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ATTENTION ILLINOIS EMPLOYERS

As employers should already know, the new Fair Labor Standards Act regulations regarding overtime go into effect on August 23, 2004. In Illinois, however, a new minimum salary level threshold has already taken effect pursuant to an Illinois law signed on April 2, 2004.

The Illinois minimum salary threshold has been increased from $155 per week to $425 per week. Although the federal regulations will raise that number to $455 on August 23, 2004, Illinois employers should be aware that employees who fall under the Illinois-specific $425 threshold are automatically entitled to overtime pay immediately.

For more information regarding the new Fair Labor Standards Act regulations, the new Illinois law regarding overtime and other topics related to overtime, please visit our website at: www.vedderprice.com.

CLASS ACTION UPDATE: AGE DISCRIMINATION IN EMPLOYMENT ACT WAIVERS

In its 2000 decision in *Adams v. Ameritech Services, Inc.,* 231 F.3d 414, 431 (2000), the United States Court of Appeals for the Seventh Circuit noted that "[t]hroughout the decade of the 1990's, corporate downsizing was a popular strategy for companies that believed they had become indolent, complacent, inefficient, or otherwise unsuited to the ever-increasing pace of competition in their markets." The statement still rings true four years later. Corporations continue to downsize, and as a result, are facing an increasing amount of employment-related litigation. Many employers that have carried out workforce reductions have found themselves confronted with a collective action lawsuit (similar to a class action) brought by terminated older employees.

In the last Class Action Update, we explained that employers could potentially avoid litigating collective or class action lawsuits by having employees execute agreements promising to submit all employment disputes to arbitration rather than pursuing their claims in court. Similarly, employers can potentially avoid the courtroom and stave off class action litigation by having employees execute waivers of claims under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq*., in exchange for severance pay or other benefits provided in a workforce reduction.

In contrast to the disputes that exist regarding the validity of arbitration provisions, ADEA waivers are clearly lawful and have been proven effective in avoiding litigation of ADEA claims. In fact, Congress amended the ADEA in 1990 with the Older Workers Benefit Protection Act ("OWBPA"), 29 U.S.C. § 626, because it viewed the increasingly popular practice of securing ADEA waivers from terminated employees as troublesome. The OWBPA sets forth strict guidelines for ADEA waivers, providing that an employee may not waive any rights under the ADEA unless the waiver is

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"knowing and voluntary." Moreover, in the case of a release executed in connection with a workforce reduction program, an employee "knowingly and voluntarily" waives his right to bring an ADEA action only when the employer has provided the employee with certain information designed to help the employee to assess the potential of a suit for age discrimination.

Employers should note that the OWBPA's requirements vary slightly depending on whether the employee is terminated pursuant to an employment termination program or an individual termination. An employment termination program exists when an employer offers a standardized package of employee severance benefits to more than one employee.

Accordingly, OWBPA requires that:

- √ The waiver be a part of an agreement between the employer and the employee that is written in a manner that is easily understood by the individual.
- √ The waiver contain a provision that specifically waives the employee's rights under the ADEA.
- √ The employee not be asked to waive any right or claim that may arise after the date the employee signs the waiver agreement.
- √ The employee waive his rights or claims only in exchange for consideration (*e.g.*, severance package) in addition to anything the employee is already entitled to (*e.g.*, pension).
- √ The employee be advised in writing to consult an attorney prior to signing the agreement.
- √ The employee be given 21 days to consider the agreement if the employee was part of an individual termination, or 45 days if the employee was terminated pursuant to a group termination program.
- √ The agreement allow the employee seven (7) days following the signing of the agreement to revoke the agreement. Significantly, the waiver is not valid until the seven-day period has passed.
- √ The waiver not interfere with the employee's right to file a charge with the EEOC or participate in an EEOC investigation.

Additionally, if the employee is terminated pursuant to an employment termination program:

- √ The employer inform the employee in understandable language of:
  1. any class, unit or group of employees covered by the program, the eligibility requirements and time limits for the termination program; and
  2. the job titles and ages of all individuals eligible or selected for the termination program, the ages of all employees in the same job classification or organizational unit who are not eligible or selected.

As stated above, an ADEA waiver must satisfy *all* the requirements of the OWBPA. Although a few courts have found that a minor violation of the OWBPA does not void the waiver, the majority have slavishly ruled that a failure to comply with one requirement will void the waiver. For example, in the Seventh Circuit's decision in *Adams v. Ameritech Services, Inc.,* 231 F.3d 414, 431 (2000), the Court voided the waivers for a group of employees terminated pursuant to a reduction-in-force because the waivers did not provide the job titles selected for the group termination. As a result, the court remanded the older workers' ADEA collective action for consideration of its merits.

Similarly, courts have found that waivers are unlawful and void when they fail to notify an employee in writing of his right to an attorney. Likewise, while an employer may ask an employee to waive the right to sue, the OWBPA states that employers cannot request an employee to waive the right to file an EEOC charge. Provisions that prohibit an employee from filing a charge should never be included in a waiver because they cannot be enforced.

A violation of the OWBPA, by itself, will not subject employers to monetary damages. A violation could, however, expose employers to declaratory and injunctive

relief that voids the ADEA waiver and opens the door to litigation on the merits of the age discrimination claim, which could obviously result in monetary damages. *Krane v. Capital One Services,* Case No. 3:03cv675 (E.D. Va. 2004).

Critically, if a waiver is found to be invalid, an employer may not be able to recoup the consideration paid to the employee to sign the waiver. Thus, no matter how generous the severance package provided in return for a waiver, if the waiver is not carefully drafted, the employer could still find itself a defendant in an ADEA suit. In *Oubre v. Entergy Operations, Inc.,* 522 U.S. 422 (1990), the Supreme Court held that, before bringing suit under the ADEA, an employee need not tender back consideration received from a severance package in exchange for signing a waiver that did not comply with the OWBPA's requirements. *Oubre* also held that retention of the severance benefits cannot amount to a ratification of the waiver because only a signed valid release can waive an ADEA action. But the Court suggested that an employer may ultimately have a claim for restitution, recoupment or setoff against an employee who brings an ADEA action. Although *Oubre* did not specifically answer whether an employer and employee may agree as a matter of contract law to the inclusion of a tender back provision as part of the waiver, the EEOC issued a regulation stating that any such agreement would be invalid under the ADEA. Nevertheless, employers that draft waivers in compliance with the OWBPA may save themselves the expense of litigating ADEA claims and any potential damage awards.

Vedder Price is highly experienced in drafting ADEA waivers and defending against ADEA collective and individual actions. If you have any questions regarding ADEA waivers or collective or class actions or have questions about collective or 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.

DISABILITY "ASSOCIATION" DISCRIMINATION UNDER THE ADA

The United States Court of Appeals for the Seventh Circuit recently addressed for the first time a claim brought under the Americans With Disabilities Act's ("ADA") "association" provision, which prohibits discrimination against "a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association." 42 U.S.C. § 12112(b)(4). The association provision was included in the ADA, in part, in response to testimony before legislators regarding a woman whose long-time employer fired her when it found out that she was caring for her son, who had AIDS.

In *Larimer v. International Business Machines Corp.*, — F.3d —, 2004 WL 1208928, Case No. 02 C 3160, Appeal No. 03-2256 (June 3, 2004), the Seventh Circuit affirmed the District Court's grant of summary judgment for the employer, IBM, in a case brought by its former Lotus software salesperson Thomas Larimer. Larimer's wife, who was also an employee of IBM, gave birth prematurely to twin daughters. The girls were hospitalized for approximately two months after birth, and IBM's employee health plan paid almost $200,000 in related costs. Shortly after his daughters came home from the hospital, IBM fired Larimer for poor performance.

Larimer filed suit in the United States District Court in the Northern District of Illinois, alleging that IBM discharged him in violation of the ADA and the Employee Retirement Income Security Act ("ERISA"). The District Court granted summary judgment to IBM, and Larimer appealed.

Larimer's ERISA Claim

The Seventh Circuit easily disposed of Larimer's ERISA claim, brought under 29 U.S.C. § 1140 (ERISA "§ 510"). Generally speaking, § 510 prohibits retaliation against individuals for exercising their rights under an ERISA plan, such as a health insurance or pension plan, and prohibits interference with the individual's attainment of ERISA plan benefits.

The Court found that Larimer had no evidence directly supporting his claim that IBM had fired him in retaliation for exercising his rights under its employee health plan. However, under the Seventh Circuit's alternative proof method for retaliation cases, Larimer still might have survived IBM's motion for summary judgment if he could have shown that he was performing his job in a satisfactory manner and that, after applying for atypically large benefits only he, and not any similarly

situated employee who did not apply for atypically large benefits, was subjected to an adverse employment action (termination). This alternative method for proving retaliation cases, derived from the familiar *McDonnell Douglas* test used in Title VII discrimination cases, was first set out by the Seventh Circuit in *Stone v. City of Indianapolis Public Utilities Division*, 281 F.3d 640, 644 (7th Cir. 2000). *Larimer* is the first time the Seventh Circuit has applied its *Stone* retaliation test to an ERISA § 510 claim.

The Seventh Circuit found that Larimer offered no evidence to show either that he was performing up to IBM's reasonable expectations or that any comparable employee who did not apply for atypically large benefits was treated better than he was, and therefore it upheld the District Court's decision in favor of IBM on Larimer's ERISA claim.

Larimer's ADA Claim

The Seventh Circuit also upheld the District Court's decision in favor of IBM on Larimer's ADA claim, which alleged that IBM fired him because his daughters are disabled.

Noting that the case was the first time it had addressed the "rarely litigated . . . association section" of the ADA, the Court first raised the question of whether Larimer's daughters were, in fact, disabled, as required to trigger the protection of the ADA. The evidence showed that the girls appeared to be healthy and normal at the time of the appeal, but that there was an undetermined probability "that they will develop serious physical or mental handicaps as they grow older." Based on language in the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 482-83 (1999), the Seventh Circuit expressed doubt that a potential future disability, even if likely to develop, could trigger the ADA's coverage unless the employer mistakenly regards the individual(s) (in *Larimer*, the plaintiff's twin daughters) as disabled. The Supreme Court in *Sutton* stated that "Because the phrase 'substantially limits' appears in the [ADA] in the present indicative verb form, we think the language is properly read as requiring that a person be presently—not potentially or hypothetically—substantially limited [in a major life activity] in order to demonstrate a disability."

Being "regarded as" disabled is an alternative route to ADA coverage. 42 U.S.C. § 12102(2)(C). However, the Court did not resolve the issue because it found that Larimer "must lose even if his daughters are disabled or regarded as disabled." Without expressly adopting it, the Court applied a test (again based on *McDonnell Douglas*) requiring a plaintiff claiming disability association discrimination to show the following in order to meet his *prima facie* burden of proof:

- √ He was qualified for the job at the time of the adverse employment action;
- √ He was subjected to an adverse employment action;
- √ He was known by the employer at the time to have a relative or associate with a disability; and
- √ He presents evidence that his case falls in one of the following three categories in which an employer has a motive to discriminate against a nondisabled employee who is merely associated with a disabled person:

  1. "Expense": The association is costly to the employer because, for example, the disabled individual is covered under the employer's health plan.
  2. "Disability by Association": The employer fears that the employee will develop the disabled person's disability (through, for example, genetic predisposition or exposure to a communicable disease).
  3. "Distraction": The employee is inattentive at work because of the associated person's disability (although not so inattentive as to need an accommodation to perform his job, as the association section does not confer on *nondisabled* employees a right to a reasonable accommodation).

The Court found that Larimer could not fit his claim into any of the three motive categories. The Court quickly ruled out the second category, "disability by association" (because his daughters' conditions were "neither communicable to Larimer nor predictive of his becoming ill or disabled"), and the third category, "distraction" (because there was no evidence that Larimer was absent or distracted at work because of the underlying medical issues).

As for the first category, "expense," the Court found that Larimer's claim did not fit this category either, because there was no evidence that Larimer's supervisors had any stake – financial or otherwise – in firing an employee with large health benefit claims. Larimer could not show, for example, that his family's health benefits were charged to his supervisors' budget, or even that his supervisors' compensation was directly tied to overall company performance, such as in a profit-sharing plan.

Because Larimer could not fit his case into any of the three enumerated motives for disability association discrimination, the Seventh Circuit upheld the District Court's ruling in favor of IBM.

Conclusion

Although rarely litigated to this point, employers can expect to see increasing numbers of disability association claims going forward as the costs of health care and other employee benefits continue to rise, employees struggle to balance professional and family obligations, and plaintiffs' lawyers who previously may have been unaware of this potential claim are educated by the Seventh Circuit's opinion in *Larimer*. It can be expected that many such claims will be paired with ERISA § 510 claims, as in *Larimer*.

Thus, the district courts and the Seventh Circuit likely will have many opportunities to further define what an actionable disability association claim is. In the interim, it is encouraging that in its first words on the subject, the Seventh Circuit has indicated that a plaintiff cannot rely on a generalized assumption that employers will wish to get rid of "expensive" employees – which would open a floodgate of litigation – but rather must produce specific evidence that the decision maker has a reason to care about the cost of the associated person's disability.

Larimer shows that employers should train their decision makers that the ADA protects not only those applicants and employees who are themselves disabled, but in some circumstances those who are merely *associated* with a disabled person, and should make employment decisions accordingly. If you have any questions about disability association discrimination, ERISA retaliation, or about the ADA or ERISA in general, please call Alison Maki (312/609-7720) or any other Vedder Price attorney with whom you have worked.

FMLA UPDATE: A RAY OF HOPE FOR MEMBERS OF THE PSYCHIC EMPLOYERS' NETWORK?

Faced with what appears to be an ever-expanding series of leave entitlements and regulations, many employers are finding it increasingly difficult to determine eligibility for leave under the Family and Medical Leave Act ("FMLA") in those situations where the employee provides inadequate notice before beginning leave as well as little or no information pertaining to the reason the leave is needed. When and how much information may an employer request when this happens? In *Aubuchon v. Knauf Fiberglass, GmbH*, 359 F.3d 950 (7th Cir. 2004), the United States Court of Appeals for the Seventh Circuit acknowledged the difficulties posed by such requests and set out to more clearly define what an employer may do in these situations.

The federal regulations provide that an employee, when the need for leave under the FMLA is foreseeable, must give at least 30 days' notice before beginning leave. This enables the employer to minimize the disruptive effect of an unscheduled leave on the employer's business. Recognizing that the need for leave is not always foreseeable and that there are certain situations where the employee may not know when the leave will be needed (change in circumstances or a medical emergency), the regulations simply require the employee to give notice to the employer "as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a).

Significantly, if the employee does not give the employer the required notice – either 30 days before the needed leave or "as soon as practicable" – the employer

may deny leave even if the employee (or family member) does have a serious health condition. Of course, doing so is fraught with the risk of litigation – even though the employer may ultimately prevail.

As discussed in prior Labor Law Newsletters (May 2003 and September 2003), the Seventh Circuit's decision in *Byrne v. Avon* muddied the waters of what constitutes adequate notice under the FMLA and when the employee is even required to give notice. The *Byrne* Court held that the plaintiff – terminated after he was found sleeping on the job – would be excused from the FMLA's notice requirement if he could prove either that the sudden change in his behavior was itself notice of a mental problem or that he was unable because of his medical condition to give notice of his need for FMLA leave. This decision left employers in an untenable position: attempting to read the mind (and medical charts) of an employee who begins acting differently or disappears altogether.

All is not lost. The Seventh Circuit has offered a ray of hope to employers in *Aubuchon* – finding no violation where an employer terminated a male employee who wanted to – and did – stay home with his pregnant wife in the weeks immediately preceding her due date. Having excused a "severely depressed" employee's failure to provide notice of his need for FMLA leave, one might expect the Court to accord the same consideration to an employee wishing to provide comfort to his expectant wife. Aubuchon's casual approach to the process, however, appears to have spurred the Court to reach a different conclusion.

Aubuchon's wife was due to deliver their child on August 19, 2000. Her pregnancy appeared to be going smoothly, and she went into labor a few days before her due date. This turned out to be a false alarm, and she did not deliver the baby until nearly two weeks later – on September 2, 2000. Aubuchon first told Knauf that he wanted to take FMLA leave on August 21, explaining that he wanted to stay home with his wife until she gave birth. For some reason, he did not give complications, false labor or any other medical condition as the reason for wanting to take the leave. As the Court explained in its decision, being pregnant is not a serious health condition. There must be something more – incapacitation or complications (such as premature contractions) that could result in premature birth of the baby.

Aubuchon did not report for work again after August 19, 2000.

On September 1, 2000, Aubuchon completed Knauf's leave request form and again made no mention of any complications that his wife may have been having. Knauf denied Aubuchon's leave request on September 4, 2000 and terminated Aubuchon's employment as his unexcused absences put him over the limit allowed by the Company's attendance policy.

After being terminated, Aubuchon provided Knauf, conveniently, with a note from his wife's obstetrician explaining that she had indeed experienced complications during her pregnancy. The Court, however, found the note to be of no consequence as it was submitted too late in the game to have any bearing on the outcome. Recognizing the difficulties employers would face if employees could essentially "cure" deficient FMLA requests after the fact, Judge Posner pronounced, "[e]mployees should not be encouraged to mousetrap their employers by requesting FMLA leave on patently insufficient grounds and then after the leave is denied obtaining a doctor's note that indicates that sufficient grounds existed, though they were never communicated to the employer.

Aubuchon, incredibly, suggested that an FMLA request based on patently insufficient grounds should serve as a signal to the employer that the employee does not understand what is required of him (or her) in giving adequate notice under the Act. Acknowledging that some of the Department of Labor's regulations suggest that any request for leave triggers a duty on the employer's part to determine whether the requested leave is covered, the Court flatly rejected this argument, stating that the consequence of such a position would be to "place a substantial and largely wasted investigative burden on employers." Thus, merely demanding leave is not enough – you must give the employer a reason to believe you are entitled to it. Putting it bluntly, the Court explained that an employee suffering from brain cancer – an FMLA condition, no doubt – does not satisfy the Act's notice requirement if he simply says that he has a headache.

What should employers take away from this decision? First and foremost, the *Aubuchon* decision reinforces the principle that employers can expect their employees to comply with the requirements of their FMLA policies and take action when they fail to do so. Still, employers

must tread carefully any time they receive an ambiguous leave request. Aubuchon's blatant disregard for the requirements of the FMLA made the Court's decision simple. This decision, while offering some hope to employers who may be "mousetrapped" by their employees, does not fully free employers from the role of all-seeing and all-knowing entities in cases where the reason for leave may be sufficient but was not properly communicated to the employer.

Lastly, although it is not germane to how employers respond to FMLA requests, the fact that Aubuchon falsified his employment application by failing to disclose that he had been terminated from a prior job for poor attendance certainly did not help his cause in the eyes of the Court and Judge Posner made a point of noting this fact in his opinion.

Vedder Price is very experienced in drafting FMLA policies and counseling employers in responding to FMLA leave requests. If you have any questions regarding your FMLA policy or a particularly difficult FMLA leave request you have received, or if you have questions about the FMLA generally, please call Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

FEDERAL COURT ENJOINS ENFORCEMENT OF ILLINOIS EMPLOYMENT OF STRIKEBREAKERS ACT IN SEVEN COUNTIES

Recent Newsletters reminded Illinois employers of new state laws that became effective January 1, 2004. One of the laws expands the 1975 Employment of Strikebreakers Act, or "ESA" (820 ILCS 30/1 *et seq.*). The ESA was limited to preventing the knowing use of professional strikebreakers, defined as any person who "repeatedly and habitually offers himself for employment on a temporary basis where a lockout or strike exists to take the place of an employee whose work has ceased as a direct consequence of such lockout or strike." As amended, ESA now also prohibits the knowing use of "day and temporary service agencies" to provide striker replacements. Such agencies are defined under the Illinois Day and Temporary Labor Services Act (820 ILCS 175/1 *et seq.*) as "any person or entity engaged in the business of employing day or temporary laborers to provide services to or for any third party employer pursuant to a contract." This Act has been correspondingly amended to prohibit the agency from sending day or temporary laborers to any place where a strike, a lockout, or other labor trouble exists. Violations of either Act are deemed Class A misdemeanors.

This legislation conflicts with long-standing federal law permitting employers to hire replacements for striking employees. In *NLRB v. Mackey Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938) the U.S. Supreme declared that employers can lawfully replace striking employees with others "in an effort to carry on the business," and need not, once the strike ends, discharge those hired to fill the places of strikers. *NLRB v. Mackey Radio & Telegraph Co.*, 304 U.S. 333, 345-46 (1938). Economic strikers who unconditionally apply for reinstatement at a time when their positions are filled by permanent replacements are entitled to reinstatement upon the departure of the replacements, unless in the meantime they have obtained regular and substantially equivalent employment.

Until recently, this conflict generated little in the way of concern or litigation. Last July, however, Caterpillar challenged the ESA by filing a lawsuit in the United States District Court for the Central Division of Illinois against the State's Attorneys for the seven counties in which it maintains manufacturing and parts-distribution facilities (Peoria, Tazewell, Macon, Kane, Kendall, Livingston and Will). Caterpillar, which has hired striker replacements in the past, alleged that the ESA is pre-empted by the National Labor Relations Act, violates the Supremacy Clause of the U.S. Constitution, and also violates Caterpillar's right to equal protection under the Fourteenth Amendment. Caterpillar brought suit in anticipation of labor contract negotiations with the UAW this year, and with the IAM in 2005, and filed a motion for preliminary injunction asking the Court to enjoin the application of the ESA to these negotiations until a final decision on the merits of its claims. On March 26, 2004, the Court granted Caterpillar's motion (Case No. 03-1245).

Caterpillar argued that the NLRA entitles it to hire professional strikebreakers and temporary replacement workers through third-party temporary employment agencies in the event of a strike, and that the ESA removes those

options. As a result, it will either lose an economic weapon allowed under the NLRA or act in defiance of Illinois law and risk criminal prosecution. The Court agreed, finding that Caterpillar would likely succeed on its claim that the ESA is unconstitutional, and that Caterpillar would suffer irreparable harm if a preliminary injunction were not issued. In the Court's view, an actual strike was not necessary to a finding of irreparable injury since the ESA erodes Caterpillar's position at the bargaining table. The economic weapon of hiring replacement workers would no longer form the backdrop to contract negotiations, and this would substantially shift the terms of bargaining in favor of the union even where the possibility of a strike were remote.

The Court concluded that Caterpillar had no adequate remedy at law and was unable to determine with any degree of certainty the effect in monetary terms the Illinois law would have on Caterpillar's negotiations with its unions. In any event, having sued the State's Attorneys in their official capacities, monetary damages were not available. The Court also found that the State's Attorneys would suffer no irreparable injury if the injunction were granted; because Caterpillar had shown a likelihood of success on its claims, there could be "no substantial harm to Defendants in enjoining the application of an unconstitutional law."

The Court's order enjoins the seven State's Attorneys from enforcing the ESA in their respective counties until a final judgment on the merits of Caterpillar's claims. That judgment should spell doom for the ESA, although pro-labor constituencies may lobby for an appeal.

If you have any questions about the Caterpillar litigation or about the replacement or reinstatement of striking employees, call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

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