VEDDER PRICE

Labor Law

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

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CLASS ACTION UPDATE: NEW CLASS ACTION FAIRNESS ACT

As part of his reelection campaign, President George W. Bush promised significant class action reform. The Class Action Fairness Act, which he signed into law on February 18, 2005, is a step in that direction. The Act aims to reduce frivolous lawsuits against businesses by allowing the removal of large class claims from state courts to federal courts.

Proponents of the Act contend that state courts and juries are often biased against out-of-state defendants and prone to grant large awards, while in federal court the odds of going to trial are lower, juries are less anti-business and judges are more evenhanded. The Act curbs "forum shopping" where suit is filed in a state court perceived as especially favorable to plaintiffs even though the locality has no particular relationship to the claim made in the lawsuit. The Act also places limits on attorneys' fees where the plaintiffs receive little monetary benefit.

Under the Act, federal courts must grant a petition to remove a state class action lawsuit that (1) has 100 or more class members; (2) seeks damages in excess of $5 million; and (3) has at least one defendant who is a citizen of a different state than at least one member of the proposed class. Under federal law, a corporation is a citizen of the state in which it is incorporated and of the state in which it has its principal place of business. Thus, for purposes of the removal provisions of the Act a corporation may be a citizen of two states.

The Act is expected to have a significant impact on wage and hour suits that follow a dual-track litigation strategy where plaintiffs file a class action suit in state court under state wage and hour law *and* a collective action suit in federal court under the Fair Labor Standards Act (FLSA) to take advantage of friendly state wage and hour laws and even friendlier judges and juries. State court procedural rules often allow plaintiffs' counsel to optimize the size of the class because potential class members are automatically included unless they "opt out." In federal court, potential members cannot join an FLSA collective action unless they "opt in" (file a written consent) and are determined to be sufficiently "similarly situated" to join the lawsuit.

The Act likely will diminish these advantages. Once a state law case is removed, plaintiffs will find it more difficult to certify their class actions under tighter federal procedural rules. If a class action is removed after it is certified, it may be decertified as a result of more

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stringent federal class action certification standards. Also, after removal the defendant employer may seek to transfer the lawsuit to a location that is more convenient, *e.g.*, to the city where the employer is headquartered.

The Act may have some unintended adverse consequences. Crafty plaintiffs' counsel can be expected to structure future state court class actions so that they fall short of the removal threshold by having no more than 99 class members, or a class that claims damages of $5 million or less. If this tactic is successful, dual-track litigation will remain a viable strategy and national employers may be forced to defend against a large federal FLSA collective action and smaller state law class actions filed around the country.

A federal district court in Colorado is one of the first courts to interpret the Act. In *Pritchett v. Office Depot, Inc.*, No. 05-MK-392 (D. Colo. Mar. 9, 2005), the employer tried to remove a Colorado wage and hour class action that had been filed in state court before the Act's passage. The federal court held that the Act did not expand jurisdiction to allow a case that was not removable when filed to be removed at a later time. In the court's view, this would allow "the removal of nearly every presently-pending class action in every state court, resulting in a sudden tidal wave of filings on an already burdened federal judiciary." Thus, the court ruled that only those cases filed in state court after February 18, 2005, may be removed to federal court pursuant to the Act.

As with most new legislation, questions of interpretation and strategic issues are sure to arise. Vedder Price is highly experienced in strategizing with respect to and defending against FLSA collective actions and state wage and hour class actions, and has successfully challenged such actions at all stages of litigation.

Wal-Mart Pays $11 Million Settlement to Avoid Federal Criminal Charges

In the January issue of this bulletin, we discussed the growing number of large wage and hour class actions being filed against corporations by illegal alien contract workers. Employers should also be aware that the federal government is cracking down on employers who use illegal alien contractors. In 2003, the government raided more than 60 Wal-Mart stores in 21 states and arrested more than 245 illegal aliens. Wal-Mart recently avoided federal criminal charges by agreeing to an $11 million settlement—four times the amount any other company has paid to avoid similar charges.

The 12 contractors who supplied janitors to Wal-Mart were not as fortunate. They paid out $4 million and pled guilty to criminal charges. The federal government chose not to file criminal charges against Wal-Mart because it had cooperated in the investigation and pledged to prevent further employment of illegal aliens. Wal-Mart also agreed to continue cooperating in the government's investigation of the contractors and to provide its managers with training on compliance with federal immigration laws.

The settlement is unrelated to the federal RICO (Racketeering Influenced Corrupt Organization) class action pending against Wal-Mart, which claims that Wal-Mart and its contractors conspired to avoid paying overtime to over 10,000 illegal alien contract janitors.

If you have questions about the new Class Action Fairness Act or about collective or class actions generally, or if you have received notice that an employee is pursuing a collective/class action, or that the Government is investigating your company's wage and hour policies, 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).

POSSIBLE "JOINT EMPLOYER" STATUS ALLOWS FMLA CLAIM TO ADVANCE

The Family and Medical Leave Act of 1993 (FMLA) applies to employers with 50 or more employees. In a recent decision that may have far-reaching consequences for an employer who contracts out employees to another company, the U.S. District Court for the Northern District of Illinois has held that a plaintiff may be able to count the employees of both companies in order to reach the 50-employee minimum required for liability under the FMLA. *Dinkins v. Varsity Contractors, Inc.*, No. 04 C 1438 (N.D. Ill. Mar. 10, 2005).

Dinkins was employed by Varsity Contractors, Inc., which provided maintenance and repair services to a shopping mall owned by the Simon Property Group. At issue was whether Varsity's 48 employees could be combined with Simon's 10 employees for purposes of the FMLA's 50-employee threshold. The court found that the plaintiff had provided sufficient evidence from which a jury could determine that Varsity and Simon were joint employers. Simon had authority under the contract to bar Varsity's employees from the work site, thereby effectively terminating them. The court therefore denied summary judgment to Varsity and allowed Dinkins' FMLA claims to stand for further consideration. If the two companies are found to be joint employers, the combined number of employees from both entities will make Dinkins eligible for FMLA leave and Varsity liable under the statute.

Because the FMLA regulations offer little guidance to the courts in defining the parameters of joint-employer status, and few federal courts at any level have had occasion to address the issue, *Dinkins* could be influential within and outside the Seventh Circuit. Consequently, employers who provide employee services to other companies on a contract basis that a court might construe as a joint-employment relationship should be mindful of the requirements of the FMLA, even if they are under the Act's 50-employee threshold.

If you have any questions about this case or the Family and Medical Leave Act generally, please contact Bruce Alper (312/609-7890), Tom Hancuch (312/609-7824) or any other Vedder Price attorney with whom you have worked.

THINK "BIG PICTURE" WHEN ADDRESSING WORKPLACE HARASSMENT

A recent opinion of the U.S. Court of Appeals for the Seventh Circuit illustrates the importance of investigating and addressing workplace harassment in the context of other complaints rather than as isolated incidents.

In *Loughman v. Malnati Organization, Inc.*, 395 F.3d 404 (7th Cir. 2005), the Seventh Circuit overturned summary judgment in favor of Lou Malnati's Pizzeria, allowing the plaintiff, Kathleen Loughman, to take her sexual harassment claims before a jury. Loughman had worked for Malnati's for almost three years. She alleged that she was subjected to harassment by various coworkers including physical assault and offensive comments and jokes throughout her employment. Although Malnati's had a harassment policy and responded to all of Loughman's complaints, the Seventh Circuit held that a jury could find that Malnati's did not do enough.

Loughman alleged that she started working at Malnati's when she was 17 years old and that almost immediately the kitchen staff began making inappropriate comments to her, which she reported to her manager. The manager said he would talk to the offenders. A few months later, a kitchen employee allegedly cornered Loughman near a basement freezer, put his arm around her waist, pushed her into a nearby room, tried to kiss her and blocked her way up the stairs for several minutes before she managed to get away.

> ***"Employers are subject to different standards for harassment liability depending on whether the harassment is committed by coworkers or a supervisor."***

Loughman reported this incident to her manager, who warned the employee that he would be fired if he touched Loughman again. The manager also reported the matter to a "high-ranking Malnati employee" who discussed it with all the restaurant managers. Loughman had no more trouble with the employee.

Loughman alleges that a year later two other employees followed her into a walk-in cooler and turned off the light, and that one of them grabbed her chest and tried to put his hands down her pants. Loughman escaped and told a coworker about the incident. The coworker told management, but no action was taken.

Nine months later, a Malnati's driver allegedly approached Loughman from behind while she was talking on the phone with a customer, ran his hands through her hair, slid his hand up her shirt, and touched her stomach. Loughman reported the incident.

Malnati's then began an investigation by its district manager. As a result of the investigation, an employee was fired for his conduct in the walk-in cooler incident nearly a year before and the driver was transferred to another location. Loughman resigned and filed suit.

Employers are subject to different standards for harassment liability depending on whether the harassment is committed by coworkers or a supervisor. In this case, because Loughman was alleging harassment only by coworkers, Malnati's would be liable if it were found to have been negligent either in discovering or remedying the harassment. Malnati's could assert as an affirmative defense that it had exercised reasonable care to prevent and correct the harassing behavior and that Loughman had unreasonably failed to avoid harm, such as by failing to take advantage of any preventive or corrective opportunities Malnati's provided.

> ***"For managers seeking to protect their employees from harassment and their companies from lawsuits,* Loughman *teaches the importance of a coordinated and comprehensive harassment policy that includes training managers and supervisors how to recognize and respond to complaints."***

The district court granted summary judgment in favor of Malnati's, finding that its harassment policy was effective because the kitchen employee never bothered Loughman again, one employee was fired, and another was transferred. The district court also noted that, although Malnati's policy allowed Loughman to report sexual harassment directly to the corporate office or to one of three female managers, she had instead reported her complaints to her manager, "who was a male and one of the most junior managers."

On appeal, the Seventh Circuit reversed the district court's decision, finding enough evidence of negligence on the part of Malnati's in discovering or remedying the harassment to send the case to a jury. The court held that when alleged harassment is physically assaultive, employers must be more aggressive in remedying it. In addition to the three physical assaults against Loughman and the frequent inappropriate comments, the court cited evidence of other harassing conduct, including physical attacks on other female employees and the fact that a manager had talked to the kitchen staff many times in response to complaints. The court concluded that a jury might "think the frequency of the discussions suggests that a different approach was needed. A jury could determine that, at some point, the management at Malnati's needed to stop merely issuing warnings and start taking disciplinary action against the offending employees."

The court also found that a jury could believe that Loughman took adequate measures to avoid harm by reporting the incidents to her manager, and that the alleged frequency of harassing conduct may have discouraged her from reporting harassment, making Malnati's policy ineffective.

Although *Loughman* deals with sexual harassment, its holding and reasoning likely will be applied to other types of harassment claims as well (*e.g.*, race, religion, national origin or disability). For managers seeking to protect their employees from harassment and their companies from lawsuits, *Loughman* teaches the importance of a coordinated and comprehensive harassment policy that includes training managers and supervisors how to recognize and respond to complaints. Managers and supervisors should be able to spot when to pass complaints on to higher levels so that widespread problems and patterns can be addressed quickly and consistently by someone with significant authority. These communications should be documented.

The Seventh Circuit's opinion makes clear that harassing conduct should be viewed in context rather than as isolated incidents. Even where the alleged perpetrators may be different, repeated and/or similar complaints can be a sign that aggressive monitoring and action is necessary.

If you have questions about harassment policies, please call Alison Maki (312/609-7720) or any other Vedder Price attorney with whom you have worked.

SEVENTH CIRCUIT SCOLDS LOWER COURT FOR EXCUSING OBVIOUS RACIAL HARASSMENT

Reversing summary judgment on a hostile environment claim for the second time in *Cerros v. Steel Techs. Inc.*, No. 03-3701 (7th Cir. Feb. 23, 2005), the U.S. Court of Appeals for the Seventh Circuit expressed concern about a district court's repeated misunderstanding of the legal threshold for harassment cases.

Claiming that he was the target of graffiti and slurs like "spic," "wetback" and "brown boy," Cerros sued his employer under Title VII of the 1964 Civil Rights Act raising a discrimination and hostile work environment claim. The federal district court granted summary judgment against Cerros on both claims. On appeal, the Seventh Circuit affirmed summary judgment on the discrimination claim but remanded on the hostile environment claim for further consideration.

On remand, the district court again granted summary judgment against Cerros. Reviewing this decision, the Seventh Circuit expressed concern with the district court's persistent misunderstanding of the law. "This is the second time the district court has granted judgment against Tony Cerros in his hostile work environment claim against his former employer," the court wrote, "and for the second time, we have concluded that we must reverse that judgment." The Seventh Circuit found the district court had failed to apply the proper test for determining whether harassment rises to the level of a Title VII violation.

> ***"The district court did not 'seem to appreciate that even one act of harassment will suffice if it is egregious,' the appeals court said, ..."***

The district court had wrongly clung to its position that the conduct at issue must be severe *and* pervasive, rather than severe *or* pervasive. The court of appeals noted that "[w]hile the order correctly uses the disjunctive 'or' when discussing the issues of severity or pervasiveness, it does not, taken as a whole, carry through on this point." The district court did not "seem to appreciate that even one act of harassment will suffice if it is egregious," the appeals court said, finding it difficult to imagine "epithets more offensive to someone of Hispanic descent than those directed at Cerros."

Another problem was the lower court's finding that supervisors must be involved in the harassment to show a hostile environment. "This implied prerequisite of supervisor involvement to establish a hostile work environment finds no support in the law," the appeals court ruled.

The Seventh Circuit also took issue with the district court's conclusion that Cerros's failure to follow the reporting mechanisms outlined in his employer's harassment policy was a sufficient basis for finding no employer liability. The relevant inquiry, the court said, is whether the employee adequately alerted the employer to the harassment, thereby satisfying an obligation to avoid the harm. The fact that Cerros had on several occasions informed his supervisors that he was being harassed was a factor not properly considered by the district court.

Finally, the Seventh Circuit took issue with the district court's holding that the existence of an anti-harassment policy establishes that an employer acted reasonably in remedying the harassment after it has occurred or in preventing future misconduct.

If you have questions about the *Cerros* decision or protecting against hostile work environment claims generally, please call Christopher Nybo (312/609-7729) or any other Vedder Price attorney with whom you have worked.

CAN LOOKING GOOD BE A NON-DISCRIMINATORY JOB REQUIREMENT?

Yes, says the U.S. Court of Appeals for the Ninth Circuit in deciding that Harrah's Casino did not discriminate when it fired a female bartender for defying company policy by refusing to wear an array of cosmetics. *Jespersen v. Harrah's Operating Company, Inc.*, No. 03-15045 (Dec. 28, 2004).

For many years the Casino had encouraged Darlene Jespersen and other female servers to wear makeup, but it had never made doing so a formal requirement. Then the Casino implemented a mandatory "Image

Transformation" policy with the stated purpose of creating a "brand standard of excellence" in all areas, with a focus on guest services positions. The Casino created detailed appearance standards that required male and female beverage servers to be "well groomed [and] appealing to the eye." The women had to wear stockings and colored nail polish and keep their hair "teased, curled or styled." Male servers could not wear makeup or colored nail polish but were required to keep their hair short and their nails trimmed.

Jespersen initially complied. But when the Casino amended its policy to require female servers to wear foundation/concealer and/or face powder as well as blush and mascara, she refused to go along and was fired. Her lawsuit followed.

The district court granted summary judgment to the Casino on Jespersen's claim that the policy constituted disparate treatment of female beverage servers in violation of Title VII. In the court's view, the policy imposed equal burdens on both sexes and did not discriminate against Jespersen on the basis of "immutable characteristics" associated with her sex.

The Ninth Circuit affirmed. Grooming policies, even those that require one gender to comply with different standards than the other, do not historically constitute illegal sex discrimination. Such policies, the court explained, are acceptable provided they regulate "mutable" characteristics (those subject to change) such as hair length. However, policies that impose more stringent standards on one gender—such as weight restrictions on female flight attendants—violate Title VII.

In evaluating appearance standards, the court explained that it weighs the relative burden imposed on workers of one sex against the burden imposed on workers of the other sex. Jespersen had claimed that the makeup requirement placed a greater burden on female employees because they were obliged to expend significant amounts of money and time buying and applying the makeup. Without holding that such expenditures were irrelevant, the court found that Jespersen had failed to present any evidence to support her claim.

The court also rejected Jespersen's argument that the makeup requirement constituted impermissible sex stereotyping—in other words that the Casino had targeted female servers for failing to dress and behave in ways that women "should" dress and behave. The court explained that gender stereotyping claims are restricted to harassing a member of one gender for failing to conform to societal norms and do not extend to adherence to appearance and grooming standards.

In a strongly worded dissent, one of the judges argued that the Casino's policy had unquestionably placed a greater burden on women, and that the Casino had discharged Jespersen for failing to conform to gender stereotypes. The judge also suggested that the majority had made an improper exception for the Casino because of the nature of its business.

The *Jespersen* decision directly affects only employers in California, Nevada, Washington, Oregon, Hawaii and Arizona. Until the Seventh Circuit Court of Appeals addresses the issue of appearance standards, employers in the Northern District of Illinois (and elsewhere outside the Ninth Circuit) should be cautious about implementing an appearance policy that imposes time, money or image burdens that fall more heavily on one gender than the other.

"The court explained that gender stereotyping claims are restricted to harassing a member of one gender for failing to conform to societal norms and do not extend to adherence to appearance and grooming standards."

If you have questions about appearance standards, or about gender discrimination claims generally, please call Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

EMPLOYERS AT RISK FOR TELEPHONE MONITORING WITHOUT NOTICE

A California appeals court has held that an employee fired after his supervisor had secretly monitored a telephone conversation may sue his employer for invasion of privacy, wrongful termination and intentional infliction of emotional distress. *Fischl v. New Horizons Computer Learning Centers*, Nos. B167509 and B169530, Feb. 22, 2005. The court found that the employee's claims were not barred by the exclusive remedy provision of the California Workers' Compensation Act (WCA) for an employment injury.

> ***"'unauthorized and illegal secret monitoring, eavesdropping or recording of an employee's telephone communications without prior notification and consent as alleged here exceeds the accepted community norm of acceptable conduct.'"***

State WCAs typically provide that they are an employee's sole source for recovery of damages suffered as a result of an occupational injury. The California WCA provides that it is the exclusive remedy of an employee against his employer for any injury "arising out of and in the course of employment" (LABOR CODE §§ 3600, 3602). Similarly, the exclusivity provision of the Illinois WCA precludes any "common law or statutory right to recover damages from the employer," for an injury sustained "while engaged in the line of duty," other than compensation under the WCA (820 ILCS 305/5). However, exceptions exist under the Illinois WCA that allow a common-law action when the employee can prove that the injury was not accidental. For example, a claim for emotional distress is not excluded if the employer (or a coemployee acting on the employer's behalf) directed, encouraged or authorized the injury-causing conduct. In California, where *Fischl* was filed, the WCA exclusivity does not apply if the acts causing the injury were outside the risks of the compensation bargain, or if motivation for the acts violated public policy.

Bradley Fischl sold computer training services for New Horizons Computer Learning Centers. He worked at the Company's Culver City office, which necessitated a lengthy round-trip commute from his home each day. Fischl had joint custody of a son who needed to be taken to school early in the morning. As an accommodation, Fischl was allowed to set his hours and perform part of his work from home. However, a new department manager told him that he had to be at work in Culver City by 7:30 A.M. Fischl explained his personal circumstances but the manager gave him two weeks to make other arrangements or be terminated.

Fischl called a friend (who was also a customer) and said that the company had changed his work schedule. When the friend asked why, Fischl said, "Nazis want little soldiers marching in the same order and line."

Unbeknownst to Fischl or his friend, the manager had just directed Fischl's immediate supervisor to eavesdrop on Fischl's telephone via a recently-installed monitoring system. The manager told Fischl that he had listened to the conversation and considered Fischl's comments to be unprofessional, and that he was terminated.

Fischl sued New Horizons alleging violation of the California Privacy Act, violation of the California state constitutional right of privacy, wrongful termination in violation of public policy, and intentional infliction of emotional distress. The lower court dismissed the action on the grounds that the harm arose from foreseeable incidents of the employment relationship and was covered by workers' compensation.

The California appeals court disagreed and held that Fischl's claims were not barred by the workers' compensation exclusivity provision. First, the acts giving rise to his claims were not encompassed by the compensation bargain between Fischl and his employer. The appeals court reasoned that although employer monitoring of an employee's company telephone during business hours is a "known and inherent risk" in the workplace, "unauthorized and illegal secret monitoring, eavesdropping or recording of an employee's telephone communications without prior notification and consent as alleged here exceeds the accepted community norm of acceptable conduct." The appeals court also found that the manager's motive for monitoring Fischl's telephone call was based on personal animus against Fischl, which violated the state's public policy interest in protecting the right to privacy. Accordingly, Fischl's claims for invasion of privacy, wrongful termination and intentional infliction of emotional distress were remanded for trial.

Fischl is a warning to employers who do not have a carefully drafted policy addressing the use and monitoring of their electronic communications. Employers who monitor should make sure that their policies clearly inform employees of such monitoring. Employers without such a policy should consider implementing one if they intend to monitor.

Vedder Price is highly experienced in drafting and updating electronic communications policies (telephone, e-mail, Internet). If you have questions regarding your electronic communications policy, need assistance preparing a new or updated policy, or have questions generally about your company's employee handbook or policies and procedures, please call Angela Pavlatos (312/609-7541), Bruce Alper (312/609-7890), or any other Vedder Price attorney with whom you have worked.

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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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