VEDDER PRICE

Labor Law

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

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AFL-CIO Splinters—Nonunion Employers Should Be Wary

Background

In 1938, a labor group that became the Congress of Industrial Organizations broke away from the American Federation of Labor in order to engage in large-scale organizing of the steel, auto and other industries. Labor leaders like Walter Reuther and John L. Lewis went on to unionize millions of workers.

By the time the AFL-CIO merged in 1955, close to a third of all private-sector employees were union members. The AFL-CIO grew to a federation of 56 unions representing 13 million members, including, among others, pilots, teachers, actors, nurses, professional athletes, mail carriers, government workers, machinists, electrical and communications workers, miners and teamsters. Funded in large part by per capita dues from its member unions, the AFL-CIO coordinates union activities in politics, lobbies for and against legislation affecting workers, and provides organizing assistance.

2005 Convention Woes

In late July, the AFL-CIO held its convention on Chicago's Navy Pier marking the 50th year of its merger. The venue was auspicious given Navy Pier's transformation from neglected port to major tourist attraction under the watchful eye of a labor-friendly mayor. Reminiscent of the 1930s, however, the convention turned rancorous over whether sufficient assets were being expended to unionize unorganized workers. On the day before the Monday opening, leaders of four of the country's largest labor unions—the International Brotherhood of Teamsters, the Service Employees International Union, the United Food and Commercial Workers, and UNITE HERE—announced that they would boycott the convention and might disaffiliate altogether. On Monday, the Teamsters and SEIU bolted.

In his keynote speech, AFL-CIO president John Sweeney decried the defections as "an insult to all the unions . . . and a tragedy for working people." Ironically, Sweeney had headed the SEIU prior to becoming the federation's president in 1995. SEIU president Andrew Stern, Sweeney's former protégé, defended his union's actions, saying that drastic changes were needed to stem the decline in union membership, which, in the private

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sector, has fallen to less than 8 percent. At a news conference, Teamster president James P. Hoffa criticized the AFL-CIO for spending too much on politics and not enough on organizing. Steelworkers' president Leo Gerard countered, "This is nothing but a disguised power grab. They should be ashamed of it."

The convention went on without the dissidents. Sweeney, 71, was reelected, unopposed, to a four-year term as president. At midweek, the NY Times weighed in with an editorial lamenting the schism but saying the labor movement "must be able to move into the low-paying service sector and organize workers." After the convention concluded on Thursday, Sweeney continued to spin the power grab theme during an interview, adding, "We're angry, we're disappointed, we're frustrated. . . . Employers are gloating about this."

The Change to Win Coalition

On Friday, the United Food and Commercial Workers announced that they, too, were jumping ship. In a letter to Sweeney, UFCW president Joseph Hansen wrote that past AFL-CIO successes were insufficient to meet new challenges and that the labor movement now had to "build workers through strategic organizing."

When the dust settled, the UFCW had joined the SEIU and Teamsters in a new seven-union organization called the Change to Win Coalition that includes UNITE HERE, the Laborers International Union of North America, the United Farm Workers, and the United Brotherhood of Carpenters, which withdrew from the AFL-CIO earlier in 2001. Disaffiliation of the SEIU, Teamsters and UFCW is expected to siphon off 3.6 million members from the AFL-CIO rolls and cause an estimated $26 million loss in the federation's $126 million annual budget.

Repercussions

What this likely means is an onslaught of organizing by the breakout coalition, and a face-saving recommitment to organizing by the chagrined federation. It also means that unions will be much more "in your face" in their approach to organizing. Traditional organizing drives are slow, and the results are unpredictable; unions lose about half of elections conducted by the Board.

Corporate Campaigns/Neutrality Agreements

Today's computer-savvy union organizers carefully research their targets and increasingly are launching corporate campaigns in an effort to bludgeon employers into submission. Corporate campaigns (more accurately, *anti*corporate campaigns) are top-down organizing drives, often national in scope, designed and coordinated to be maximally disruptive. Common tactics include lawsuits, agency charges, public disclosure of corporate and executive financial information, negative press releases, consumer boycotts, and efforts to garner the sympathy and active support of political, community and religious leaders, and of shareholders and customers.

Frequently, the object of a corporate campaign is a neutrality agreement. The beleaguered employer is offered the prospect of labor peace in exchange for a commitment not to oppose the union's organization of its unrepresented workers, wherever located. Neutrality agreements come in a variety of flavors. The most intrusive give union organizers access to company facilities and personnel data, prohibit the company from saying anything negative about the union or union representation, and provide for automatic recognition of the union as exclusive bargaining representative if union cards are signed by a majority of employees as determined by an outside third party. These pacts limit employees to hearing only one side of the story and strip them of their right under federal law to exercise free choice in a secret ballot election.

Get Ready

Faced with these prospects, employers with nonunion operations should act now to assess their vulnerability to union organizing and take steps to insulate themselves from unionization. Don't wait until a union has you in its

crosshairs. Conduct wage and benefit surveys to make sure your compensation packages are fair and competitive; review your HR policies and their application for inconsistencies and unintended biases; take another look at your employee communication programs to confirm their effectiveness; and reinstruct your supervisors and managers on being sensitive to worker concerns and morale and on spotting and reporting early warning signs of disaffection.

Vedder Price

Vedder Price can help. We do audits tailored to assess a company's vulnerability to union organizing that include manager interviews, critical reviews of employment policies and benefit programs, and recommendations on how to improve employee relations and remain union-free. We also are experienced in guiding management through the rigors of a corporate campaign.

If you have questions about union avoidance, neutrality agreements, or responding effectively to a corporate campaign or other union organizing drive, please call Jim Petrie (312/609-7660) or any other Vedder Price attorney with whom you have worked.

NLRB Finds Employee Confidentiality Requirement Too Broad

Section 8(a)(1) of the National Labor Relations Act prohibits an employer from interfering with an employee's right (guaranteed by section 7 of the Act) to engage in union activity. In a recent NLRB decision, the Board found that a confidentiality provision in an employee handbook prohibiting the release of "any information concerning . . . its partners" (i.e., employees) was overly broad and violated section 8(a)(1). *Cintas Corp. and Union of Needletrades, Indus. & Textile Employees*, 344 NLRB No. 118 (June 30, 2005).

An employer's rule violates section 8(a)(1) if it "would reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel and Hotel Employees, Restaurant Employees & Bartenders Union, Local 2850*, 326 NLRB 824, 825 (1998). If the rule does not explicitly restrict section 7 activity, a violation requires a showing that (1) employees would reasonably construe the language to prohibit section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of section 7 rights. *Martin Luther Memorial Home, Inc. d/b/a Lutheran Heritage Village–Livonia and Foreman*, 343 NLRB No. 75 (Nov. 19, 2004).

In *Lafayette Park Hotel*, the Board concluded that a handbook provision restricting employees from "[d]ivulging Hotel-private information to employees or other individuals or entities that are not authorized to receive that information" did not violate section 8(a)(1) because employees would not interpret the language as "prohibiting discussion of wages and working conditions among employees or with a union." However, prohibiting the discussion of any material covered in an employee handbook, where the handbook specifies wages, hours, and other terms and conditions of employment, violates Section 8(a)(1). *Freund Baking Co. and Bakery, Confectionery & Tobacco Workers Int'l Union, Local 119*, 336 NLRB 847 (2001).

In the recent *Cintas* case, the company's employee handbook stated: "We recognize and protect the confidentiality of any information concerning the company, its business plans, its partners [employees], new business efforts, customers, accounting and financial matters." The handbook cautioned employees that "violating a confidence or unauthorized release of confidential information" could result in disciplinary action. An administrative law judge concluded that "employees could reasonably construe the confidentiality provision as restricting their right to discuss their wages and terms and conditions of employment with their fellow employees and the Union." Cintas did not produce a legitimate business purpose for the offending portion of its rule. The Board affirmed the ALJ's decision. Cintas was ordered to delete the language from the handbook, advise employees of the unlawful language, and provide them with a new lawful provision.

Cintas is a reminder that confidentiality clauses should not be written so as to suggest that employees cannot discuss their wages and terms of employment with coworkers or union officials. However, if the clause maintains the confidentiality of such private information as business plans, trade secrets, customer information, contracts, financial data or other proprietary data, it should pass muster under the National Labor Relations Act.

If you have questions about the *Cintas* case or the legality of a confidentiality clause or other employee handbook provision, please call Jim Petrie (312/609-7660), Jim Spizzo (312/609-7705) or any other Vedder Price attorney with whom you have worked.

EEOC Publishes Guidance On Cancer As A Disability

On July 26, 2005, the Equal Employment Opportunity Commission published "Questions & Answers About Cancer in the Workplace and the Americans with Disabilities Act." This guide, the EEOC's fourth in a series addressing various disabilities, provides information about cancer and examples of how the ADA's standards may apply to individuals who have or have had cancer.

Cancer as a Disability

The EEOC considers an individual to be disabled when cancer, resulting conditions, treatment, and/or side effects "last[] long enough" and substantially limit one or more of major life activities. According to the EEOC, a condition "lasts long enough" if it continues for "more than several months." *EEOC example:* A woman able to work during treatment for breast cancer but too exhausted to cook at home, shop, or do household chores is disabled because her cancer substantially limits her ability to care for herself.

Cancer may be a disability because it was substantially limiting at some time in the past. *EEOC example:* A man has a "record of a disability" when treatment for blood cancer weakened his immune system and left him unable to care for himself for six months.

According to the EEOC, cancer also is a disability when, even though it does not substantially limit a person's major life activities, the employer treats that person as if it does. *EEOC example:* An individual with a facial scar from skin cancer surgery is "regarded as" disabled when an employer refuses to consider the individual for a customer service position based on fears that the scar will make customers uncomfortable.

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

Cancer-Related Inquiries

Employers are prohibited under the ADA from most *preoffer* disability-related and medical inquiries. Thus, before a conditional employment offer has been made, employers may not ask whether an applicant has or ever had cancer, is undergoing or has undergone chemotherapy or other treatment for cancer, or has taken leave for cancer or its treatment in the past.

If an applicant volunteers that he has cancer and the employer reasonably believes that he will need an accommodation to perform the job, the employer may ask whether the applicant will need an accommodation.

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 and all nonmedical information has been received and evaluated.

Once an individual has been hired, an employer may ask for medical information only if it has a legitimate reason to believe that the employee's condition is the cause of performance problems or poses a direct safety threat. The employer may ask the employee why his performance has declined and explore ways to improve poor performance.

EEOC example: A receptionist has been missing calls and is frequently away from her desk. A coworker

informs management that these problems began when the receptionist started radiation treatments for cancer. The employer may ask the receptionist whether her treatment is causing her performance problems and, if so, how long the treatments will last and whether she needs a reasonable accommodation.

Privacy

In close-knit work settings, it may be difficult for employers not to disclose an individual's cancer diagnosis and treatment. Nevertheless, the ADA requires employers to keep all medical information separate from general personnel files and to not disclose it except (1) to supervisors and managers in order to implement a reasonable accommodation; (2) to safety and first aid personnel if the employee would need special medical or emergency assistance; or (3) where necessary to comply with an investigation of ADA or similar state law compliance or for workers' compensation or insurance purposes.

Reasonable Accommodation

The new guidance gives examples of accommodations for individuals disabled by cancer. Additional time for a preemployment test might be a reasonable accommodation for a job applicant fatigued by cancer treatments. Other potential accommodations include: modification of a dress code to allow an employee to wear a headscarf until her hair grows back after chemotherapy; leave for doctor appointments and/or to seek or recuperate from treatment; periodic breaks or a private area to rest or take medication; a modified work schedule or permission to work at home; and reallocation of marginal tasks to other employees, or reassignment to another job.

According to the EEOC, employers should not automatically deny requests for leave without a fixed date of return. Rather, if the employee can provide an *approximate* date of return, such as "six to eight weeks" or "about three months," such an unspecified leave may be a reasonable accommodation. The employer may require updates on the employee's anticipated return date and may periodically reevaluate whether continued leave constitutes an undue hardship.

If you have questions about accommodating an employee with a cancer-related 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.

Use Of The "Minnesota Multiphasic Personality Inventory" May Violate The ADA

The Minnesota Multiphasic Personality Inventory ("MMPI") is a test that determines where a person falls on scales measuring traits such as depression, paranoia and mania. On June 14, 2005, the U.S. Court of Appeals for the Seventh Circuit held that the MMPI is a medical examination and that its use by an employer in making personnel decisions violated the Americans with Disabilities Act. *Karraker et al. v. Rent-A-Center et al.*, No. 04-2881.

The ADA prohibits employers from requiring job applicants to submit to medical examinations or respond to disability-related inquiries as a condition to being offered employment. Employers may require current employees to undergo a medical examination or respond to inquiries if they are shown to be job-related and consistent with business necessity. However, any medical examination or inquiry that screens out (or tends to screen out) persons with disabilities is prohibited.

Any employee may challenge a medical examination or disability-related inquiry that is not job-related and consistent with business necessity. In *Karraker*, the plaintiffs were required to take Rent-A-Center's APT Management Trainee-Executive Profile to move up from entry-level positions. As part of the Profile, they had to answer more than 500 questions from the MMPI. Because they scored more than 12 "weighted deviations" on this test, they were deemed ineligible for promotion.

Plaintiffs sued, alleging that Rent-A-Center's use of the MMPI violated the ADA. Rent-A-Center stipulated that the MMPI was a preemployment test even though it

was also given to employees seeking promotion. This obligated Rent-A-Center to prove that the MMPI is not a medical examination. Had Rent-A-Center given the MMPI only to employees already offered a promotion, it might have prevailed by showing that the MMPI was a medical examination that was "job-related and consistent with business necessity."

The court rejected the position taken by Rent-A-Center's expert that the MMPI does not diagnose or detect psychological disorders. The court found that the MMPI is intended, at least in part, to reveal mental illnesses and thus harms the employment prospects of individuals with mental disabilities. The court concluded it was likely that a person with a mental disorder, who is protected by the ADA, would receive a "problematic" score costing him or her the desired promotion.

In light of this decision, employers within the Seventh Circuit (Illinois, Indiana and Wisconsin) should not administer the MMPI during the preoffer stage. Because Rent-A-Center did not argue that the MMPI is job-related and consistent with business necessity, it is not clear whether the court would accept this defense where the test is given only to those individuals already offered a position, or to employees seeking promotion. An employer using the MMPI in this manner must take into account the court's concern that the MMPI tends to reveal mental illnesses and thus harms the employment opportunities of individuals with such illnesses. Employers intending to use the MMPI at any point in the employment process now face the prospect of ADA litigation, and may wish to consider other testing options that do not tend to screen out applicants or employees afflicted with mental disabilities.

If you have questions about this decision or use of the MMPI test, please contact Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

Federal Court Says Driving Is Not A Major Life Activity Under The ADA

A computer programmer whose vertigo prevented her from driving to work had no discrimination claim under the Americans with Disabilities Act, the U.S. District Court for the Northern District of Illinois recently ruled in *Yindee v. Commerce Clearing House Inc.*, No. 04 C 0730. Granting summary judgment to her employer, the court found that plaintiff's vertigo did not substantially limit her in a major life activity since the sole activity affected by her condition was driving.

Background

Yindee was diagnosed with vertigo (periodic, unexplained bouts of dizziness), and her physician instructed her to stop driving while the condition continued. She requested and was approved to telecommute and did so until her supervisor ended the program, citing performance problems. Yindee lodged a written complaint against the supervisor and filed a discrimination charge with the EEOC. Her performance continued to deteriorate. At the request of her physician, she took an FMLA medical leave of absence. The day she returned, the company put her on a performance improvement plan. She was subsequently terminated and sued her employer.

Driving Is Not a Major Life Activity

In granting the company's motion for summary judgment, the court determined that Yindee's vertigo did not rise to the level of being a disability. The ADA defines "disability" as an impairment, either physical or mental, that substantially limits one or more major life activities. Citing *Toyota Motor Mfg. Ky. v. Williams*, 534 U.S. 184 (2002), the court held that driving "in and of itself is not of central importance to daily life, on a par with activities such as seeing, hearing, or working in a broad class of jobs, so it is not a major life activity as that term is used in an ADA context." Because Yindee's inability to drive

as a result of vertigo was not a disability, there was no legal obligation on her employer to accommodate that condition.

Vertigo is only one of many medical conditions that may result in restrictions on driving, so the court's decision may have broad application. However, while employers appear to have no ADA obligation to accommodate employees who are medically restricted from driving, this determination ultimately will depend on the facts and circumstances of individual cases. Employers should seek legal counsel on how to respond to issues involving employees with medically imposed driving restrictions or any other ADA-related issues.

If you have questions about this case or the ADA generally, please call Chris Nybo (312/609-7729) or any other Vedder Price attorney with whom you have worked.

Business Immigration Law Update

H-1B (Specialty Occupation) Visas—Cap Crisis

The H-1B visa allows employers to sponsor a foreign national for a temporary professional position (e.g., engineer, financial analyst, physician, graphic designer, researcher) if the foreign national has at least a bachelor's degree in the specialized field normally required for the position. However, only 65,000 new H-1B visas are available in the U.S. for each fiscal year, and on August 12, 2005, the U.S. Department of Homeland Security announced that it had reached maximum capacity. Except in very limited circumstances, no new H-1B petitions will be accepted until April 1, 2006, for a start date of October 1, 2006.

An important recent change in the law adds 20,000 H-1B visas for persons who have earned a master's degree or higher from a U.S. college or university. Also, a new E-3 visa category enables Australian nationals in specialty occupations to work in the U.S. despite the cap. Steep new filing fees of $1500/$750 per employee (payable by employer) now apply, in addition to the regular $185 filing fee and new one-time $500 antifraud fee.

L-1 (Intracompany Transferee) Visas—New Restrictions

The L-1 visa enables a U.S. employer to transfer to this country a foreign national who is currently employed by a foreign parent, subsidiary, branch or affiliate company. The foreign national can be transferred to the related U.S. company temporarily in a managerial or executive capacity or in a position that requires specialized knowledge of the multinational company. Effective June 6, 2005, all L-1 applicants must have worked at least one full year at a related company abroad, without exception for Blanket L beneficiaries. A new $500 antifraud fee applies to each new L-1 petition filed after March 8, 2005.

Changes to Permanent "Green Card" Certification Program

On March 28, 2005, a new and supposedly faster labor certification process called "PERM" went into effect for sponsoring foreign national employees for permanent residence ("green card") status. PERM requires employers to test the job market before filing a permanent labor certification application. Employers will be subject to audit for up to five years after an application is approved. The PERM process anticipates approval or denial of an application within 45 to 60 days of filing. However, the U.S. Department of Labor still has approximately 350,000 pre-PERM applications on file which it is adjudicating through its "backlog reduction" centers.

Machine-Readable Passport Requirement at U.S. Borders

The U.S. Department of Homeland Security now requires persons traveling to the United States without a visa under the auspices of the Visa Waiver Program (VWP) to present a machine-readable passport (MRP). MRPs have two optical-character typeface lines at the bottom of the passport's biographic page to discourage fraud and confirm the passport holder's identity.

Visa Waiver travelers seeking to enter the U.S. for business or tourist visits who do not have an MRP may apply for a nonimmigrant visa at a U.S. embassy or consulate in the following countries: Andorra, Australia, Austria, Belgium, Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland and United Kingdom.

Passport Requirement Awaits Travelers in the Western Hemisphere

By January 1, 2008, travelers to and from the United States, the Caribbean, Bermuda, Panama, Mexico and Canada must have a passport or other acceptable document to enter or reenter the United States. This will apply to all U.S. citizens entering the United States from Western Hemisphere countries and to certain foreign nationals who currently do not need a passport to travel to the United States. Employers should encourage their representatives to apply now for passports if they are currently traveling on birth certificates or other documents.

Pending Legislation

Several bills proposing major immigration law reform have been introduced in the U.S. Congress. Some of these bills highlight increased enforcement; others address undocumented workers and workplace protections. Clearly, new legislation is needed to meet the need for more H-1B visas. Ideally, Congress should reinstate the 195,000 H-1B visas previously available annually. Concerned employers are encouraged to contact their Congressional representatives to remind them that the ability to hire the best and the brightest, no matter the country of origin, helps keep U.S. businesses competitive.

If you have questions about the topics discussed in this article or U.S. business immigration laws generally, please call Gabrielle Buckley (312/609-7626) or any other Vedder Price attorney with whom you have worked. Vedder Price will host a complimentary breakfast seminar on "Major Changes in Business Immigration Law" at its New York office on Wednesday, September 14, 2005 and at its Chicago office on Thursday, September 22, 2005. For information or to register to attend, please contact David Croker (312/609-7869).

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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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