VEDDER PRICE

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

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CLASS ACTION UPDATE: CAN ARBITRATION AGREEMENTS PRECLUDE CLASS ACTIONS?

Many employers have considered requiring, or now require, their nonunion employees to execute agreements promising to submit employment disputes, such as claims of employment discrimination, to arbitration rather than pursuing their claims in court. While there are downsides to such agreements, these employers view arbitration as a quicker, cheaper alternative to trial in court, where large jury verdicts and large legal bills can result. Such arbitration agreements are generally enforceable, but some employers have gone further and included provisions that may jeopardize the enforcement of the agreements, such as provisions foreclosing in arbitration remedies that might be available in court, like punitive damages. Still others have included provisions that courts have concluded make the agreements too one-sided to be enforceable, for example, language that makes the outcome binding on the employee, but not the employer.

A recent U.S. Supreme Court decision raises the possibility that arbitration agreements may possibly be used as an effective "class-action shield" that prevents employees from bringing class actions against their employer in court or in arbitration. This would result from requiring employees to sign arbitration agreements that compel them not only to arbitrate their employment claims, but to do so only on an individual basis.

A number of courts had held that the Federal Arbitration Act does not permit class arbitration unless the parties' agreement expressly allows for it. Many commentators predicted that the United States Supreme Court would decide this issue in *Green Tree Financial v. Bazzle,* 123 S. Ct. 2402 (June 23, 2003). The Court instead ruled that the issue of whether an arbitration agreement permits class arbitration should be decided by the arbitrator. Although *Green Tree* was not an employment case, the decision will have a significant effect on how employers draft arbitration agreements with their nonunion employees.

In *Green Tree,* four consumers sued under South Carolina law, claiming that defendant Green Tree Financial, a commercial lending company, had failed to make legally required disclosures when it entered into loan contracts with them. Each contract contained an arbitration provision requiring arbitration of "all" contract-related disputes, but none mentioned class arbitration. The consumers brought two separate actions in state court, seeking class certification. In the first action, the court certified a class and, at the request of the loan

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company, compelled arbitration. The arbitrator conducted the proceeding as a class arbitration and awarded the class over $10 million in damages, plus attorneys' fees. In the second case, the loan company was also successful in forcing arbitration. The arbitrator (the same one as in the first case) certified a class, and awarded this class over $9 million in damages, in addition to attorneys' fees.

Green Tree appealed both decisions, claiming that class arbitrations, in general, were not allowed. The Supreme Court of South Carolina held that, although the contracts were silent with respect to class arbitration, the contracts permitted class arbitration. The United States Supreme Court acknowledged that the contracts' silence did, in fact, create an issue as to whether class arbitration was appropriate. Notwithstanding, the Court held that, based on the broad language of the arbitration clause empowering the arbitrator to resolve "[a]ll disputes . . . arising from or relating to" the contracts, the parties had agreed that an arbitrator would decide whether a class arbitration was allowable. The Court viewed the issue as one of contract interpretation, which historically has been reserved for the arbitrator. It emphasized that there are very few circumstances where the courts should decide an arbitration-related matter. For example, a court should act where the issue is "whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy." However, the question of whether an arbitration agreement prohibits class arbitration did not fall into one of those narrow exceptions. Because "the class arbitration was imposed on the parties and the arbitrator by the South Carolina trial court," the awards were vacated and sent back for the arbitrator to decide whether the language of the contract permitted class actions.

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Before *Green Tree*, the clear majority of federal courts — the Second, Fifth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuit Courts of Appeals — had determined that, absent an express agreement by the parties, there could be no class arbitration. In fact, it was generally accepted that the question of whether an arbitration agreement provided for class arbitration was an issue for the court, not the arbitrator. For example, the Seventh Circuit Court of Appeals in *Champ v. Siegal Trading Co.,* 55 F.3d 269 (1995), answered with a resounding "no" when asked whether a district court had the authority to certify a class arbitration where the arbitration clause was silent on the issue. The court acknowledged that denying certification of a class would result in inefficiency and inequities for the potential class members. However, the court was compelled to "enforce the parties' agreements as they wrote it, 'even if the result is piecemeal' litigation."

Green Tree, though not an employment case, is clearly relevant to employment arbitration provisions. For employers with arbitration clauses that expressly forbid class arbitrations, the *Green Tree* opinion should allow them to compel employees to arbitrate their claims as individuals only. However, there is the possibility that such a provision will be deemed to be unconscionable and, hence, unenforceable. Employers with arbitration agreements that are silent regarding class arbitrations are placed, by *Green Tree*, at the will of arbitrators who will decide on a case-by-case basis whether agreements provide for class arbitration. While it has been suggested that arbitrators who desire to continue hearing arbitration cases for employers may be reluctant to interpret an arbitration agreement in favor of class arbitration, that is certainly not a given.

Green Tree suggests that employers may want to draft new arbitration agreements that expressly forbid class-wide arbitration. But obtaining consent of incumbent employees to any new arbitration agreement may be problematic. For example, is the employer prepared to terminate an employee who refuses to sign? Also, an arbitration provision that bans class actions will likely be challenged as unconscionable. If such a challenge proves successful, employers would lose their shield against class actions in arbitration.

Following *Green Tree*, the American Arbitration

Association ("AAA") issued rules stating that arbitrators may decide whether class arbitration is appropriate when the agreement is silent with respect to class claims. Interestingly, the AAA is not accepting arbitrations where the parties' agreement expressly prohibits class claims unless a court directs the parties to submit the dispute to arbitration. Indicating its view that *Green Tree* is not necessarily the final word even where the arbitration agreement explicitly forbids class actions, the AAA's web site states: "The arbitrability of class arbitrations where the parties' agreement precludes such relief is a developing area of law, and the Association awaits further guidance from the courts on this issue." Employers are also waiting for guidance on that issue.

Vedder Price is highly experienced in drafting arbitration agreements and in defending employers in arbitration. If you have any questions regarding employment-related arbitration agreements or are in need of counsel to represent your company in an individual or class arbitration, or if you 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.

SUPREME COURT UPDATE: ADEA PERMITS FAVORING OLD OVER YOUNG; EMPLOYER NEED NOT REHIRE FORMER USER UNDER ADA

Two significant employment cases before the U.S. Supreme Court have recently been decided: *General Dynamics Land Systems, Inc. v. Cline, et al.* (No. 02-1080 decided 2/24/04), and *Hernandez v. Raytheon*, 540 U.S. _____, 157 L.Ed.2d 357, 124, S.Ct. 513 (2003). Both cases are discussed below.

At issue in *General Dynamics* was whether the ADEA protects younger workers against older workers. The Company and a union had eliminated from their labor contract management's obligation to provide health benefits to subsequently retired employees, but grandfathered employees then at least 50 years old. Employees in the 40-49 age group (and thus protected under the Act) claimed that they had been discriminated against. A lawsuit brought by these employees was dismissed by a federal district court. A divided panel of the Sixth Circuit reversed, finding that the ADEA protects "any individual" covered by the Act from discrimination because of age, and that if Congress had intended the Act to protect only the older workers against the younger it would have clearly said so.

In a 6-3 decision, the Supreme Court resolved the issue in the employer's favor: "We see the text, structure, purpose, and history of the ADEA, along with its relationship to other federal statutes, as showing that the statute does not mean to stop employers from favoring an older employee over a younger one. The judgment of the Court of Appeals is reversed." Justice Scalia filed a dissenting opinion, as did Justice Thomas, joined in by Justice Kennedy.

The Supreme Court's majority decision construes the word "age" to mean different things depending upon where it appears in the ADEA. Thus, "age" when used to establish the defense of a bona fide occupational qualification means comparative youth. However, in the context of discrimination "age" means "old age." In the majority's view, Congress's concern with distinctions that hurt older people was manifested in a statute "structured and intended to protect the older from arbitrary favor for the younger."

Hernandez involved a claim of disability discrimination under the ADA. Hernandez was allowed to resign from his employment in lieu of termination after persistent substance abuse and a positive drug test. Two years later, and allegedly drug free, he reapplied for employment and was rejected. The employer told the EEOC that the rejection was based on Hernandez's demonstrated drug use while previously employed. After receiving a right-to-sue letter, Hernandez filed suit under the ADA claiming discrimination based upon his record of a disability.

A federal district court granted summary judgment to the employer. On appeal the Ninth Circuit reversed. The Court of Appeals cited record evidence that Hernandez had been a drug addict, that his addiction had substantially limited one or more of his life activities, and that his positive drug test formed a record of that addiction. Thus, at the time he resigned in lieu of termination he was disabled under the ADA and a record of that disability existed.

The Court of Appeals concluded that Hernandez had made out a *prima facie* case of discrimination on the basis of disability. Additionally, it held that a policy that serves to bar the reemployment of a drug addict despite his

successful rehabilitation violates the ADA. In a 7-0 decision (Souter and Breyer not participating), the Supreme Court rejected the 9th Circuit's disparate impact analysis and stated (slip op. p. 7):

> ". . . the Court of Appeals held that a neutral no-rehire policy could never suffice in a case where the employee was terminated for illegal drug use, because such a policy has a disparate impact on recovering drug addicts. In so holding, the Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate-treatment claims. Had the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason under the ADA. And thus the only remaining question would be whether respondent could produce sufficient evidence from which a jury could conclude that 'petitioner's stated reason for respondent's rejection was in fact pretext.'"

Citing the *McDonnell Douglas* shifting burden of proof standard, the Supreme Court remanded the case to determine whether Rayethon's apparent nondiscriminatory reason for refusing to hire Hernandez (terminated for violating workplace conduct rules) was a pretext.

If you have any questions about the *General Dynamics* or *Hernandez* cases, please contact Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

FAIR AND ACCURATE CREDIT TRANSACTIONS ACT BENEFITS EMPLOYERS UNDER FAIR CREDIT REPORTING ACT

On December 4, 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act"), which includes a provision that excludes third-party investigations of suspected employee misconduct from the Fair Credit Reporting Act ("FCRA"). This is welcome news to employers, who since 1999 have been struggling with the question as to why the FCRA ever applied to employee misconduct investigations in the first place.

On April 5, 1999, the Federal Trade Commission ("FTC") had issued an opinion letter, known as the "Vail Letter," regarding an employer's use of third parties when investigating workplace misconduct. The FTC's legal staff had informed an attorney hired to perform a sexual harassment investigation for a company that her report was probably covered under the FCRA. In 1998, two landmark U.S. Supreme Court decisions clarified employers' duties to be proactive in reducing and preventing workplace harassment and discrimination. When an employer is notified of such behavior, it must promptly, thoroughly, and neutrally investigate the allegation. *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Thus, employers have a duty to investigate. The Vail Letter concluded that an employer's use of an outside organization, including an attorney or law firm, to conduct investigations relating to workplace misconduct fell within the statutory definition of a "consumer reporting agency" as defined and covered by the FCRA.

"With the passage of the [Fair and Accurate Credit Transactions Act of 2003] FACT Act, employers may now free themselves of the Vail Letter obligations and hire third-party investigators for internal investigations without notifying or obtaining the consent of suspected employees."

In essence, the letter triggered new obligations and impositions on employers hiring a third party to conduct an investigation of employee misconduct. Under the Vail Letter, employers investigating employee misconduct (such as theft, harassment or workers' compensation fraud) were required to obtain an employee's prior consent to the investigation. In addition, the employer was expected to provide the employee a summary of his or her rights under the FCRA and a copy of any report obtained from the third-party investigator before taking any adverse action against the employee. Needless to say, the application of the FCRA to investigations of employee misconduct hobbled an employer's ability to effectively monitor and control its workforce.

Subsequent to the Vail Letter, there were several courts that disagreed with the FTC's interpretation letter

and held that such investigations were not subject to FCRA. As one district court stated, "[t]he letters are not binding and not persuasive . . . the application of the FCRA's notice-and-delay provisions would undermine the efficiency and efficacy of employers' legitimate workplace investigations. *Johnson v. Federal Express Corp.*, 147 F.Supp.2d 1268, 1272 (M.D. Ala., 2001). *See also Hartman v. Lisle Park Dist.*, 158 F.Supp.2d 869, 876 (N.D. Ill., 2001) (concluding that the Vail Letter is not entitled to deference); *Robinson v. Time Warner, Inc.*, 187 F.R.D. 144, 148 n.2 (S.D.N.Y., 1999) (same). However, it was not until the passage of the FACT Act that this issue was conclusively resolved.

Effective March 31, 2004, the FACT Act exempts reports by third-party investigators from the FCRA, if the reports concern investigation of suspected employment misconduct, compliance with state, federal or local laws, rules of self-regulatory organizations or preexisting written employer policies. The FCRA still applies to investigations of a consumer's creditworthiness, so employers must take care to comply with the FCRA disclosure requirements when an internal investigation includes a report of the employee's creditworthiness. With the passage of the FACT Act, employers may now free themselves of the Vail Letter obligations and hire third-party investigators for internal investigations without notifying or obtaining the consent of suspected employees.

" . . . if an employer takes adverse action based on the report, the FACT Act entitles the targeted employee to a summary of the report, including the nature and substance of the investigation. It does not, however, require that the individuals who were interviewed be identified in the summary, that any source of information be divulged to the targeted employee, or that the employee be notified in advance of the adverse action."

Under the FACT Act disclosure of any report resulting from a third-party's investigation is limited to the employer, government officials, regulatory organizations or other individuals or agencies authorized by law. As a practical matter, employers should not disclose the report to the complaining party. Because the complaining party is not specifically allowed to receive the report under the FACT Act, providing the report to him or her may bring the report within the scope of an "investigative consumer report," invoking the FCRA's disclosure requirements. Additionally, if an employer takes adverse action based on the report, the FACT Act entitles the targeted employee to a summary of the report, including the nature and substance of the investigation. It does not, however, require that the individuals who were interviewed be identified in the summary, that any source of information be divulged to the targeted employee, or that the employee be notified in advance of the adverse action.

The FACT Act also implicates privacy issues and provides further protection for medical records and health information of applicants and employees. The new law requires that any employer requesting medical information about an applicant or employee obtain a written authorization from the individual that explains in clear and conspicuous language the purpose for which the information is being furnished. This authorization will be in addition to the authorization requirements of the Health Insurance Portability and Accountability Act ("HIPPA"). HIPAA requires certain health care providers who prepare these reports on behalf of employers to obtain specific authorization from the employee.

Under the FACT Act, any medical information obtained must be relevant to the job in question. Further, the FACT Act reminds employers of their obligation not to disclose medical information, except as necessary to carry out the purpose for which the information was initially disclosed, or as otherwise permitted by law.

Although the FACT Act adds a few new obligations on behalf of the employer when seeking medical information about their employees or applicants, on the whole, the new law is a welcome addition to the regulatory framework. Employers who have reason to investigate their employees are now free of the "Catch-22" created by the Vail Letter and the employer's duty to conduct a prompt, thorough and neutral investigation. The FCRA no longer requires the disclosure of such investigations to the target employee until adverse action is taken, and then the employer need provide only a summary of the investigation. Thus, the FACT Act allows employers to combat workplace harassment and discrimination through effective internal investigations.

If you have questions on either of these statutes or their relationship to each other, please call Ed Renner (312/609-7831), Ethan Zelizer (312/609-7515) or any other Vedder Price attorney with whom you have worked.

NLRB ACTIVITY DURING FISCAL YEAR 2003: YOUR FEDERAL TAX DOLLARS AT WORK

A jump or dip in the volume of cases handled by the National Labor Relations Board usually reflects a corresponding upswing or downturn in union activity. Judging by the numbers we've seen, the Board and organized labor haven't been all that busy.

Following the close of its fiscal year (12 months ended September 30, 2003), the Board's General Counsel published a summary of operations of 32 regional offices, 3 subregional offices and 17 resident offices that conduct representation elections and investigate and prosecute unfair labor practice cases. In Fiscal Year 2003, the Board received 4.6% fewer unfair labor practice cases and 11.8% fewer representation cases than in Fiscal Year 2002. The Board apparently delivered a bigger bang for its buck, however. In Fiscal Year 2003, it recovered more than $92 million in back pay or reimbursement of dues, fees and fines (compared to $60 million in Fiscal Year 2002) and obtained job reinstatement offers for 3,511 workers (up from 1,689 in Fiscal Year 2002).

For more details about the General Counsel's summary, contact Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

OSHA INVESTIGATES COMPLAINTS UNDER SARBANES-OXLEY

The Sarbanes-Oxley Act of 2002 protects employees in publicly traded companies and the companies' contractors, subcontractors, or agents against discrimination and retaliation for providing information against individuals who have allegedly violated an SEC rule or federal law relating to fraud against shareholders.

The U.S. Department of Labor ("DOL") is designated to handle whistleblower complaints under the Act, and the Secretary of Labor has assigned responsibility for whistleblower investigations to OSHA. Accordingly, OSHA has promulgated interim procedures for handling and investigating complaints, issuance of findings and preliminary orders, procedures for litigating complaints, objecting to findings, requesting hearings, withdrawal of complaints and settlements, judicial enforcement and judicial review. OSHA expects little change in the procedures outlined in the interim rule when a final rule is issued.

Although OSHA has traditionally employed personnel especially dedicated to investigations under the numerous other whistleblower laws the DOL administers, those laws address retaliation for raising safety concerns exclusively. Indeed, OSHA already is responsible for investigating whistleblower complaints under about 13 other statutes. However, all of them involve safety, health or environmental issues. Thus, Sarbanes-Oxley will be new ground for OSHA's investigators. Non-safety OSHA investigations, for example under Sarbanes-Oxley, are still in the developmental stage.

Procedures under the interim final rule cover the filing of Sarbanes-Oxley complaints, the investigation of those complaints, and the issuance of findings and preliminary orders. The procedures for litigating complaints, objecting to findings, requesting hearings, withdrawal of complaints and settlements, judicial enforcement and judicial review are also covered by the rule.

If you have any questions about OSHA's complaint handling under Sarbanes-Oxley, or questions about the statute itself, please call Ethan Zelizer (312/609-7515), George Blake (312/609-7520) or any other Vedder Price attorney which whom you've worked.

REMINDER TO ILLINOIS EMPLOYERS: WHAT ABOUT THOSE NEW YEAR'S RESOLUTIONS?

You will recall that our December 2003 issue alerted Illinois Employers to the fact that there were a number of new laws becoming effective this January 1, specifically: an FMLA type leave under VESSA for victims of domestic or sexual violence; changes in employment applications regarding questions about arrests and convictions; a statute intended to provide over 330,000 employees equal pay for equal work regardless of sex; protection for private sector whistleblowers; restrictions on the use of temporary employees in a strike; recognition of public sector employees through a card-check; and an increase in the minimum wage to $5.50 an hour.

Remember how you resolved that this time, you are going to stay on top of things and in fact, get ahead of the game. Well, did you? It's still not to late but don't let things slide too much longer because these can be costly items.

If you want to discuss these laws, or have any questions about any aspects of them, or how to change your policies or procedures to comply therewith, please call Ethan Zelizer (312/609-7515), Bruce Alper (312/609-7890), Tom Hancuch (312/609-7824), George Blake (312/609-7520) or any other Vedder Price attorney with whom you have worked.

HOW TO HANDLE FMLA INTERMITTENT LEAVE REQUESTS

In our May 2003 issue, we discussed the Family and Medical Leave Act ("FMLA") and the problems employers were having with intermittent leave in the context of a United States Court of Appeals case in the Seventh Circuit. Nonetheless, employees' use and abuse of intermittent FMLA leave continues to be a difficult and confusing issue for many employers.

" . . . if in practice, an employer wants very specific information during the certification process, to the fullest extent that the regulations allow, it must state the same in its policies. Assuming the policy provides adequate notice to its employees, an employer may deny FMLA leave and apply its applicable attendance policies when an employee fails to comply with the certification or recertification process."

So we are going to try to shed some additional light on the subject of intermittent leave, and try to answer the question:

> What can an employer do if it suspects employee abuse of intermittent leave Under the FMLA?

Under the FMLA regulations, an employer may require an employee to provide medical certification for his or her medical condition. Additionally, an employer may require that the employee provide updated certifications, but no more often than every 30 days, absent certain exceptions such as a change in employee's condition or evidence of fraud in obtaining the FMLA leave.

Further, an employer must give its employees notice of how it will implement its FMLA policies. Thus, an employer may only "crack-down" on FMLA abuse to the extent its policies forewarn employees that it may do so. For example, if in practice, an employer wants very specific information during the certification process, to the fullest extent that the regulations allow, it must state the same in its policies. Assuming the policy provides adequate notice to its employees, an employer may deny FMLA leave and apply its applicable attendance policies when an employee fails to comply with the certification or recertification process.

For intermittent leave, a certification form may require the employee's doctor to state the medical necessity for an intermittent leave schedule. Additionally, if the qualifying condition is chronic in nature, the certification form can ask whether the patient is presently incapacitated and the likely duration and frequency of episodes of incapacity. Again, however, if an employer's stated policies are too narrow and preclude such an inquiry, then these questions may not be asked.

An employer may also require that the certification or recertification of intermittent leave contain responsive information regarding the duration and frequency of the episodes an employee will likely suffer. This information may provide an employer with the right to require re-certification more frequently than every thirty days. Where circumstances described by a previous certification have changed significantly, an employer can require recertification, irrespective of the 30-day rule. Thus, where an employee's attendance and tardiness differ substantially from what was provided for in the previous certification, an employer may immediately require recertification.

An employee must have at least fifteen days to comply with certification or recertification requests. This requirement must be strictly adhered to.

If an employee submits a complete certification or recertification form signed by the employee's doctor, an employer may not request additional information from the employee's doctor. However, a health care provider representing an employer may contact the employee's

health care provider, with the employee's permission, for purposes of clarification and authentication of the medical certification.

The certification process is the only tool that an employer may use to verify an employee's FMLA leave. Thus, employees must still have at least 15 days to comply with the recertification request, even where abuse is suspected. Likewise, the same 30-day limit on requiring recertifications applies except where an employer receives information that casts doubt upon the employee's stated reason for the absence.

Finally, an employer may temporarily transfer an employee using intermittent leave to an available alternative position where the employee's periodic absences or tardiness is foreseeable. There are both advantages and disadvantages to this option. Although the temporary position need not have equivalent duties, the pay and benefits must be equivalent, irrespective of any difference in duties. Additionally, this type of transfer may not be used as a method to discourage leave taking or in retaliation of leave taking; rather, it may only be in accommodation to the employer's business. After the leave, the employee must be restored to the same or equivalent job as the job held at the commencement of the leave.

If you have any questions about this matter, or about the FMLA in general, please call Paige Barnett at (312/609-7676), Ed Renner at (312/609-7831) or any other Vedder Price attorney with whom you have worked.

ODDS & ENDS

In a scene reminiscent of predatory co-workers everywhere, a 500-pound self-propelled delivery droid got over his inhibitions and pinned Jane, a very attractive female employee, against a file cabinet. Jane had been reaching for mail held by the robot and hit his stop button, but he continued to put the moves on her. Jane filed suit against the company and the robot, claiming injuries to her shoulder, back and legs. Her employer countered that, because the droid moved at a snail's pace, it was hard to imagine that his unwanted advances could trap her. The robot denied any misconduct, and moved for a change of venue to his home planet.

In our next issue (June 2004) we'll present the 2003 "Stella awards." Stay tuned!!

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