Cleveland obtained a jury verdict for the employer in an age discrimination class case arising from a plant closing. There were over 320 class members, and the company's potential liability was millions of dollars. In litigating this and many other class cases, we have acquired an unmatched depth of knowledge and experience in issues of critical importance in class action litigation, such as state-of-the-art management of an enormous volume of records, and effective refutation of plaintiffs' expert evidence, with concurrent successful development and presentation of the employer's expert evidence.

Because of the growing importance of class action litigation, we will be devoting an article in each of our upcoming newsletters to class action developments and issues. We have also established a class action team within our labor and employment practice, headed by Nina Stillman (312/609-7560) and Mike Cleveland (312/609-7860). Please contact either Nina or Mike, or Dick Schnadig (312/609-7810) if you would like more information concerning our class action practice.

## NOTICE OF FMLA ABSENCES: WHAT DID THE EMPLOYERS KNOW, AND WHEN DID THEY KNOW IT?

Two cases in United States Court of Appeals for the Seventh Circuit, less than two years apart, point out the dilemma that employees and employers face in making sure that the employers know of the need for "qualifying leave" under the Family and Medical Leave Act (FMLA). For example, an employee with depression does not have the right to take unscheduled and unpredictable leave on a moment's notice when such cumulatively substantial absences would render the employee unqualified for a position requiring reliable attendance. Even if such an

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employee is protected under the FMLA, she must comply with the requirement that she notify her employer of the need for FMLA-qualifying leave. See also *Peeples v. Coastal Office Products*, No. 02-1848 (4th Cir. May 7, 2003) (discharge for absenteeism upheld where employee did not notify employer of absence-causing depression).

In *Collins v. NTN-Bower Corporation, et al.*, 272 F.3d 1006 (7th Cir. 2001), the court said that, although clinical depression "certainly meets" the description of a "serious health condition," depression falling short of clinical depression may not qualify. The court did not have to address this issue because she had not provided her employer with sufficient notice that she might have a serious health condition.

On only one occasion, the employee in *Collins* mentioned to her supervisor that she suffered from depression. A year later, having been warned informally and formally more than a dozen times about her deficient attendance, she was fired after calling in "sick" for two days. The court agreed with the employer that the employee failed to provide proper notice under the FMLA. Enforcing the idea that employers are not required to be mind readers, the court held that being "sick" does not imply "a serious health condition" that may be covered by the FMLA. Simply being told that an employee is "sick" is not adequate. Regardless of the timing of such notice, employers are entitled to information sufficient to let them know that the FMLA might apply.

The court stated that, once the employee knew she had depression, she should have informed her employer that she may miss work on occasion due to her condition. Having not done so, the employer was free to terminate her for excessive absenteeism even if the absences were caused by her depression.

By way of contrast, in *Byrne v. Avon Products*, No. 02-2629 (7th Cir. May 9, 2003), the court denied the employer's motion for summary judgment under the FMLA where an employee with four years of highly regarded service suddenly "lost it." For about a ten-day span in November, he began to sleep on the job and hide from people and would not discuss the matter with supervision but instead left work, advising a co-worker that he was not feeling well. In addition, calls to his home were answered by one of the employee's sisters, who told Avon that Byrne was "very sick." After agreeing to attend a meeting on November 17, he failed to show and was fired for that act plus sleeping on the job.

Byrne was suffering from depression. A psychiatrist said he had begun to hallucinate by November 16, had attempted suicide on November 17, and, during another panic attack, had tried to flush his head down the toilet. Two months of treatment, however, enabled him to overcome his medical difficulties, but Avon would not take him back. The district court granted Avon summary judgment, calling Byrne's actions misconduct on the job.

Byrne lost on his Americans with Disabilities Act ("ADA") claim because he was not able to work. However, the FMLA affords those who can't work as a result of a "serious health condition" up to 12 weeks of leave in a year. Byrne's condition was serious, and he was ready to work again before the 12 weeks ran out. The court held that FMLA leave depends on the employer's knowledge of a qualifying condition. Byrne argued that his sister's statements that he was "very sick," plus news of his hospitalization which Avon had the next day, provided necessary information. The court distinguished *Collins v. NTN Bower*, *supra*, (employee's mere claim to be "sick" is not enough). The court also noted that perhaps Byrne's unusual behavior (given his excellent record) was itself notice that something had gone medically wrong. Moreover, Byrne was not able to give notice of his condition effectively.

The court concluded that, if a trier of fact believes either (a) that the change of behavior was enough to notify an employer that Byrne suffered from a serious health condition, or (b) that Byrne was mentally unable to either work or give notice early in November of 1998, then he would be entitled to FMLA leave covering the period that Avon treated as misconduct. These are independent possibilities and either would entitle Byrne to reinstatement. The court therefore denied the employer's motion for summary judgment.

If you have any questions about these cases or the FMLA generally, please call Charis Runnels (312/609-7711), Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

## COMPANY'S REFUSAL TO REINSTATE UNFAIR LABOR PRACTICE STRIKERS IN 1998 PROVES COSTLY IN 2003

A recent decision of the Seventh Circuit Court of Appeals reminds employers that permanently replacing unfair labor practice strikers can be expensive.

The applicable law is well settled. An employer may replace striking employees in order to continue operating. If the strike is economic in nature (is precipitated by the inability of labor and management to agree on wages, hours or working conditions), the replacements may be permanent. When the strike ends, permanently replaced economic strikers are entitled only to preferential reinstatement as jobs become available. However, the law prohibits the permanent replacement of unfair labor practice strikers. If a strike is motivated or prolonged, even in part, by the employer's unfair labor practices, when it ends the strikers are entitled to immediate reinstatement. Litigating this entitlement can lead to significant back-pay liability, as the following case illustrates.

Midwestern Personnel Services provided cement truck drivers to River City Holdings, which sold concrete mix. In 1997, River City contracted to supply cement to a union job site from a plant in Rockport, Indiana, and needed to increase the number of Rockport drivers provided by Midwestern. Moreover, the drivers had to hold union cards to enter the job site. Midwestern had a labor contract with Teamsters Local 836 covering drivers in Pennsylvania, but its Rockport drivers were non-union. To meet River City's needs, Midwestern asked Local 836 to "come into Indiana" and extend its contract to the Rockport drivers. A representative of Local 836 met with the drivers who signed union cards but did not vote on whether to join the union. Before the meeting, however, Midwestern and Local 836 negotiated an addendum extending the Pennsylvania contract (and its no-strike clause) to these drivers with a 20¢ per hour raise.

Discontent arose among the drivers over being forced to accept an out-of-state union. Word of this spread to Teamsters Local 215 in Indiana, which stepped in to organize the drivers and request recognition from Midwestern as bargaining representative. Midwestern informed Local 215 that the drivers were covered by a labor contract with Local 836 that contained a no-strike clause, and warned that if the drivers went on strike they could be permanently replaced. Local 836 subsequently disclaimed representation of the drivers. Midwestern then took the position that Local 836 had transferred its representation rights to Local 215 and that the labor contract went with the transfer.

On January 17, 1998, the drivers went on strike carrying picket signs declaring "On Strike, Unfair Labor Practices." On March 27, 1998, Local 215 made an unconditional offer to return to work on behalf of the drivers. Midwestern spurned the offer, labeling the strike an economic strike, and refused to reinstate the drivers. Local 215 then filed unfair labor practice charges alleging, among other things, that Midwestern had unlawfully assisted and recognized Local 836, and had failed to reinstate the drivers immediately upon their unconditional offer to return to work. Midwestern opted to litigate.

A hearing on the charges was held before an Administrative Law Judge in September 1999. In January 2000, the ALJ decided that the strike had been an unfair labor practice strike, and that Midwestern had unlawfully refused to reinstate twenty-six drivers. The remedy included offering these drivers reinstatement to their former or substantially equivalent jobs, with back pay for lost earnings and benefits plus interest. Undeterred, Midwestern filed exceptions. On June 21, 2000, the NLRB affirmed the ALJ's order and back pay remedy. Continuing to fight, Midwestern appealed and on March 11, 2003—*five years after the strike ended*—the United States Court of Appeals for the Seventh Circuit enforced the Board's order directing Midwestern to reinstate the twenty-six drivers with five years of back pay and interest! *National Labor Relations Board v. Midwestern Personnel Services, Inc.*, (7th Cir., Nos. 02-2209 & 02-2566, decided March 11, 2003).

If you have any questions about any of the issues in this case or their application to any situation you may be facing, please call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

## WAIVER(ING) GOODBYE?

In what has become a common practice, most employers who provide separation benefits require the terminating employee to release all claims, or at least all employment-related claims, as the *quid pro quo.* It is not unusual to specifically list claims under the Family and Medical Leave Act ("FMLA") as those being released. Even if not mentioned by name, any employer would argue that a release of all employment-related claims includes claims under this statute. A recent decision by a federal district judge in Chicago calls into question the enforceability of these releases.

In *Dierlam v. Wesley Jessen Corporation*, 222 F. Supp. 2d 1052 (U.S.D.C., N.D., Ill., E.D., 2002), the plaintiff was one of many employees offered a "stay

bonus" if she remained employed with the company during the transition period of its acquisition by another company. As long as the plaintiff was "actively employed" on a certain date, she would receive a bonus equivalent to 50% of her annual salary. During the transition period, the plaintiff requested and was granted twelve weeks of FMLA leave. Taking the position that the plaintiff was not actively employed for purposes of the bonus, the company reduced her bonus *pro rata* to her actual attendance. At the conclusion of the transition period, plaintiff's employment was terminated and she signed a separation agreement and release. Included among the claims released were those under the FMLA. The employee then sued the company, alleging her stay bonus was reduced in violation of the FMLA.

On cross-motions for summary judgment, the district court concluded that the waiver of FMLA rights obtained by the company was unenforceable as a matter of law. The court relied on a regulation under the FMLA providing that "[e]mployees cannot waive, nor may employers induce employees to waive, their rights under the FMLA." 29 CFR § 825.220(d). The district judge found only one other court in the country that had interpreted this regulation —the Southern District of Texas. That court also concluded that the plain language of the regulation precluded a waiver of an FMLA claim. Although disconcerting to employers, the decision is not that extraordinary. It is settled law that claims under the Fair Labor Standards Act ("FLSA") cannot be released except with Labor Department or court supervision. The enforcement provisions of the FMLA, and obviously this particular regulation, were modeled after the FLSA.

Having held that the release does not preclude the suit, the court in *Dierlam* next interpreted a different FMLA regulation, this one dealing with the merits of the claim. The court held that the employee was entitled to receive the full stay bonus despite her twelve-week absence. Because the stay bonus was conditioned on attendance, not productivity, the employee could not be penalized for taking an FMLA-protected leave under 29 CFR § 825.215. Although the court's interpretation of this regulation breaks no new ground, it does underscore the problems employers face when drafting special bonus plans designed to ensure that employees remain employed, or to reward good attendance.

With this decision, employers (particularly in northern Illinois) cannot assume they are immune from FMLA claims because they have a signed, sealed, broadly worded release. Further, employers may want to consult counsel when drafting commission, bonus or other compensation programs to ensure that the impact of unforeseen absences is taken into account in determining eligibility.

If you have any questions about the FMLA, please feel free to call Aaron Gelb (312/609-7844), Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

## EMPLOYER UNLAWFULLY WITHDREW FROM TENTATIVE HEALTH CARE AGREEMENT

In *NLRB v. Suffield Academy*, 322 F.3d 196 (2 Cir. 2003), the United States Court of Appeals for the Second Circuit enforced the National Labor Relations Board's ("NLRB") Decision and Order holding that Respondent Suffield Academy violated Sections 8(a)(1) and (5) of the National Labor Relations Act by failing to bargain in good faith when it withdrew from a tentative agreement to provide certain health care coverage and by unilaterally subcontracting bargaining unit work absent a lawful impasse in negotiations.

***The Negotiations:*** From May 1996 through August 1997, the Academy negotiated with Teamsters Local 559 concerning a collective-bargaining agreement covering certain of the Academy's employees. One of the negotiating ground rules was that all agreements on individual items were tentative, pending overall agreement on the entire contract.

A central issue in negotiations was health care coverage. In May 1996, the Union proposed that the Academy provide coverage for unit employees under the Teamsters' A-Plus health insurance plan. In January 1997, the Academy tentatively accepted the Union proposal on health insurance.

That tentative agreement remained in place until July 23, 1997, when the parties began their meeting by reaffirming the tentative agreements that had been reached up to that point. The Academy specifically reaffirmed its tentative agreement to provide A-Plus health coverage. Later, after an Academy-requested brief recess, Academy representatives said it had decided not to offer A-Plus coverage after all. The Academy offered no reason for its sudden change in position. Not until a week later did the Academy explain that the A-Plus coverage offer was withdrawn because the Academy preferred instead to funnel the

costs of such coverage into wage increases for unit employees.

On about September 1, 1997, the Academy subcontracted certain cleaning duties to non-union employees, despite protests from the Union that such actions ran afoul of subcontracting restrictions to which the parties tentatively had agreed. The Union subsequently filed a charge with the NLRB alleging Academy unfair labor practices.

***The Second Circuit Decision:*** Collective bargaining must be conducted in good faith, and, absent specific evidence of bad faith bargaining, the Board must consider the totality of the circumstances in order to determine whether a party has negotiated in good faith. In *Suffield Academy*, the Second Circuit rejected the Academy's argument that *Driftwood v. Convalescent Hosp.*, 312 N.L.R.B. 247, 252 (1993), *enforced sub nom.*, *NLRB v. Valley W. Health Care*, 67 F.3d 307 (9th Cir. 1995), created an impermissible *per se* rule that shifts the Board's inquiry from determining whether a party negotiated in bad faith to deciding whether a party had "good cause" for withdrawing from a tentative agreement.

The Court held that "*Driftwood* merely states that '[t]he withdrawal of a proposal by an employer without good cause is *evidence* of a lack of good faith bargaining by the employer in violation of Section 8(a)(5) of the Act where the proposal has been tentatively agreed upon.'" The Second Circuit endorsed the Board's ruling that the mere withdrawal of a tentative agreement *is not a per se violation* of Section 8(a)(5) but only one factor to consider in determining good or bad faith bargaining.

Under this standard, the Board found that a variety of circumstances contributed to its finding that the Academy bargained in bad faith: (1) the Academy's sudden withdrawal from the tentative agreement to provide A-Plus coverage (an agreement that it had reaffirmed shortly before); (2) the lack of a convincing rationale for the withdrawal; (3) the importance of the A-Plus provision to the agreement as a whole; and (4) the fact that the agreement was nearing completion at the time of withdrawal.

***The Remedy:*** The Second Circuit also affirmed the Board's remedy requiring the Academy, *inter alia*, to reinstate and offer the Union the revised collective bargaining proposal, including its tentative agreement to provide the Union's health insurance plan to unit employees.

***Practical Implications:*** The lesson for employers is to exercise caution in making even tentative agreements. In addition, the employer who wishes to withdraw from a tentative agreement must be ready to explain and justify its withdrawal, including providing any reason(s) (such as a change in economic circumstances) that led it to withdraw its tentative agreement.

If you have any questions about this case or about bargaining in general, or you wish assistance in analyzing or evaluating your position on tentative agreements or withdrawing from such agreements, please call Paige Barnett (312/609-7676), Jim Spizzo (312/609-7705), George Blake (312/609-7520) or any other Vedder Price Attorney with whom you have worked.

## OSHA'S ENHANCED ENFORCEMENT POLICY

On March 11, 2003, the Occupational Safety and Health Administration ("OSHA") unveiled a new enforcement initiative designed to target employers that have received "high-gravity" citations. Employers specifically at risk are those to which OSHA has previously issued citations for: (1) highest severity willful violations; (2) multiple serious violations at the highest severity level; (3) repeat violations; (4) failure to abate; and (5) serious or willful violations associated with fatalities.

To put more "tenacity and teeth in our enforcement practices," OSHA Administrator John Henshaw announced that OSHA's enhanced enforcement policy will strengthen five specific enforcement tools: (1) follow-up inspections; (2) programmed inspections; (3) public awareness; (4) settlements; and (5) federal court enforcement. Thus, employers who have received "high-gravity" citations can expect follow-up inspections in the near future, particularly to verify that previously cited conditions have been abated. As part of OSHA's programmed inspection protocol, OSHA will also begin to record the name of any corporate parent of a randomly selected site, and then target for inspection all facilities under that corporate umbrella that have received "high-gravity" citations. In addition, for future "high-gravity" citations, OSHA will begin mailing a copy of the citation to the employer's corporate headquarters and will continue to issue local and national press releases on enforcement activity.

OSHA also intends to use settlement agreements aggressively to ensure the future compliance of employers incurring "high-gravity" citations, including:

- requiring employers to hire consultants to develop a process to change the safety and health culture in the facility;
- applying the agreement corporation-wide;
- requiring the employer to provide information on other job sites; and
- requiring employers to report to OSHA any serious injury or illness that requires outside medical care and consenting to OSHA inspections based on the report.

To ensure compliance, OSHA will include in the settlement language that the employer consents to entry of a court enforcement order under section 11(b) of the Occupational Safety and Health Act in the event the employer violates the terms of the agreement.

Finally, as part of its enforcement initiative, OSHA intends to apply more frequently to federal courts of appeal under section 11(b) for orders summarily enforcing "high-gravity" citations that have become final orders, either as a result of settlements or final orders of the Occupational Safety and Review Commission. In cases of subsequent noncompliance after issuance of a section 11(b) order, OSHA will seek contempt of court sanctions.

Anecdotal evidence indicates that OSHA is quite serious about policing and punishing those employers it believes are ignoring their health and safety responsibilities and that OSHA intends to use its new enforcement policy aggressively. Vedder Price attorneys who have frequent contact with OSHA area, regional and national office personnel and the agency's attorneys have learned that many OSHA offices have already experienced a significant rise in their caseloads in the two months following announcement of the initiative.

If you have any questions about OSHA's enhanced enforcement policy, or the risks it might pose to any of your establishments, please contact James E. Bayles, Jr. (312/609-7785), Nina G. Stillman (312/609-7560) or any other Vedder Price attorney with whom you have worked.

## NEW RULE PROPOSED REGARDING EXEMPTION OF WHITE-COLLAR EMPLOYEES UNDER FAIR LABOR STANDARDS ACT

On March 31, 2003, the Secretary of Labor proposed a new Rule covering "white-collar" exemptions under the Fair Labor Standards Act ("FLSA"). This is not only a "heads up" as to what possible new guidelines may appear down the road, but it is also an opportunity to remind ourselves of certain key points in the current law.

***B. The Current Law.*** The FLSA exempts from its minimum wage and overtime pay provisions executives, administrative employees, professionals (including teachers and computer employees), and outside salesmen, commonly referred to as "white-collar" employees. The statute does not define the white-collar categories. However, the Secretary was given rulemaking authority and developed the present Regulations and interpretations concerning the exemptions, which provide "*duties*" and "*salary*" tests for exemption (29 CFR 541). The Secretary warns that an exemption is not presumed but must be affirmatively established. Job titles or job descriptions do not determine exemptions. Nor does paying a "salary" rather than an hourly rate. Whether an exemption applies depends on the specific duties and responsibilities of each job, whether the employee is paid on a salary basis, how much salary, and whether it is guaranteed without regard to quality or quantity of work performed.

**(1) *Salary Basis*.** Presently, there are two salary tests for executive, administrative and professional employees. The "long test" requires that an executive or administrative employee receive a salary of only $155.00 a week and that a professional employee receives a salary of only $170.00 a week. The "short test" is satisfied if the employee receives a salary of $250.00 per week, or only about $13,000.00 per year! Anyone even possibly exempt undoubtedly exceeds this amount, and thus only the "short test" is used anymore. Finally, there is no specific salary or other compensation requirement for outside salesmen.

To be exempt, the employee must meet the salary basis requirements, including receiving a minimum amount that is guaranteed each week (section 541.118). An employee can receive more than his guaranteed minimum (*e.g.*, a bonus), but not less.

And an employee's salary basis can be destroyed (and the exemption lost) if improper deductions are made from an employee's salary, or even if the potential for improper

deductions is present! *Thus, it is important to review section 541.118, which thoroughly covers the "salary basis" requirement of white-collar exemptions.*

**(2)** ***The Duties Test***. Under the "short test," each potentially exempt white-collar employee must also have the required duties to be exempt. For example—

**(a)** ***Executive*:** Must have a primary duty (generally more than half the time) of the management of the enterprise or a recognized department or subdivision. The person must also customarily and regularly direct the work of two or more other employees.

**(b)** ***Administrative*:** Must have a primary duty of office or nonmanual work directly related to management policies or general business operations of the employer or the employer's customers. He also must customarily and regularly exercise discretion and independent judgment in significant matters.

Discretion and independent judgment is different from skill and ability. A good nonexempt machinist has the skill and ability to perform his job, and he will make decisions in the course of the day, but they will be based on skill and ability rather than discretion and independent judgment. In addition, a truck driver who chooses his route exercises discretion and independent judgment. But the decision to take Fourth Street rather than Seventh Avenue is not of significance, and thus is not exempt work.

**(c)** ***Learned Professional*:** Must have a primary duty of work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study, *e.g.*, accounting or engineering. He must consistently exercise discretion and judgment.

**(d)** ***Creative Professional*:** Must have a primary duty of work that is original and creative in character in a recognized field of artistic endeavor, the result of which depends primarily on the invention, imagination or talent of the employee.

**(e)** ***Teacher*:** Must have a primary duty of teaching, tutoring, instructing or lecturing in the activity of imparting knowledge in a school system or educational establishment or institution, which includes work requiring the consistent exercise of discretion and judgment.

**(f)** ***Salaried Computer Employee*:** Must have a primary duty of work requiring theoretical and practical application of highly specialized knowledge in computer systems analysis, programming and software engineering. The individual is employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer software field, and consistently exercises discretion and judgment.

**(g)** ***Outside Salesman*:** The outside salesman must have a primary duty of making sales or obtaining orders or contracts for services, or for the use of facilities for which a consideration will be paid by the client or customer, and that work must customarily and regularly keep him away from the employer's place of business.

*Remember*, the employee must meet *each of the criteria* in order to be exempt. For example, an individual could be highly paid—very highly paid—but not be exempt because he (1) is not paid on a salaried basis, or (2) does not supervise the two employees required for executive exemption, or (3) does not exercise the discretion and independent judgment required for exemption in his particular category.

***C. Some Highlights of the Proposed Rule.*** The Secretary of Labor has proposed a broad new Part 541. Much of the subject matter was old and out of date (the salary levels), hadn't kept up with changes in the work place (the technology revolution), and other parts had led to confusion because of the patchwork nature of some 65 years of trying to deal with problems on a case-by-case basis. The Secretary has now attempted to pull it all together and package it neatly for our use. A few of the highlights—

On the *organizational front*, the Secretary appears to have achieved certain of his objectives *e.g.*, simplifying and clarifying Part 541. Initially, the proposed Rule is only about half as long as the present Part 541. Second, the Secretary has given each category of employee its own section of the regulations which appears to be self-contained as to whether the particular employee is exempt or not. Thus, hopefully there will be less cross referencing and hunting for information. (And although it's just an impression, the language does seem a little simpler and clearer.)

As to *compensation*, the old "long" and "short" tests for salaried employees are replaced by a single standardized test for all in the amount of $425 per week. (This is still only an inadequate $22,100 per year!) There still would be no compensation requirement for outside salesmen. Lastly, there would be a provision that any individual doing office or nonmanual work and who receives a salary of at least $65,000 per year is exempt if performing exempt duties of an executive, administrative or professional employee.

There are proposed changes in *duties* and *responsibilities*. For example, an executive must have the additional authority to hire or fire other employees or his recommendations will be given particular weight in these and other personnel matters. Administrative employees will see the old "discretion and independent judgment" replaced with the requirement that the employee hold a "position of responsibility." The learned professional category would be changed by eliminating the discretion and judgment requirement. It would also be expanded by exempting employees who acquired their advanced knowledge through a combination of work experience, training in the armed forces, technical school or other intellectual instruction. A proposed creative professional test would be broadened to bring in work of originality and to encompass recognized fields of "creative" as well as artistic endeavor.

The Department of Labor has specifically invited interested parties, including employees, to comment on the proposed regulations. Written comments are due on or before June 30, 2003, and they should be addressed to Tammy D. McCutchen, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Given the Department of Labor's track record, it is impossible to predict just what will come out of this exercise or when we can expect anything. However, we will keep you posted on developments as they occur.

If you have any questions about the Fair Labor Standards Act, its present requirements or proposed Rule, or if you need assistance in putting together comments you wish to submit to the Secretary of Labor, please call any member of our FLSA Task Force such as Bruce Alper (312/609-7890), Tom Hancuch (312/609-7824), Tom Wilde (312/609-7821), or George Blake (312/609-7520), or any other Vedder Price attorney with whom you have worked.

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Vedder, Price, Kaufman & Kammholz is a national, full-service law firm with over 200 attorneys in Chicago, New York City, and 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, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, 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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