VEDDER PRICE

Labor Law

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

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Illinois Law Update: Year-End Summary

Reminder: The Illinois General Assembly enacted several laws in 2005 that impose new obligations on Illinois employers.

Illinois WARN Act Exceeds Federal Requirements

Under the new Illinois Worker Adjustment and Retraining Notification ("I-WARN") Act, employers with 75 or more full-time employees must give 60 days' advance notice to affected employees prior to a plant closing or mass layoff. Unlike the federal WARN Act, the Illinois Act defines a "mass layoff" as affecting either (1) 25 or more full-time employees if they represent at least one-third of the workforce or (2) at least 250 full-time employees. It defines a "plant closing" as the shutdown of a single site of employment, a division, or an operating unit that results in the termination of 50 or more full-time employees.

The I-WARN Act requires that notice be given to affected employees and their unions, the Illinois Department of Commerce and Economic Opportunity, and the chief elected official for both the county and municipality within which the closing or layoff will occur. Any business that receives state or local economic development incentives for doing business in Illinois under the Illinois Business Economic Support Act must also provide a copy of the notice to the Governor, the Speaker and Minority Leader of the House of Representatives, the President and Minority Leader of the Senate, and the Mayor of each municipality in Illinois in which the business is located.

The Act authorizes the Illinois Department of Labor to hold administrative hearings and determine civil liabilities and penalties for violators. Penalties for failure to give timely notice include the recovery of back pay and benefits and a civil penalty of up to $500 per day for each day of the violation.

Hospitals May Not Require Nurses to Work Mandatory Overtime

As Vedder Price reported in its June and August 2005 Labor Law Bulletins, an amendment to the Illinois Hospital Licensing Act now prohibits hospitals from requiring nurses to undertake compulsory overtime work except in "unforeseen emergent circumstances."

In this Issue

According to the Act, an "unforeseen emergent circumstance" means (1) any declared national, State, or municipal disaster or other catastrophic event, or any implementation of a hospital's disaster plan, that will substantially affect or increase the need for health care services, or (2) any circumstance in which patient care needs require specialized nursing skills through the completion of a procedure. An "unforeseen emergent circumstance" does not include situations in which the hospital fails to have enough nursing staff to meet the usual and reasonably predictable nursing needs of its patients.

The Act also limits the amount of overtime nurses may work. Even when unforeseen emergencies require nurses to work additional hours, the nurses may not work more than four hours beyond their regularly scheduled work shifts. In addition, any nurse who works a 12-hour shift must have at least eight hours of rest before working again.

The Act prohibits hospitals from disciplining, discharging, or taking any other adverse employment action solely because a nurse refuses to work non-emergency mandated overtime.

Paid Leave For Employees Who Donate Blood

The Illinois Blood Donation Leave Act allows employees, upon request, to take time off with pay to donate blood. Effective January 1, 2006, the Act amends the Illinois Organ Donor Leave Act, 5 ILCS 327/20, and covers certain private sector and local government employees who donate blood or blood platelets in accordance with medical standards established by the American Red Cross, America's Blood Centers, or the American Association of Blood Banks, or with other nationally recognized standards. It provides employees up to one hour of paid leave to donate blood every 56 days, and up to two hours of paid leave to donate blood platelets no more than 24 times in each 12-month period.

The Act applies to full-time employees with at least six months of service working for private sector and local government employers with more than 50 employees. As the Act now reads, employees may take leave only after obtaining approval from their employers.

The Act requires the Illinois Department of Public Health to adopt rules governing blood donation leave, including rules that establish conditions and procedures for requesting and approving leave, and that require medical documentation of the proposed blood donation before leave is approved by the employer.

Unpaid Leave For Spouse or Parent of a Deployed Soldier

Effective August 15, 2005, the Illinois Family Military Leave Act allows the spouse or parent of a soldier subject to a deployment order to take unpaid leave. Eligible employees must have been employed by the same employer for at least 12 months and have worked at least 1,250 hours of service during that period. Employees of companies with from 15 to 50 employees are entitled to up to 15 days of leave, and employees of companies with more than 50 employees can take up to 30 days. Employees must first exhaust all accrued vacation and personal leave.

Employees must give 14 days' notice if the leave will exceed five workdays. For shorter leave, employees should give notice where practicable. The employer may require certification to verify the employee's eligibility for leave. Employees subject to the Act must be restored to their previous or equivalent positions, may continue their benefits during leave, and cannot lose any accrued benefits.

Discrimination Because of Sexual Orientation Prohibited

On January 21, 2005, the Illinois Human Rights Act was amended to prohibit discrimination by employers, lenders, and landlords on the basis of sexual orientation. The amendment applies to any Illinois employer that has 15 or more employees or 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 it does not require an employer to give preferential treatment or special rights, or to implement affirmative action policies or programs, based on sexual orientation.

If you have any questions about these new Illinois laws, please call Angela Pavlatos (312/609-7541), Jenny Friedman Koerth (312/609-7786), Courtney McDonough (312/609-7622) or any other Vedder Price attorney with whom you have worked.

U.S. Supreme Court Grants Employees More Compensable Time

On November 8, 2005, the U.S. Supreme Court unanimously held in consolidated cases (*IBP, Inc. v. Alvarez*, No. 03-1328, and *Tum v. Barber Foods*, No. 04-66) that time spent by employees walking from a changing area to the production area is compensable under the Fair Labor Standards Act (as amended by the Portal-to-Portal Act) when it follows the donning of required protective gear. Also compensable is time spent walking from the production floor to the changing area to remove protective gear. The Court's decision resolves a split between the Ninth and Fifth Circuit Courts of Appeal and can be expected to increase the payroll expense of many employers.

The employees in *Alvarez* worked in the company's meat processing division. Their regular uniform included hardhats, hair nets, earplugs, gloves, sleeves, aprons, leggings, and boots. However, employees who used knives also had to wear chain link metal aprons, vests, plexi-glass armguards, and special gloves. All protective gear was kept in the company locker rooms. Although the employees were paid for the first four minutes of clothes-changing time, they did not receive pay for time spent walking between the changing and production areas. The *Tum* employees worked in a poultry processing plant. They, too, were required to wear an assortment of protective gear to perform their jobs but were paid starting from the time they clocked in at the production area.

The Court's Opinion

The principal issue decided by the Supreme Court was whether payment for post-donning and pre-doffing walking time is excluded by the Portal-to-Portal Act, which exempts from compensation:

(1) walking to and from the actual place of performance of an employee's principal activity, or

(2) other activities that are "preliminary to or postliminary to" an employee's principal activity.

IBP argued that walking time was excluded because the employees' "principal activity" was the cutting of meat; thus, for example, any walking that occurred prior to the cutting of the first piece of meat was non-compensable as preliminary to the employee's primary activity.

The Court rejected IBP's argument and found that the donning of protective gear was the principal activity that started the workday, and that any walking that occurred post-donning or pre-doffing was compensable. The Court reasoned that the definition of "principal activity" encompassed activities that are "integral and indispensable" to the "principal activity." As such, "the locker rooms where the special safety gear is donned and doffed are the relevant 'place of performance' of the principal activity that the employee was employed to perform," the Court said.

IBP also argued that in enacting the Portal-to-Portal Act, Congress sought to protect employers from millions of dollars of liability for pre-work walking. The Court disagreed, finding that the walking at issue occurred after the workday began and before the workday ended.

The second issue addressed by the Court was whether employees must be paid for the time they spend waiting to receive their protective gear. The Court found that this waiting time was not a principal activity and thus was removed from FLSA coverage by the Portal-to-Portal Act. The Court said that "unlike the donning of certain

types of protective gear, which is always essential if the worker is to do his job, the waiting may or may not be necessary in particular situations for every employee" and "is certainly not 'integral and indispensable' in the same sense that the donning is." The Court cautioned that a different result may be appropriate if the employer requires its employees to arrive at a particular time in order to begin waiting.

Application

Employers with workers who are required to wear protective gear should consider whether their pay policies are compliant with the Court's decision. As we have pointed out in prior Newsletters, FLSA collective actions are popular and very profitable for plaintiffs and their attorneys.

Alvarez also has serious implications for employers whose employees engage in other types of pre-shift preparation that are arguably integral to the performance of their jobs. Employees have succeeded in lawsuits where they claimed that they should have been paid for time spent in pre-shift meetings or in preparing machines or equipment necessary to do their jobs. Employers should also be aware that courts have found that time spent donning and doffing *non-protective* gear may be compensable when done at the employer's request and for the employer's benefit. *Lee v. Am-Pro Protective Agency, Inc.*, 860 F. Supp. 325 (E.D. Va. 1994) (time spent changing into security guard uniforms compensable where uniforms benefited the employer and were necessary to the performance of the guard's main job).

An issue the *Alvarez* decision does not address is whether the post-donning and pre-doffing walking was *de minimis, i.e.*, an amount of time so insubstantial or insignificant that it should be disregarded. Department of Labor Regulations state that activities will be disregarded "where there are uncertain and indefinite periods of time involved of few seconds or minutes duration, and where the failure to count such time is due to considerations justified by industrial realities." 29 C.F.R. § 785.47. However, *Alvarez* suggests that six minutes of walking time post-donning and pre-doffing would not be considered *de minimis*. Employers should avoid the temptation to shrug off what they perceive to be *de minimis* amounts of time when determining whether their employees should be paid for pre-work activities that may be integral to the performance of their jobs.

Vedder Price is highly experienced in auditing employer FLSA practices and defending against FLSA collective actions at all stages of litigation. If you have any questions about the FLSA, or have received notice that an employee is suing under the FLSA, or have questions about 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.

U.S. Department of Labor Issues Opinion on Salary Deductions for Absences Due to Inclement Weather

In an October 2005 opinion letter, the U.S. Department of Labor (DOL) provides guidance to private employers regarding permissible deductions from exempt employee salaries for absences caused by inclement weather such as heavy snow or other types of disasters.

As background, regulations under the Fair Labor Standards Act require employers to pay exempt employees a full week's salary for any week in which they perform any work. There are certain exceptions to this general rule. For example, employers may deduct for absences of one or more full days due to personal reasons other than sickness or disability. Employers may also deduct for absences of one or more full days due to sickness or disability if the employer has a bona fide plan, policy or practice of providing compensation for such absences. Under such a policy, the salary deduction is replaced by an equal amount from the employee's leave account. No salary replacement is required for employees who have not qualified for the leave plan or have exhausted their leave.

The DOL's opinion first addresses whether an employer may direct exempt employees to take vacation (or leave-account deductions) or leave without pay during

office closures due to inclement weather without jeopardizing the employees' exempt status. The DOL says that there is no prohibition against instructing exempt employees to take vacation or leave deductions for a particular full or partial day as long as the employees receive in payment an amount equal to their guaranteed salary. The DOL cautions that employers must pay exempt employees with no accrued leave or a negative leave balance their full salary when the absences are caused by the employer (*e.g.*, an office closure).

The DOL next considers whether exempt employees who *choose* to miss work during inclement weather when the employer's office remains open may suffer a full day's salary deduction or be required to take vacation (or leave-account deductions) or unpaid leave without jeopardizing their exempt status. The DOL says that when the employer is open for business, it would consider absences caused by transportation difficulties experienced during a snow emergency as absences for "personal reasons." In this situation, the employer may require the employees to take vacations or make leave-account deductions. If the employees have no accrued vacation or leave benefit, the employer may make salary deductions.

Finally, the DOL says that exempt employees who are probationary or have used up their accrued vacation (or leave account) and who choose to stay home for a partial day due to inclement weather must be paid for the full day.

The DOL's opinion was written in response to specific sets of facts and may not be applicable to all employer leave policies. Because improper deductions from an employee's salary may result in the loss of exempt status, employers should seek guidance from counsel before changing any leave policies concerning absences.

If you have any questions about the DOL's opinion or about when salary deductions may affect an employee's exempt status under the FLSA, please call Joe Mulherin (312/609-7725) or any other Vedder Price attorney with whom you have worked.

U.S. Department of Labor Also Issues Military Leave Regulations

As discussed in our Labor Law Bulletin dated December 22, 2005, the U.S. Department of Labor has also issued final regulations under The Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA"). The regulations define/clarify key provisions of USERRA and provide detailed guidance on benefit entitlements and reemployment rights. Employers are strongly encouraged to review and update, as necessary, their military leave policies to ensure that they are consistent with these regulations as well as applicable state laws. The full text of the final regulations can be found at *http://www.nacua.org/documentsUSERRA_FinalRules.pdf*

If you did not receive our Bulletin and would like a copy, or if you have any questions about USERRA or need assistance reviewing your military leave policies in light of the new regulations, please contact Tom Hancuch (312/609-7824), Jenny Friedman Koerth (312/609-7786), Elizabeth Noonan (312/609-7795) or any other Vedder Price attorney with whom you have worked.

Court Prohibits Waiver of FMLA Claims Without Prior Approval

The U.S. Court of Appeals for the Fourth Circuit has ruled that unapproved waivers of claims under the Family and Medical Leave Act are unenforceable. In *Taylor v. Progress Energy, Inc.*, 415 F.3d 364 (4th Cir. 2005), plaintiff Taylor requested and was improperly denied FMLA leave for the treatment of severe leg pain and an abdominal mass. After learning of a planned layoff, she asked the company to record her absences as FMLA-protected. The company denied her request and terminated her based on the poor productivity ratings she had received due to her frequent absences.

In exchange for additional separation benefits from the company, Taylor signed a general release. Although the release did not expressly waive FMLA claims, it included a catch-all reference to "other federal … law" claims.

Taylor later sued the company in federal court, arguing that Section 825.220(d) of the Department of Labor's FMLA regulations precludes enforcement of the release. 825.220(d) states in pertinent part that "Employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." The Fourth Circuit sided with Taylor, holding that without prior Department of Labor or court approval the FMLA bars the prospective or retrospective waiver or release of FMLA claims. Accordingly, in the Fourth Circuit, waivers and releases under the FMLA must satisfy the same procedural prerequisites as waivers and releases under the Fair Labor Standards Act.

The *Taylor* ruling conflicts with the Fifth Circuit Court of Appeals, which had previously ruled that 825.220(d) applies to current employees and prohibits prospective waiver of rights, not the post-dispute settlement of claims. *Faris v. Williams WPC-I, Inc.*, 332 F.3d 316 (5th Cir. 2003). Although *Taylor* is not binding in the Seventh Circuit, employers in Illinois, Wisconsin, and Indiana should proceed with caution in this area and consider the risk that settlement agreements waiving prospective and/or retrospective FMLA claims could be deemed unenforceable.

Other Courts Take Pro-Employee Stance On FMLA Issues

Three recent federal court decisions (two in the Seventh Circuit) reflect the generally pro-employee tendency of the courts when reviewing cases involving the denial of FMLA rights.

Notice

The FMLA and its applicable regulations require an employee to give notice of the need for FMLA leave as soon as practical. The Seventh Circuit has construed this requirement broadly in favor of employees. Most recently in *Byrne v. Avon Products, Inc.*, 328 F.3d 279 (7th Cir. 2003), the Court found that an employee with a good attendance record gave sufficient notice of his need for FMLA leave when he started sleeping on the job, which was unusual behavior given his prior employment history.

Certification

Employers may ask for written certification from a doctor when an employee requests FMLA leave. The certification provides the date on which the serious medical condition began and its probable duration, and it confirms that the employee is unable to work.

In *Kauffman v. Federal Express Corporation*, 426 F.3d 880 (7th Cir. 2005), the court found that a certification on which a doctor had written "bronchitis" next to a line stating that the employee was incapacitated for more than three days was sufficient to identify a serious health condition warranting FMLA leave. The doctor's failure to list the probable duration of the illness made the form incomplete but not inadequate under the law, and the onus was on the employer to ask its employee to cure any deficiencies in the form. Employers should be mindful of their duty to inform employees of incomplete certifications and provide them an opportunity to cure any deficiencies before initiating an adverse action for taking unauthorized leave.

Paid Leave

FMLA-eligible employees may elect to substitute accrued vacation time or other paid leave for any portion of the twelve-week leave period provided by the FMLA. This substitution cannot be limited by the employer. In *Solovey v. Wyoming Valley Health Care System Hospital*, No. CIV.A. 3:04-CV-2683 (M.D. Pa. Oct. 13, 2005), the court held that employers cannot enforce internal policies requiring advance notice for use of vacation time when an employee attempts to apply some of that paid time to FMLA leave as allowed by law.

If you have any questions about the cases discussed above or FMLA matters generally, please contact Jenny Friedman Koerth (312/609-7786), Elizabeth Noonan (312/609-7795) or any other Vedder Price attorney with whom you have worked.

EEOC Provides Guidance on Vision Impairments in the Workplace

On October 24, 2005, the Equal Employment Opportunity Commission published "Questions & Answers About Blindness and Vision Impairments in the Workplace and the Americans with Disabilities Act." This guide, the fifth in a series addressing various disabilities, provides information about vision impairments and examples of how the ADA's standards apply.

What Is a Vision Impairment and When Is It a Disability?

According to the Centers for Disease Control and Prevention, a person with a vision impairment has eyesight that cannot be corrected to a normal level. Vision impairment can affect a person's visual acuity (the ability to see objects clearly) and/or visual field (the ability to see in a wide area without moving one's head). Vision impairment may be caused by underlying medical conditions such as diabetes and glaucoma, or by aging.

The EEOC considers a vision impairment to be a disability under the ADA if:

(1) it substantially limits a major life activity (including seeing);

(2) it was substantially limiting in the past (for example, where an individual who had a disabling visual impairment underwent corrective eye surgery); or

(3) an employer regards or treats a person as having a substantially limiting vision impairment (for example, where an employer requires an applicant to undergo a post-offer medical exam and uses the examining doctor's findings to disqualify the applicant for a broad class of jobs rather than just for a particular position for which he was examined).

Vision-Related Inquiries

Employers are prohibited by the ADA from making *pre-offer* disability-related and medical inquiries. Thus, before a conditional employment offer has been made, employers may not ask questions such as whether an applicant has had eye surgery or has any condition that may have caused a vision impairment. However, employers may ask an applicant if he or she will need a reasonable accommodation to complete the application process and/or can perform specific, job-related tasks, such as reading product labels, as long as all applicants are asked these questions.

After a conditional offer has been made, employers generally may 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 the employee's condition is causing performance problems or poses a direct safety threat. Of course, the employer always may ask the employee why his performance has declined and explore ways to improve poor performance.

If an employee with a non-obvious vision impairment requests a reasonable accommodation, the employer may ask for documentation sufficient to show that the impairment qualifies as a disability (*i.e.*, substantially limits a major life activity) and that the employee needs the accommodation.

Confidentiality of Medical Information

Under the ADA, employers must keep all medical information separate from personnel files and treat it confidentially. Employers may not disclose medical information except: (1) to supervisors and managers where necessary to implement a reasonable accommodation; (2) to safety and first aid personnel if the employee should need special medical or emergency assistance; (3) where necessary to comply with an investigation of ADA or similar state law compliance; or

(4) where necessary for workers' compensation or insurance purposes.

EEOC example: If an employee is given a new computer screen as a reasonable accommodation for a vision impairment and other employees ask why, the employer may not disclose information about the employee's impairment or the fact that the new screen is a reasonable accommodation.

Reasonable Accommodation

Under the ADA, reasonable accommodations may be required for the application process, performance of work tasks, or to allow employees the benefits and privileges of employment.

The new guidance gives examples of potential accommodations for individuals with disabling vision impairments, including:

- Assistive technology, such as a closed circuit TV screen for reading printed materials, an external computer screen magnifier, cassette or digital recorders, computer reading software, or an optical scanner to transfer documents from print to electronic form;
- Leave (accrued paid leave or, if exhausted, unpaid leave) for doctor appointments and/or to receive training on assitive devices;
- Written materials in an accessible format, such as large print, Braille, audio cassette, or computer disk;
- Modified policies to allow use of a guide dog; and/or
- Reallocation of marginal tasks to other employees, or reassignment to another job.

If you have any questions about accommodating an employee with a vision-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.

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About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C. is a national full-service law firm with approximately 225 attorneys in Chicago, New York and Roseland, 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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