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Labor Law

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CLASS ACTION UPDATE: $22.4 MILLION FLSA SETTLEMENT FOR CONTRACT JANITORS

A recent $22.4 million tentative settlement entered into by three California grocery chains and 2,100 illegal alien contract janitors is another example of the success plaintiffs are having with the record number of Fair Labor Standards Act (FLSA) collective actions being filed against employers. The settlement suggests that courts are willing to look past an employee's independent contractor status and find that a company is a "joint employer" and liable for the FLSA violations of its contractor. It also signals that employers cannot avoid liability in an FLSA collective action just because the plaintiffs are illegal immigrants.

In *Flores v. Albertsons, Inc.,* No. CV 01-00515 (C.D. Cal. 2002), a cleaning services company contracted with Albertsons, Ralph's and Vons to provide nighttime janitorial services. The 2,100 janitors who serviced the grocery stores, primarily undocumented workers from Mexico, were designated "independent contractors." The janitors disputed their independent contractor status and claimed that the grocery stores were "joint employers" who violated the FLSA by failing to pay them overtime even though they worked on average over 70 hours a week. The janitors also claimed that they were paid an average of $3.50 an hour, in cash with no taxes withheld, and were not given vacation days or health insurance.

Under the FLSA, a joint employer is individually responsible for complying with the FLSA. 29 C.F.R. § 791.2(a). In determining whether an entity is a joint employer the courts consider whether it *directly* or *indirectly* hires and fires employees, controls or modifies schedules and working conditions, determines pay rates or methods of payment, and maintains employment records. Courts also look at whether the "premises and equipment" of the entity are used for the work, whether the employees' work is integral to the entity's business, and the permanence of the working relationship. In *Flores,* whether the grocery chains were joint employers was critical for the plaintiffs because the janitorial services company had declared bankruptcy, leaving the grocery chains as the only "deep pockets."

The grocery chains filed motions for summary judgment, arguing that they were not joint employers because the janitors were independent contractors employed and controlled by the janitorial services company. The motions were denied because the court found that merely designating employees independent contractors is not dispositive, and because there were

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significant questions about whether the grocery chains had control over the janitors while they were in the stores. Although the stores lacked authority to hire or fire, day-to-day supervision over the janitors came principally from the grocery store managers. The court also found that equipment of the grocers was often used to perform janitorial tasks, and that there was some permanence in the working relationship as janitors worked at the same stores for extended periods of time. While not integral to the business of running a grocery store, the court noted the "practical necessity" of keeping a store clean.

Denial of summary judgment, which likely motivated the large settlement, may cause problems for other employers and their lawyers as they confront similar suits. Wal-Mart is currently defending against a RICO (Racketeering Influenced Corrupt Organization) action filed by undocumented janitors from Brazil, Czech Republic, Mexico, Mongolia and Poland, who claim that Wal-Mart and its janitorial contractors are "joint employers" and that both are liable for violating overtime laws. As did the grocery chains in *Flores*, Wal-Mart claims that it did not employ the janitors and is not a joint employer.

Flores serves as a warning that employers may not rely on contracting agencies as a shield against claimed FLSA violations. Employers should examine their relationships with contractors to ensure that the contractors comply with state and federal wage and hour laws, and that they solely control hiring and firing decisions, working conditions, pay rates, methods of payment, administration of pay, and completion of the job. If these responsibilities reside in or are shared by the employer, joint-employer status may follow.

The *Flores* settlement also is a reminder that illegal immigrant status does not preclude a worker from successfully pursuing an FLSA collective action. In *Flores*, the court made clear that "the protections of the FLSA are available to citizens and undocumented workers alike." Relying on the U.S. Supreme Court decision in *Hoffman Plastics, Inc. v. National Labor Relations Board,* 535 U.S. 137 (2002), the grocery chains argued that the janitors' status as illegal immigrants was relevant to the lawsuit because it limited back pay liability. In *Hoffman,* the Supreme Court had held that the NLRB could not award back pay to undocumented workers unlawfully terminated due to participation in a union organizing campaign, reasoning that federal immigration policy as expressed by Congress in the Immigration Reform & Control Act foreclosed "backpay to an illegal alien for years of work not performed, for wages that could not have been earned, and for a job obtained in the first instance by a criminal fraud."

The *Flores* court distinguished *Hoffman* because the janitors had not been terminated and were not seeking back pay for work not actually performed.

The *Flores* settlement teaches that employers should not cut corners in their arrangements with contract agencies and contract employees. Employers must be proactive in ensuring that their own practices and policies comply with the FLSA and immigration laws and that their contracting employers also comply with such laws.

Vedder Price is highly experienced in defending against FLSA collective actions and has successfully challenged such actions at all stages of litigation. If you have questions about the FLSA, have received notice that an employee is pursuing a collective action, or have questions about collective or class actions generally, please call Joe Mulherin (312/609-7725), Dick Schnadig (312/609-7810), Mike Cleveland (312/609-7860), or any other Vedder Price attorney with whom you have worked. For questions related to immigration and the IRCA, please call Gabrielle Buckley (312/609-7626) who chairs our Business Immigration practice.

NLRB RESTORES PRIOR LAW ON UNION REPRESENTATION OF AGENCY TEMPS

In another important decision for employers who jointly employ temporary workers provided by a personnel staffing agency, a 3-2 Board majority has held that the employer and agency must both consent before an election can be conducted in a unit comprising the employer's regular employees and any jointly employed temps. *H.S. CARE L.L.C., d/b/a Oakwood Care Center*, 343 NLRB No. 76 (11/19/04). The decision overturns *M.B. Sturgis, Inc.*, 331 NLRB 1298, which the Board decided in 2000.

Faced with rapid technological change and competitive market pressures, many companies supplement their regular workforce with employees supplied by a temporary help agency in order to reduce labor costs. Typically, the wages and benefits paid to the temporary workers are controlled by the agency, while

their work assignments and supervision are the responsibility of the "user" employer. This arrangement may put the agency and employer in a joint-employer status with respect to the supplied workers (under Board law, joint employers share or codetermine matters governing essential terms and conditions of employment) and can create problems when a union seeks to represent the user employer's "employees." Can the union represent a unit of regular employees and the jointly employed temporary workers? If the union already represents a unit of regular employees, can it accrete the temporary workers into that unit?

The Board had most recently answered these questions in *Sturgis*, holding that bargaining units that (a) combine employees solely employed by the user employer with (b) temporary workers jointly employed by the user employer and supplier agency are permissible under the Act. *Sturgis* jettisoned longstanding prior precedent which had permitted such units only with the consent of both employers. After *Sturgis* such consent was no longer required, and a unit would be found appropriate if the jointly employed workers shared a community of interest with the solely employed employees (*e.g.*, worked side-by-side at the same facility under the same supervision with common working conditions).

Following the election of President Bush in 2000, the composition of the Board changed and with it the view of a majority of its members regarding the wisdom of *Sturgis*. Thus, upon review of a recent Regional Director's decision approving a petition by the S.E.I.U. to represent employees solely employed by Oakwood Care Center and workers jointly employed by the Center and a personnel staffing agency, a majority of the current Board overruled *Sturgis* and returned to prior law that such a unit may be appropriate only with the consent of all parties.

Essentially, the *Oakwood* majority (Chairman Robert Battista and members Peter Schaumber and Ronald Meisburg) concluded that solely employed workers and jointly employed workers are employees of different employers, and that their inclusion in the same bargaining unit creates a multiemployer unit that is permissible only with the parties' consent to enter into bargaining on a multiemployer basis. "*Sturgis*, however well intentioned, was misguided both as a matter of statutory interpretation and sound national labor policy," said the majority. Board member Wilma Liebman, who had participated in the *Sturgis* decision, dissented along with member Dennis Walsh, noting that the majority "seems to have gone out of its way to make it impossible for joint employees to exercise their Section 7 rights [to choose union representation] effectively." Without regard to the merit of that claim, it seems fair to say that unions will now find it more difficult to organize or represent agency temps.

If you have questions about union representation of agency temporary workers, or about NLRB matters generally, please contact Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

TITLE VII UPDATE: COURT VALIDATES COMPREHENSIVE ANTI-HARASSMENT POLICY AND "SWIFT AND EFFECTIVE" RESPONSE

Under Title VII of the Civil Rights Act of 1964, an employer may be liable for sexual harassment by a supervisor with authority over the victimized employee. When no tangible employment action against the employee is involved, the employer may raise an affirmative defense to liability that (a) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (b) the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Typically, the first element is met where the employer shows that its employees were notified of a comprehensive no-harassment policy, and that its managers were trained to and did administer the policy effectively. However, proving the second element may be well-nigh impossible where the employee complains shortly after a single incident. Not surprisingly, commentators and employers have questioned why an employer should be held liable in situations where it promptly investigates the matter and takes effective action to prevent a recurrence.

This question was recently put to the United States Court of Appeals for the Eighth Circuit in *McCurdy v. Arkansas State Police*, 375 F.3d 762 (2004). McCurdy sued the Arkansas State Police alleging that it was liable for sexual harassment by her supervisor, Sergeant Hall, on one occasion at the start of her shift. Within hours, McCurdy reported the incident to the highest ranking

officer on duty who, in turn, notified his supervisor, a Lieutenant, at home. They ensured McCurdy would have no contact with Hall over the weekend and on Monday the Lieutenant and her Captain interviewed McCurdy, Hall and several others.

Rather than continue the investigation themselves, the Captain and Lieutenant asked the Special Investigations Unit (Internal Affairs) to intervene. After completing its investigation, the SIU concluded that Hall had violated State Police policies and recommended demotion to the rank of Corporal, counseling for his behavior, and one year's probation with close monitoring by the command staff. In the meantime, Hall was reassigned to a daytime desk position so he would have no further contact with McCurdy.

The matter went to a Disciplinary Review Board which concluded that Hall had violated the State Police's rules on coarse language and gestures, improper conduct, insubordination and truthfulness.

The State Police Director terminated Hall, informing him in writing that he had violated the State Police's sexual harassment, insubordination and truthfulness policies. Hall appealed this decision. The Commission hearing the appeal reinstated Hall, but transferred him to another location and demoted him to corporal.

McCurdy sued the State Police for the harassment by Hall. The district court granted summary judgment to the State Police and McCurdy appealed. The Eighth Circuit held that the defendant's "swift and effective response" shielded it from liability and that it did not need to show that McCurdy had unreasonably failed to take advantage of the remedial measures available to her.

This result is a victory for all conscientious employers. It shows the importance of having in place a well-drafted policy and a trained human resources staff to investigate the complaint and quickly take effective corrective action.

Most employers have a no-harassment policy and require managers to participate in training on harassment prevention and other EEO issues. Because the law is ever-changing, however, HR managers should ask whether their policies and related practices/procedures are "state of the art."

Even if you updated your policy a few years ago, take a fresh look at the tools you have in place to prevent harassment and to respond to complaints. Because the right policies and procedures can win the case (and their absence can deprive you of key defenses), this is a litigation-avoidance matter that should not be put on the back burner.

Vedder Price is highly experienced in drafting and updating no-harassment policies, counseling employers who are responding to harassment complaints, assisting with or conducting investigations, and defending against harassment litigation. If you have questions regarding your no-harassment policy, EEO training efforts, a harassment investigation, or if you have questions about Title VII generally, please call Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

THE PROBLEM EMPLOYEE: DISCIPLINE OR ACCOMMODATION?

Two recent cases illustrate how dealing with an employee who interacts negatively with coworkers can lead to litigation. In one case, a belligerent supervisor claimed that a campaign of racial harassment had created a hostile work environment and led to his constructive discharge. In the other, a discharged employee sued her employer for back pay and punitive damages under the Americans With Disabilities Act because her troublesome behavior was caused by a bipolar disorder.

In *Herron v. DaimlerChrysler Corp.* (No. 03-2802) (2004), the United States Court of Appeals for the Seventh Circuit found that Herron, who is black, was a highly productive supervisor who interacted poorly with coworkers, supervisors and subordinates. He was headstrong, disrespectful, argumentative and belligerent, and no manager wanted to work with him. After several poor appraisal reviews and discipline, he resigned and sued DaimlerChrysler, claiming race discrimination, retaliation and a racially hostile work environment that had led to his alleged constructive discharge. The trial court granted summary judgment to DaimlerChrysler and the court of appeals affirmed, agreeing that Herron had not established a *prima facie* case to support his claims. Herron had to show that he was meeting his employer's legitimate expectations. As to this, the court concluded:

> Herron was an employee who was able to do some aspects of his job quite well. Unfortunately, he also was an employee

> whose interaction with his subordinates, peers and supervisors was unacceptable.

Jacques v. Dimarzio, Inc. (Nos. 03-9080, 03-9109) (2004), decided by the United States Court of Appeals for the Second Circuit, also involved a plaintiff who had serious problems "interacting" with coworkers. An average to above-average assembler, Jacques regularly complained about working conditions and was repeatedly in conflict with other workers. She was fired after her working relationships had become "poisonous." Unlike the plaintiff in *DaimlerChrysler*, however, Jacques suffered from a bipolar disorder that caused periods of severe depression, and her supervisor was aware of this condition. A jury awarded Jacques $190,000 in back pay and damages. On appeal, the award was set aside because of a faulty jury instruction but the court's analysis of the ADA issue is instructive.

Noting that a person is disabled under the ADA if he or she has a physical or mental impairment that substantially limits one or more of the major life activities, the court agreed with the Ninth Circuit Court of Appeals that the "inability to interact with others" is a major life activity. The court disagreed with the Ninth Circuit's test of what constitutes a substantial limitation of this activity. In the Ninth Circuit's opinion, the limitation is substantial if it is "characterized on a regular basis by severe problems, for example, consistently high levels of hostility, social withdrawal, or failure to communicate when necessary." The court found this approach unworkable and was concerned that it would frustrate the maintenance of a civil workplace environment:

> The more troublesome and nasty the employee, the greater the risk of litigation costs for the employer that disciplines or fires him. All things considered, a "cantankerous" person or a curmudgeon would be more secure by becoming more unpleasant.

Instead, the court ruled that a plaintiff is substantially limited in interacting with others when his impairment "severely limits the fundamental ability to connect with others, *i.e.,* to initiate contact with other people and respond to them, or to go among other people – at the most basic level of these activities."

It is unclear from the court's opinion whether Jacques will prevail on retrial of her ADA claim. Had the plaintiff in *DaimlerChrysler* suffered from bipolar disorder and sued under the ADA, it seems apparent that he could not have successfully claimed a severely limited ability to "initiate contact with other people and respond to them."

If you have questions about dealing with employees who interact poorly with coworkers, please contact Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

EEOC OFFERS GUIDANCE ON INTELLECTUAL DISABILITIES UNDER THE ADA

In October 2004 the Equal Employment Opportunity Commission published "Questions & Answers About Persons with Intellectual Disabilities in the Workplace and the Americans with Disabilities Act."

This guide provides general information and examples of how the ADA's existing standards apply to intellectual disabilities. The EEOC points out that, contrary to popular belief, employees with intellectual disabilities (more commonly known as "mental retardation," a term the EEOC wants to avoid) normally do not have a higher absenteeism rate than other workers or generate higher insurance rates or workers' compensation claims. The EEOC says that people with intellectual disabilities can hold jobs such as data entry clerk, mail clerk, store clerk, messenger, printer, assembler, factory worker, hospital attendant, housekeeper, maintenance worker, and clerical aide.

Intellectual Disability

The EEOC considers an individual intellectually disabled when IQ is below 70-75; the disability originated before the age of 18; and "significant limitations" exist in everyday life skills such as self-care, communication, social skills, health and safety, academics, self-direction, and work.

The individual must also meet one of the three previously articulated tests for coverage under the ADA:

(1) The impairment (or multiple impairments in combination) must substantially limit one or

more major life activities, such as walking, seeing, hearing, thinking, speaking, learning, concentrating, self-care, and working. *EEOC example*: An individual who needs help cleaning his apartment, grocery shopping, going to appointments, cooking, reading mail, and paying bills is substantially limited in self-care and therefore disabled under the ADA.

(2) The individual has a past record or history of an intellectual disability. *EEOC example*: An individual diagnosed with an intellectual disability in high school has a past record or history of a disability and therefore is protected under the ADA.

(3) The employer mistakenly regards the individual as having an intellectual disability. *EEOC example*: An applicant has a facial deformity that affects her speech and an interviewer rejects her application because he believes that she has an intellectual disability and will be unable to communicate effectively with customers. The applicant is regarded as being disabled and therefore is protected under the ADA.

The ADA also protects individuals without a disability from discrimination based on their association with a disabled person. For example, an employer may not reject an applicant because of concern that the applicant's child's intellectual or other disability will result in the applicant's poor attendance.

Hiring and Discipline

Employers are prohibited under the ADA from most *pre-offer* disability-related and medical inquiries. For example, before a conditional employment offer has been made, employers may not ask whether an applicant was ever diagnosed with an intellectual disability, takes medication, or is receiving psychiatric treatment. Employers may ask an applicant if he can perform specific, job-related tasks, such as putting files in alphabetical or numerical order.

After a conditional offer has been made, employers generally are permitted to ask health and disability-related questions and/or require a medical exam, as long as all applicants are treated the same.

After hiring, employers generally may ask for medical information if they reasonably believe, based on objective evidence, that the employee's condition is the cause of performance problems or that the condition poses a direct safety threat.

Reasonable Accommodation

The EEOC gives examples of accommodations for the intellectually disabled applicant or employee.

Application Accommodations might include:

(1) providing a reader or interpreter for application materials;

(2) demonstrating what the job requires;

(3) replacing a written test with an expanded interview to allow an applicant to demonstrate skills.

Workplace Accommodations might include:

(1) job restructuring to exchange functions (for example, allowing the employee to assume his coworker's cleaning duties while the coworker assumes his money-counting duties);

(2) training that is slower-paced, extended, broken into smaller steps, repeated as needed, or enhanced by visual aids or color coding;

(3) having a job coach available to facilitate communication regarding potential accommodation and to provide initial training, monitoring, and assessment;

(4) offering a modified work schedule;

(5) providing new or modified equipment (for example, a large-button telephone with speed dial and labeled buttons for a receptionist

who has difficulty remembering office telephone numbers); and

(6) relocating an individual's work station to reduce distractions.

Importantly, requests for accommodation can come from a third-party representative of the job applicant or employee. Employers must consider and respond to these requests just as if they were made directly by the disabled individual.

Moreover, an employer *must initiate* a discussion about the need for a reasonable accommodation even without a request if the employer knows or has reason to know that (1) the employee has a disability, (2) the employee has workplace problems because of the disability, and (3) the disability prevents the employee from requesting an accommodation.

Harassment

Employers should be aware of the potential for harassment based on disability. The EEOC states that about 20% of discrimination claims brought by people with intellectual disabilities allege harassment. Name-calling and other humiliating, threatening, or harmful conduct should be addressed promptly and effectively. Harassment policies and training should include the employer's prohibition of harassment based on disability.

If you have questions about accommodating an employee with an intellectual disability, or compliance with the ADA generally, please call Alison Maki (312/609-7720) or any other Vedder Price attorney with whom you have worked.

THREE NEW ILLINOIS LAWS

On January 21, 2005, Illinois Governor Rod Blagojevich signed into law an amendment to the Illinois Human Rights Act to prohibit **discrimination on the basis of sexual orientation** by employers, lenders and landlords. The amendment applies to any Illinois employer with 15 or more employees, or which has a state contract.

The amendment defines "sexual orientation" as "actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth." Gender-related activity appears to cover transsexuals, or persons who seek to change their gender or consider themselves a different gender than their gender at birth. The amendment excludes a physical or sexual attraction to a minor by an adult, and does not require an employer to give preferential treatment or special rights, or to implement affirmative action policies or programs, based on sexual orientation. Vedder Price will continue to provide analysis and guidance on the new law. If you have any questions, please call Bruce Alper (312/609-7890), Chris Nybo (312/609-7729) or any Vedder Price attorney with whom you have worked.

Effective January 1, 2005 one of two additional new laws covering many Illinois employers **increased the state minimum wage** from $5.50 per hour to $6.50, $1.35 more than the federal minimum wage.

The third new law requires covered employers to comply with the **Illinois Worker Adjustment and Retraining Notification Act** (IWARN). Similar to its federal counterpart, IWARN requires 60 days' notice of a mass layoff, relocation, or termination of an industrial or commercial facility.

The state law follows the federal law in most key areas except: (1) IWARN applies to employers of 75 or more full-time workers, while the federal law applies to employers of 100 or more; (2) under IWARN, a "mass layoff" is a force reduction at an employment site of at least 25 employees (comprising at least a third of the site's work force), or at least 250 employees, while under the federal law the minimum is 50 employees (comprising at least a third of the site's workforce) or 500 employees; (3) IWARN requires individual notice to employees who are represented by a union, as well as notice to the union, whereas under federal law notice to the union is sufficient; and (4) violations of IWARN will be investigated and adjudicated by the Illinois Department of Labor, whereas the federal law allows employees to sue in court. Remedies under the state law are limited to back pay and civil penalties of not more than $500 per day for any period of noncompliance.

If you have questions about the new state minimum wage, or for advice about compliance with IWARN or the federal WARN Act, please contact Paige Barnett (312/609-7676) or any other Vedder Price attorney with whom you have worked.

USERRA IS AMENDED; PROPOSED REGS DRAW LITTLE PUBLIC ATTENTION

The Uniform Services Employment and Re-Employment Rights Act of 1994 (USERRA) provides significant rights and benefits to employees who leave their jobs voluntarily or involuntarily to perform duty in a uniformed service.

On December 10, 2004, President Bush signed into law the Veterans Benefits Improvement Act of 2004 (VBIA). VBIA amends laws affording housing and education benefits to veterans, and also amends USERRA in two respects important to employers. It extends from 18 to 24 months the maximum period of elective continuation of employer-sponsored health insurance that must be offered to the departing employee. Also, it obligates employers to give persons eligible for re-employment under USERRA information concerning their rights. This obligation can be met by posting a notice available from the U.S. Department of Labor. Notices must be posted by March 10, 2005.

In September 2004, the DOL issued proposed regulations in Q&A format interpreting USERRA. The regs drew scant public attention and the 60-day period for public comment has closed. The DOL's website at www.dol.gov/vets/programs/userra has a link to the regs which are subject to revision before they are issued in final form later this year.

If you have questions about rights, benefits and obligations under USERRA, please contact Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

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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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