VEDDER PRICE

Labor Law

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

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CLASS ACTION UPDATE: SEXUAL HARASSMENT CLASS ACTIONS

As detailed in the previous issues of this newsletter, class actions based on federal and state employment laws are on the rise. Sexual harassment class actions are no exception.

While we generally think of sexual harassment cases as involving only two employees (harasser and harassee) or at most a small number of perpetrators or victims, recent decisions and settlements demonstrate that sexual harassment cases can be successfully brought as class actions. And they can cost employers millions of dollars in damages, not to mention imposing typically high class action litigation costs. For example, after years of litigation and many unsuccessful efforts to limit the scope of the case, Dial Corporation recently settled a sexual harassment class action suit for $10 million dollars. The class, comprised of 100 women, claimed that they were regularly subjected to unwanted touching, sexual assaults and verbal abuse by male coworkers while working at Dial's Aurora, Illinois soap production factory. The suit alleged that Dial had knowledge of the pattern of abuse for 13 years but ignored it.

The EEOC has also been very active in suing on behalf of large numbers of alleged victims of sexual harassment. The EEOC was a party to the *Dial* case, and also obtained a $34,000,000 settlement in a suit brought against Mitsubishi Motor Manufacturing of America on behalf of a class of 486 female employees who were allegedly subjected to hostile work environment sexual harassment.

In both the Dial and Mitsubishi cases, the employers also had to agree to outside monitoring of their compliance with the law and their policies against sexual harassment. In both cases, a three-member board was established–comprised of one representative appointed by the plaintiffs and the EEOC, one by the employer, and one by the other two.

Large sexual harassment settlements and verdicts are not limited to the cases with hundreds of claimants. In a lawsuit brought by the EEOC, *EEOC v. Rio Bravo International, Inc.*, No. 99-CV-1371 (M.D. Fla. 2003), a jury awarded a total of $1,550,000 to five former restaurant employees who complained that they were sexually harassed over a four-year period. It was the largest jury verdict for the EEOC in a sexual harassment case in Florida. In an interesting and unusual side note,

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the company brought a claim for breach of fiduciary duty against the principal harasser, a bartender who had been promoted to an assistant manager position. He was ordered to reimburse the company for $50,000 of the damages awarded in the sexual harassment case.

Also illustrating the large dollar potential of sexual harassment class actions are two cases pending against Combined Insurance Company of America in federal court in Chicago. The two actions are comprised of up to 6,000 alleged victims of sexual harassment and, based on the number of potential claimants, liability or a potential settlement could dwarf the amounts paid by Dial and Mitsubishi. While the alleged class in the Combined Insurance cases may actually prove too big and complex for the litigation to proceed as a class action, for the present, the employer is confronted with the necessity of defending this massive sexual harassment case. *Radmanovich v. Combined Insurance Company of America*, No. 01 C 9502 (N.D. Ill. June 27, 2003); *Palmer v. Combined Insurance Company of America*, No. 02 C 1674 (N.D. Ill. Sept. 2, 2003).

"There can be no doubt that sexual harassment class actions are viable and can pose serious threats to any organization, large or small. The risks posed make it all the more important that employers take some basic steps . . ."

There can be no doubt that sexual harassment class actions are viable and can pose serious threats to any organization, large or small. The risks posed make it all the more important that employers take some basic steps to avoid sexual harassment claims, such as:

- Adopting a policy prohibiting sexual and other types of harassment, with an accessible/ effective complaint procedure.
- Adopting sexual harassment investigation procedures.
- Adopting a sexual harassment training program.
- Implementation of punishment guidelines for harassers.

The potential for a class action case also means that employers should be alert to emerging patterns of complaints or to indications that there are widespread prevailing attitudes or practices that could be used as a basis for a sexual harassment class case.

Vedder Price is highly experienced in defending sexual harassment class actions, and has successfully challenged such class actions at all stages of litigation. If you have any questions regarding Title VII or employment-related class actions, or have received notice that an employee is seeking certification of a class, or have questions about class actions generally, please call Joe Mulherin (312/609-7725), Dick Schnadig (312/609-7810), Nina Stillman (312/609-7560), Mike Cleveland (312/609-7860) or any other Vedder Price attorney with whom you have worked.

NEUTRALITY AGREEMENTS – PAVING THE ROAD TO UNIONIZATION

Earlier this year, the nation's top labor leaders convened in Florida at AFL-CIO sponsored meetings to map out strategies to reverse a continuing decline in union membership and to jumpstart organizing. One tactic discussed and now being employed with renewed vigor is approaching management to sign so-called "neutrality agreements" with respect to organizing of unrepresented workers.

Of concern to labor is the slow process and unpredictability of traditional organizing drives which must counteract company "vote-no" campaigns. Unions win only about half of the representation elections conducted by the NLRB. They fare much better when their representative status is determined by card check, and better still when cards are used in combination with a pledge of neutrality from the employer.

Neutrality agreements come in a variety of shapes and sizes. The more intrusive have the following provisions: (1) union organizers are given access to company facilities and personal information about the employees being organized, including their home addresses; (2) the company is prohibited from saying anything negative about the union or union representation generally; (3) recognition of the union is automatic if a majority of employees sign cards as determined by an outside third party; and (4) there is a time limit on when the labor agreement must be negotiated, and disputed items must be submitted to an arbitrator for resolution (interest arbitration).

Such agreements once signed are enforceable in court unless they contravene federal labor policy, and as to policy the NLRB itself has enforced an employer's agreement to waive its right to the Board's election and certification procedures and substitute alternative procedures.

Union leaders claim neutrality agreements are needed because employer hostility to union organization, and retaliation against employees for engaging in pro-union activities, has intensified in recent years. Speaking to an audience of labor-management attorneys at the American Bar Association's annual meeting this summer in San Francisco, UNITE Senior Associate General Counsel Brent Garren argued that because employer "vote-no" campaigns are riddled with coercion, card checks conducted by a neutral are a more accurate gauge of employee sentiment than NLRB elections. In response, former Board member Charles Cohen pointed out that the National Labor Relations Act protects an employer's speech rights, and that there is much an employer can lawfully say that can change minds.

"Opponents of neutrality agreements all agree that gagging management unfairly limits employees to hearing only one side of the story, and that signing a card is not equivalent to exercising free choice in a secret ballot election."

Also discussing this subject at the ABA meeting were current Board members Robert J. Battista (R), Peter C. Schaumber (R), R. Alexander Acosta (R), Dennis P. Walsh (D) and Wilma B. Liebman (D). Board Chairman Battista expressed concern that the purpose of neutrality agreements is not to expedite elections but rather to silence one of the parties. Member Walsh defended the Board's election procedures and said that the Board reduces conflict by maintaining "laboratory conditions."

"Unions generally prefer to negotiate neutrality agreements at the corporate level with top management officials, rather than in the trenches as part of the give and take of contract negotiations. There are practical reasons for this."

Opponents of neutrality agreements all agree that gagging management unfairly limits employees to hearing only one side of the story, and that signing a card is not equivalent to exercising free choice in a secret ballot election. Particularly outspoken is the National Right to Work Legal Defense Foundation, which recently filed a lawsuit challenging an agreement between the Steelworkers and Heartland Industrial Partners in which Heartland has committed to neutrality if the union seeks to organize unrepresented employees of Heartland or companies that it acquires. The agreement not only obligates Heartland to recognize the union if a majority of employees sign cards, but mandates that resulting labor contracts include a union security clause requiring covered workers to pay union dues or agency fees.

Heartland then acquired a controlling interest in Collins & Aikman, a manufacturer of automotive interior components, and extended its neutrality agreement to that company when the Steelworkers began organizing. The lawsuit, filed on behalf of six employees of Aikman, alleges that the agreement is a sweetheart deal that violates Section 302 of the Labor-Management Relations Act, which prohibits employers from giving money or other thing of value to a union. The pending action urges that Heartland has given the Steelworkers something of value in the form of substantial assistance in organizing employees with the prospect of a financial payoff from union dues.

Despite wide-spread opposition, neutrality agreements are proliferating. The UAW has been especially effective in coaxing automotive parts suppliers to sign them. The honey-coated pitch is that partnering with the union will foster business from the automakers, and that the union can effectively intervene when price concessions are sought. The UAW may be getting help from the automakers. Daimler Chrysler, for example, has pledged to remain neutral during UAW organizing drives at its U.S. subsidiaries and affiliates, and pointedly encourages its suppliers to adopt a similar policy. Saturn Corporation has told its suppliers that it does not discourage their employees from joining unions, and that it has a positive and constructive relationship with the UAW and other labor organizations.

Not all automaker suppliers who have signed neutrality agreements have done so with the UAW. Earlier this year Goodyear signed such an agreement with the Steelworkers. And neutrality agreements are not unique to the auto industry. Cingular Wireless has one with the Communications Workers.

Unions generally prefer to negotiate neutrality agreements at the corporate level with top management officials, rather than in the trenches as part of the give and take of contract negotiations. There are practical reasons for this. Because the National Labor Relations Act protects an employer's free-speech right to communicate with its employees, a union's demand for waiver of that right is a permissive subject of bargaining which cannot be insisted on to impasse. Moreover, it isn't easy for a union to convince employees that its ability to organize workers at some other or future facility is worth striking over.

"Get prepared. Someday soon your CEO may receive a friendly call from an officer of a union that has your unrepresented workers in its cross-hairs."

Labor has been busy garnering support for its position from state and local governments. California recently enacted a neutrality law barring employers receiving state funds from using those funds to "assist, promote or deter union organizing." The law requires employers to certify that no state funds will be used for such purposes, and to maintain records of how the funds are used. The U.S. Chamber of Commerce and several employers filed suit in federal district court alleging that key portions of the law are preempted by the National Labor Relations Act because they regulate employer speech about union organizing. The court agreed. The California Attorney General, and the AFL-CIO which intervened in the lawsuit as a party defendant, have appealed to the Ninth Circuit. The National Labor Relations Board has weighed in with an amicus brief supporting the preemption argument. The matter is pending.

Under challenge in a Wisconsin federal court is an ordinance enacted by the Milwaukee County Board of Supervisors that requires certain contractors doing business with the County to negotiate "labor peace agreements" with unions seeking to organize their workers. The agreements must include these provisions: (1) the employer will not give employees false or misleading information in an effort to influence employee preference regarding union representation; (2) the employer will provide the union with a list of employee names, addresses and phone numbers; and (3) the employer will give union representatives reasonable access to the workplace to inform employees about the union. Disputes over the application of the agreement must be submitted to binding arbitration. Employers must include in any contract with the County a pledge to abide by the ordinance even before being approached by a union. A lawsuit pending against the County brought by the Metropolitan Milwaukee Association of Commerce alleges that the ordinance is preempted by the National Labor Relations Act and violates the First Amendment rights of its members.

Less intrusive is recent legislation in Illinois (see discussion of new Illinois employment laws elsewhere in this issue) allowing public employees to form unions based on card-check recognition. Unions in the public sector may now present evidence of majority support to the Illinois Labor Relations Board, and the Board will certify a union as the exclusive bargaining representative unless there is countervailing evidence of fraud or coercion. There are also proposals pending in Illinois which would prohibit vendors under the Medicaid program from using Medicaid reimbursements to pay for activities to influence employees regarding whether to organize or not.

Our advice? Get prepared. Someday soon your CEO may receive a friendly call from an officer of a union that has your unrepresented workers in its cross-hairs. If you have any questions about how to get prepared, or about neutrality agreements in general, please call Jim Petrie (312/609-7660), Jim Spizzo (312/609-7705), Steve Hamann (312/609-7579) or any other Vedder Price attorney with whom you have worked.

TO ALL ILLINOIS EMPLOYERS: HAPPY NEW YEAR !!!

Several new laws recently enacted in Springfield have important implications for employers and employees alike. You saw some of the laws in a Vedder Price Special Report a couple of months ago. However, there are so

many and they are so important that we decided to give you another look.

The most far-reaching of these new laws (already in effect) allows victims of domestic and sexual abuse to take an FMLA-type leave. Other new laws address issues such as equal pay for both sexes, inquiries about an applicant's arrests and convictions, protection for whistleblowers, the new minimum wage and the use of strikebreakers from temporary agencies. These new laws require careful review and, where necessary, revision of your company policies and procedures. What follows is a summary of these new laws.

VESSA Leave for Victims of Domestic or Sexual Violence

The Victims' Economic Safety and Security Act (VESSA), effective August 25, 2003, has broad implications for all public-sector employers and for private-sector employers with 50 or more employees. Intended to address the needs of domestic violence and sexual violence victims in Illinois, VESSA follows the same basic framework as the federal Family and Medical Leave Act ("FMLA"). VESSA provides a victim of domestic or sexual abuse up to 12 weeks of unpaid leave within a 12-month period. Although similar to FMLA, VESSA isn't identical to FMLA and, therefore, presents some aggravating and potentially difficult compliance issues for Illinois employers.

Eligible Employees and Reasons for Leave. VESSA grants leave to employees, or a family or household member, who are victims of domestic or sexual violence. VESSA can be interpreted as allowing both same-sex roommates and same-sex domestic partners of victims to take leave under VESSA. The Act denies leave, however, to persons who are "adverse to the individual," thereby excluding perpetrators or accomplices to perpetrators of domestic or sexual violence.

Leave may be taken intermittently or by means of a reduced work schedule until the 12-week entitlement is exhausted. However, unlike FMLA, VESSA provides leave to employees immediately and does *not* require a minimum length of service. VESSA leave may be taken to: (1) permanently or temporarily relocate; (2) seek medical or psychological attention; (3) obtain victim services; (4) participate in safety planning or other actions to increase the safety of the victim; and (5) seek legal assistance or remedies to ensure the victim's safety, including time off for civil or criminal hearings.

Notice and Certification. Unless it is "impracticable" (the term is not defined), an employee must provide the employer with at least 48 hours' advance notice of the employee's intention to take leave under VESSA. If an employer determines that notice was impracticable, an employee has a "reasonable" (also not defined) period of time to provide certification of the VESSA qualifying event.

Whether an absence is scheduled or unscheduled, an employer has the right to require proper certification. However, VESSA merely requires a sworn statement from the family or a household member that he or she is a victim, and that leave was for one of the enumerated purposes. An employer may require further production of medical documentation, a police or court report, documentation from the clergy, or any other corroborating evidence if an employee later obtains such evidence.

Entitlements and Protections. Like FMLA, VESSA requires an employee to be restored to the same or equivalent position worked by the employee before the leave. Equivalent benefits, pay, and terms of employment must be restored, although benefits need not continue to accrue during the leave. As under FMLA, health care coverage must be provided to an employee on VESSA leave.

VESSA prohibits discrimination against employees who exercise their rights or oppose unlawful actions under VESSA. It further prohibits discrimination against employees or prospective employees who are perceived as being the victims of domestic or sexual violence. This provision extends to employees who have family or household members who are perceived as victims. Like FMLA, VESSA prohibits employer retaliation after an employee has utilized a VESSA right. Retaliation includes failure or refusal to hire, discharge, harassment or other discrimination against a protected individual. VESSA also prevents employers from disciplining or discharging an employee because the workplace may be "disrupted or threatened" by a perpetrator committing or threatening to commit an act of domestic or sexual violence against an employee.

Reasonable Accommodations. As is true with the Americans with Disabilities Act (ADA), an employer is

affirmatively required to provide reasonable accommodations under VESSA, unless it shows undue hardship. Again, as under ADA, an employer is required only to accommodate the "known limitations" an employee may have due to being a victim of domestic or sexual abuse or being a family or household member of a victim. Reasonable VESSA accommodations include "adjustment to a job structure, workplace facility, or work requirement, including transfer, reassignment, or modified schedule, leave, a changed telephone number or seating assignment, installation of a lock, or implementation of a security procedure, in response to actual or threatened domestic or sexual violence." Leave herein may be additional VESSA leave, but whether it is subject to the 12-week cap will be covered in the regulations due out early next year. This may present problems for employers.

Enforcement and Compliance. The Illinois Department of Labor (IDOL) administers and enforces VESSA. Every employer is required to conspicuously post and maintain documentation provided by the IDOL summarizing the requirements and employees' rights under VESSA. No private right of action exists within VESSA, but an employee may file a complaint with the IDOL alleging a VESSA violation. At its discretion, the IDOL will investigate and will hold a public hearing, upon request. Violations of VESSA may be reported up to three years from the date the alleged violation occurred.

An employer in violation of VESSA may be liable to an employee for back pay and benefits, compensatory damages, attorneys' fees and equitable relief such as hiring, reinstatement, promotion and reasonable accommodations.

Employers will likely face difficult decisions and compliance issues as they attempt to implement VESSA. With new responsibility come unexpected liabilities and potential pitfalls for the unwary. To comply with VESSA, employers should review their FMLA and other leave policies to determine what additions or alterations should be made.

Changes to Employment Applications

Pursuant to a January 1, 2004 amendment to the Illinois Criminal Identification Act, an employer who inquires into an applicant's arrests or conviction records must state that the applicant need not disclose sealed or expunged records of arrests or convictions. Additionally, employers may not ask if an applicant has had records expunged or convictions pardoned. Illinois employers should have this language included in their application forms at the start of the new year.

Equal Pay Act

The Illinois Equal Pay Act, effective January 1, 2004, guarantees that men and women will receive equal pay for equal work. The Act will protect an additional 330,000 Illinois workers who are not covered by the federal law. It prohibits public- and private-sector employers with four or more employees from paying unequal wages to women and men who perform work that requires equivalent skill, effort and responsibility and is performed under similar working conditions. Exceptions are available, however, if a wage difference is based on seniority, merit, a system measuring earnings by quantity or quality or any other factor other than gender, provided that such other factor does not itself violate the Illinois Human Rights Act or any other statute.

Key Provisions. The Act allows the Illinois Department of Labor (IDOL) to conduct its own investigations in connection with enforcement of the Act and to order employers to pay wages that the IDOL deems due and payable.

Moreover, unlike the federal law, which requires that workers who bring claims be located at the same job site as their comparators to avoid issues such as variations in cost of living, the Act permits employees to compare their pay to others within the same county, working for the same employer. The Act also prohibits retaliatory discharge and other discrimination based on a worker's invocation of the Act. Payroll records must be kept for at least three years.

Enforcement and Penalties. Illinois employees have the option of either filing a complaint with the IDOL or filing suit in state court up to three years from the date he or she learns of the underpayment. The Act also increases the penalties for violators and provides that no employee wages may be reduced to comply with the Act. Employers found guilty of breaking the law must make up the wage difference to the employee, are required to pay the employee's legal costs and may be subject to a fine of up to $2,500 for each violation.

Education and Outreach. The Act encourages the IDOL to provide educational outreach programs for employers to notify them of their obligations under the new law and to help them eliminate gender-based pay disparities among workers. The law also directs the IDOL to establish guidelines for employers to enable them to evaluate job categories based on objective criteria, such as educational requirements.

Protection for Private-Sector Whistleblowers

Effective January 1, 2004, Illinois private employers will be prohibited from enforcing any rule or policy that prevents an employee from disclosing information to a government or law enforcement agency if an employee has reasonable cause to believe that the information discloses a violation of any federal, state or local rule or law. Broader than traditional retaliatory discharge under common law, the Act prohibits an employer from retaliating against an employee in any way, including, for example, promotions, transfers, wages or any other personnel actions. Further, employers are barred from retaliating against an employee who refuses to participate in an activity that would result in a violation of state or federal law. Violations can result in reinstatement and damages, including back pay, litigation costs and attorneys' fees. Punitive damages are not available under this Act.

The new law is a clear response to the Enron-like policies that encouraged, and at times demanded, employees to keep quiet, look the other way or commit out-and-out illegal acts. Although the law has not been tested yet in Illinois, similar statutes in several states have been applied to prevent the enforceability of confidentiality agreements and noncompetition agreements that have violated public policy. A similar statute in New Jersey has given rise to recent case law finding employers liable for common-law and statutory violations if they take adverse employment action against an employee for either failing to sign or acting contrary to an agreement found to be unenforceable.

Minimum Wage Increase

On January 1, 2004, the minimum wage goes from $5.15 to $5.50 per hour and on January 1, 2005, to $6.50 per hour. By way of contrast, the federal minimum wage has remained at $5.15 per hour since 1997.

Use of Temporaries During a Strike

Effective January 1, 2004, amendments to the Employment of Strikebreakers Act and the Day and Temporary Services Act will prevent employers from contracting with day and temporary labor service firms in an effort to replace workers during a lockout or strike. Previously, temporary and day laborers needed only to be informed that they were entering a facility under strike or lockout. The new law will bar labor service agencies from sending workers to job sites where a strike, lockout or other labor problem exists giving rise to the need for temporary laborers.

Public-Sector Card-Check Recognition

Effective through an emergency rule adopted and signed into effect on August 5, 2003, public employees are now allowed to form unions based on card-check recognition. The emergency rule will be in effect until the formal rules are officially promulgated. Unions can now present evidence of majority support and, absent employer evidence of fraud or coercion, the Illinois Labor Board will certify the union as the exclusive bargaining representative. Several rules have been subject to heated debate and will likely change once the formal rules are promulgated. Public employers should note the short period of time they have to campaign against certification.

If you have any questions about any aspect of the seven new Illinois laws or regulations discussed above, or how to change your policies and procedures to comply therewith, please call Ethan Zelizer (312/609-7515), Bruce Alper (312/609-7890), Thomas Hancuch (312/609-7824) or George Blake (312/609-7520).

ODDS & ENDS

It seems that Odds & Ends was away for several issues at, of all places, cooking school, and returned with a recipe for stew:

You start with some legislation—

SAY WHAT ???? Effective January 1, 2004, it will be illegal in Illinois to discriminate on the basis of language. A recent amendment to the Illinois Human Rights Act bars employers from imposing a restriction "that has the effect of prohibiting a language from being spoken by an employee in conversations that are unrelated to the employee's duties." The amendment says "language" means a person's native tongue, such as Polish, Spanish or Chinese, but does not include slang, jargon, profanity or vulgarity. Who would know?

Flavor it with a pinch of precise lawyering—

The young and usually charming lawyer, obviously irritated by some adverse rulings throughout the trial, finally lost her cool and loudly asked the judge: "Your Honor, what would you do if I told you you were a stupid, egotistical, pompous ass and absolutely the worst judge I have ever appeared before or ever heard of." His Honor answered: "I would throw you in jail for 30 days for contempt of court." Then she said, "What if I just thought it, your Honor?" The judge responded, "Well, there is nothing I could do. You are entitled to your thoughts, no matter what they are." Triumphantly, the young attorney announced, "Your Honor, let the record show that *I think* you are a stupid, egotistical, pompous ass and absolutely the worst judge I have ever appeared before or ever heard of."

Then, blend in a bit of political incorrectness—

They never passed a bar!! A federal judge in New York has ruled that a female bartender may proceed to trial on a sexual harassment claim against her employer based on repeated abuse from three regular patrons known for their obnoxious behavior, which included inappropriate comments about women and lewd jokes. The regular patrons are attorneys.

Finally, add a dash of lawyer bashing (Odds & Ends will not reveal the Vedder Price shareholder involved)—

The devil visited a lawyer's office and made him an offer. "I can arrange some things for you," the devil said. "I'll increase your income fivefold. Your partners will love you; your clients will respect you; you'll have four months of vacation each year and live to be a hundred. All I require in return is that the souls of your wife, your children, and your grandchildren rot in hell for eternity." The lawyer thought a moment, then said, "What's the catch?"

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About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national, full-service law firm with over 210 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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