VEDDER PRICE

Labor Law

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

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Illinois Enacts Social Security Number Confidentiality Law

Effective July 1, 2006, Illinois law restricts the use of SSNs by private-sector employers. Designed to help protect individuals from identity theft, the law prohibits all nongovernmental employers in Illinois from:

- Printing an employee's SSN on any materials mailed to the employee (unless state or federal law requires otherwise, as in the case of W-2 forms). Thus, SSNs generally may not be included on pay stubs, benefit plan explanation of benefits forms, and retirement plan statements.

- Publicly posting or displaying an employee's SSN.

- Requiring an employee to transmit his SSN over the Internet unless the connection is secure or the SSN is encrypted.

- Requiring an employee to use his SSN to access an Internet web site, including the employer's own web site, unless an authentication device, such as a password, is also required to access the web site.

- Requiring an employee to use his SSN to "access products or services provided by" the employer. The law specifically prohibits using SSNs as employee IDs on group insurance cards.

The new law does not apply to (1) the collection, use or release of an SSN as required by state or federal law, or (2) the use of an SSN for internal verification

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or administrative purposes. However, the law appears to permit the continued use of SSNs for payroll processing purposes. SSNs also may be included on materials sent by mail as part of an "application or enrollment process" or to confirm the accuracy of the SSN being used.

If an employer started using an employee's SSN before July 1, 2005 in a manner that would violate this law, it may continue to do so only with the employee's knowledge and approval.

The law is enforced by the Attorney General. A civil penalty of up to $10,000 may be imposed per violation, in addition to equitable relief.

If you have any questions about this subject, please contact Tom Hancuch (312/609-7824) or any other Vedder Price attorney with whom you have worked.

Salary Deductions to Recover the Cost of Lost or Damaged Company Property Could Backfire

Your employee leaves his company-provided BlackBerry on the roof of his car and drives away. Another employee accidentally downloads a virus while surfing the Internet and corrupts the hard drive of her company laptop. Do you deduct the cost of repair or replacement of these items from the employees' salaries? If you do, a March 10, 2006 opinion letter from the U.S. Department of Labor says those deductions could cause the affected employees and others in their job classifications to lose their exempt status, subjecting you to liability for unpaid overtime and liquidated damages.

To be exempt from the Fair Labor Standards Act's overtime requirements, an employee must engage in certain types of duties and levels of decisionmaking and be paid at least $455 a week on a "salaried basis." The focus of the DOL's opinion letter is the "salaried basis" component. Employees are paid on a "salaried basis" when they regularly receive a predetermined amount that is not subject to reduction because of variations in the quality or quantity of the work performed. Exempt employees must receive their full salary for any week in which they perform work unless their absence or conduct falls within a handful of exceptions, such as full-day absences for personal reasons (not for sickness or disability) and violations of employer safety rules.

The DOL's opinion concludes that deductions for lost, damaged or destroyed company property do not fit under any of the allowable exceptions. Rather, they are akin to deductions for "quality of work performed by employees," which are a clear violation of the "salaried basis" rule. The DOL warns that such deductions will subject the employer to an evaluation of whether the affected employees have lost their exempt status.

A negative evaluation can lead to loss of the overtime exemption for the period over which the improper deductions were made for *all* employees in the same job classification who work for the manager responsible for the improper deduction. Isolated or inadvertent improper deductions will not result in loss of the exemption if the employees are reimbursed.

Vedder Price is highly experienced in auditing employer FLSA practices, drafting employer policies and defending against FLSA individual lawsuits and collective actions, having challenged FLSA suits 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, 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.

Decisionmakers: Independently Investigate Reports of Employee Misconduct from Lower-Level Managers

Reports of employee misconduct from a manager without authority to impose discipline are considered by some employers to be a risk-free basis for disciplining the employee. The decisionmaker need only show that he reasonably believed the manager's report and acted accordingly. Whatever bias may have prompted the manager to act is not imputed to the decisionmaker unless he knows of the bias.

Beware. This apparent safe harbor has its risks.

In a recent decision, *EEOC v. BCI Coca-Cola Bottling Co.*, No. 04-2220 (June 7, 2006), the U.S. Court of Appeals for the Tenth Circuit (Oklahoma, Kansas, New Mexico, Colorado, Wyoming and Utah) held that an employer may be guilty of race discrimination where the decisionmaker terminated an employee (not knowing that the employee was black) based solely on the version of events reported by a subordinate manager known to be biased against black employees. This theory of liability is called the "rubber stamp" or "cat's paw" doctrine. In the context of employment discrimination, "rubber stamp" means the decisionmaker gives perfunctory approval to an adverse employment action recommended by a biased manager; "cat's paw" means the biased manager uses the decisionmaker as a dupe to trigger a discriminatory employment action that the manager could not otherwise accomplish due to his lack of authority.

Most federal appellate courts have adopted this theory in some form. The Fifth Circuit holds that mere involvement by the manager is enough to impute his discriminatory bias to the decisionmaker. At the other end of the spectrum, the Fourth Circuit says that a biased manager must exert substantial influence or play a significant role in the decision.

In *BCI Coca-Cola*, the Tenth Circuit rejects both approaches. Claiming the more logical middle ground, the Tenth Circuit holds that to impute liability to the decisionmaker, a plaintiff must show that discriminatory actions of the subordinate manager "caused the adverse employment action." An employer can avoid liability, says the court, "by conducting an independent investigation of the allegations against the employee."

> In that event, the employer has taken care not to rely exclusively on the say-so of the biased subordinate, and the causal link is defeated. Indeed, under our precedent, simply asking an employee for his version of the events may defeat the inference that an employment action was discriminatory. Employers therefore have a powerful incentive to hear both sides of the story before taking an adverse employment action against a member of a protected class.

In the Seventh Circuit (Illinois, Indiana and Wisconsin), the court has adopted a similar middle-ground approach. Thus, to hold an employer liable the plaintiff may show that the biased manager manipulated the decisionmaking process, for example by concealing facts or providing false or highly selective information. *Lust v. Sealy, Inc.*, 383 F.3d 580 (2004). Likewise, if the evidence shows that the decisionmaker simply rubber-stamped a recommendation tainted with illegal bias, the employer will be liable for the harm caused. However, an independent investigation is strong evidence that rubber-stamping did not occur, or that the decisionmaker was not a cat's paw. *Byrd v. Illinois Dep't of Public Health*, 423 F.3d 696 (2005).

The lesson taught by these cases is that decisionmakers should thoroughly investigate reports of employee misconduct before imposing discipline. Give the employee an opportunity to respond. Ask him to provide any records he believes may be relevant and to identify coworkers with knowledge of the facts. Document what you learn. If you take these steps, you stand an excellent chance of avoiding liability based on a subsequent claim that the person who reported the misconduct was motivated by discrimination.

Vedder Price regularly counsels employers on investigating employee misconduct and imposing appropriate discipline. If you have questions about such matters, or about race discrimination issues in general, please call Aaron Gelb (312/609-7844) or any other Vedder Price attorney with whom you have worked.

NLRB Allows Hospitals to Ban Buttons Suggesting Unsafe Staffing

In *Sacred Heart Medical Center*, 347 NLRB No. 48 (June 30, 2006), the National Labor Relations Board upholds the right of a hospital to restrict nurses from wearing buttons that suggest that patient safety is being compromised.

It is settled law that restrictions on wearing union-related buttons are presumptively valid in patient care areas, but are presumptively invalid outside such areas. However, an employer may rebut the presumption of invalidity by showing that the restriction is necessary to avoid disruption of health care operations or disturbance of patients.

In *Sacred Heart*, nurses represented by a union began wearing buttons during labor contract negotiations that read “RNs Demand Safe Staffing.” Concerned that the buttons would upset patients and their families, the hospital issued a memorandum prohibiting the button from being worn “in any area on our campus where [the wearer] may encounter patients or family members.” The written rationale for the restriction was that “patients and family members may fear that the Medical Center is not able to provide adequate care.” The union filed an unfair labor practice charge complaining that the restriction outside immediate patient care areas interfered with the nurses’ statutory rights.

In a 2–1 decision, the Board dismissed the complaint, finding that a reasonable person would construe the button as a claim that staffing levels were unsafe, and that this would “cause unease and worry about patients and their families, and disturb the tranquil hospital atmosphere that is necessary for successful patient care.” Distinguishing other buttons the hospital had allowed the nurses to wear, the Board said the message of this button was unequivocal, sending a “clear message to patients that their care is currently in jeopardy.”

Unions often assume the role of concerned community activist as part of an aggressive organizing or bargaining strategy. In a hospital setting, inadequate nurse staffing is a favorite rallying cry. The Sacred Heart decision will enable health care employers to prevent their employees from communicating such divisive and disruptive messages to patients and families.

If you have any questions about this decision or union organizing in the health care industry generally, feel free to call Bruce Alper (312/609-7890) or any other Vedder Price attorney with whom you have worked.

U.S. Supreme Court Struggles to Define Employer Retaliation under Title VII

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex or national origin. It also forbids employers from retaliating against employees or applicants for filing a charge, participating or assisting in a charge or an investigation, or otherwise exercising rights provided under Title VII.

The U.S. Supreme Court recently issued a decision in *Burlington Northern & Santa Fe Railway Co. v. White*, No. 05-259 (June 22, 2006), purporting to clarify what employer actions constitute retaliation actionable under Title VII. The answer could make it easier for an employee to prove retaliation.

White, a railroad forklift operator, was assigned to more physically demanding duties after accusing a supervisor of sexual discrimination. She filed an EEOC charge complaining of the reassignment and, a few days later, was suspended without pay for insubordination. After 37 days, Burlington rescinded the suspension with full back pay. White sued Burlington. A jury found the actions taken against her to be retaliation under Title VII and awarded her $43,000.

Burlington appealed, arguing that its conduct did not violate Title VII. The Supreme Court disagreed. It held that there was sufficient evidence to support the jury's finding that White's reassignment to less desirable duties was actionable, or "materially adverse," even though she was not demoted or transferred and in fact was assigned duties within her job description. The Court said that White's new duties were "by all accounts more arduous and dirtier" and that her former forklift operator assignment was considered more prestigious.

The Court also affirmed the jury's decision that White's 37-day unpaid suspension, although rescinded with full back pay, was materially adverse under the circumstances. It occurred over the Christmas holiday, during which she and her family had no income and did not know whether or when she might return to work.

Essentially, the Supreme Court has defined employer retaliation under Title VII as action that would dissuade a reasonable worker from pursuing a charge of discrimination. This is the test used by the U.S. Court of Appeals for the Seventh Circuit but is broader than the test applied by many other federal appellate courts.

Whether retaliation is actionable will depend on the particular circumstances of the case. "Context matters," said Justice Breyer. The same employer conduct might be deemed actionable retaliation as to one employee but not as to another. As Breyer explained, a change in work schedule "may make little difference to many workers, but may matter enormously to a young mother with school age children." Likewise, a supervisor's refusal to invite an employee to lunch, while "normally trivial," might be actionable if the event is "a weekly training lunch that contributes significantly to the employee's professional advancement."

Burlington should change little for employers in the Seventh Circuit, which already applies the standard adopted by the Court. As a practical matter, however, the decision may embolden plaintiffs' lawyers to file more retaliation claims and result in more cases being decided by juries.

To prevent and defend against retaliation claims, your antidiscrimination and harassment policies should include a strongly worded statement that retaliation for reporting discrimination or harassment, or for participating in an investigation, will not be tolerated and should be reported immediately. When a complaint of discrimination or harassment is made, you should reiterate this position to all involved and monitor the situation carefully thereafter. Supervisors should be reminded that retaliation is prohibited, and that they have a responsibility to stop and to report any retaliation they observe.

Any contemplated action that will affect an employee who has reported or participated in an investigation of alleged discrimination or harassment should be reviewed to ensure that motivation for the action is not retaliatory. (See *Decisionmakers* article on p. 2.)

If you have questions about retaliation claims or Title VII generally, please call Alison Maki (312/609-7720) or any other Vedder Price attorney with whom you have worked.

NY/NJ

Prejudgment Interest Available under New Jersey's Law Against Discrimination

In a recent decision that could have a significant economic impact on companies with employees in New Jersey, the New Jersey Supreme Court has held that prejudgment interest is available under the state's Law Against Discrimination, N.J.S.A. § 10:5-1 et seq. (the "LAD"), even in cases where the defendant is a public entity. *Potente v. County of Hudson*, No. A-56-2005, 2006 N.J. LEXIS 1037, 2006 WL 1585413

(June 6, 2006). The Supreme Court determined that the trial court had improvidently granted a directed verdict on the subject of failure to accommodate a disability, reversing the intermediate court of appeals, and remanded the matter for a new trial. Although it was unnecessary for the Supreme Court to address the question of prejudgment interest under the LAD, it chose to do so for the first time in order to guide the parties on retrial.

The Supreme Court looked at the text of the LAD itself, which provides that "[a]ll remedies available in common law tort actions shall be available to prevailing plaintiffs," and found that prejudgment interest was an available remedy in common law tort actions at the time the LAD was enacted.

The defendant, a public employer, argued that, even if prejudgment interest was available under the LAD, it could not be obtained from a public employer. However, the Supreme Court determined that the federal decision on which the defendant relied was "simply wrong."

In light of this decision by the state's highest court, New Jersey employers should be mindful of the availability of prejudgment interest in formulating a defense strategy when facing claims brought under the LAD and avoid unnecessary delays in cases where there is a substantial chance that the plaintiff will ultimately receive a monetary judgment.

If you have any questions about this case or the New Jersey Law Against Discrimination generally, please contact Alan Koral (212/402-7750), Daniel Green (212/407-7735) or any other Vedder Price attorney with whom you have worked.

EEOC Is Gearing Up for High-Impact "Systemic" Litigation

The U.S. Equal Employment Opportunity Commission has announced plans to begin emphasizing multiple-plaintiff cases as part of a new push to pursue high-impact litigation. Adopting the recommendations of a Task Force Report issued in March, the EEOC intends to strengthen its program of so-called "systemic" litigation. Systemic litigation is the EEOC equivalent of class-action cases brought by private plaintiffs.

To accomplish this, the EEOC will nationalize its systemic litigation approach in field offices around the country and coordinate with other agencies, such as the Departments of Justice and Labor, to bring systemic cases. The Commission plans to hire personnel to identify systemic discrimination and provide support for the related complex litigation.

HR managers should be aware of the Commission's new mindset. A class-action EEOC investigation or lawsuit can be expensive and time-consuming. Employers are encouraged to work closely with their employment counsel on pending or future EEOC matters having potential class or systemic ramifications.

If you have questions about the EEOC's new focus on systemic litigation, please contact Sara Kagay (312/609-7538) or any other Vedder Price attorney with whom you have worked.

Seventh Circuit Revisits Adequacy of Employee Notice of Need for FMLA Leave

A recent Seventh Circuit decision suggests that the court may be aware of the concern it caused employers regarding Family Medical Leave Act notice when it decided *Byrne v. Avon Products*, No. 02-2626 (7th Cir. May 9, 2003).

Under the FMLA, employees suffering from serious health conditions are permitted up to 12 weeks of leave in one year if they provide their employers with adequate notice of the need for leave. Leave can be denied if notice is not provided even if the employee has a covered condition. If the notice does not provide enough information, the employer must inquire further.

In *Byrne*, the Seventh Circuit overturned the district court's grant of summary judgment to Avon.

Byrne, who had an exemplary work record, began sleeping on the job and hiding from coworkers. Before supervision could confront him, he walked off the job, telling a coworker that he didn't feel well. Calls to his home were answered by his sister, who said he was "very sick." When he failed to appear for a scheduled meeting, Avon terminated him for misuse of company time. Byrne wound up hospitalized and treated for a severe depression.

The district court found that Byrne had not given Avon notice that he had a mental disability serious enough to qualify him for FMLA leave. However, the Seventh Circuit concluded that Byrne may have been mentally unable to give such notice and that his unusual behavior at work may have constituted adequate notice given his prior excellent work record.

Byrne is troublesome because it appears to place a heavy burden on management to screen workplace misconduct for signs of a serious underlying health problem and grant unsolicited FMLA leave to enable medical treatment. However, a recent Seventh Circuit decision may lighten that load.

In *Phillips v. Quebecor World RAI, Inc.*, No. 05-2744 (7th Cir. June 12, 2006), Phillips left work early on October 15 after telling her supervisor she was sick. She returned to work on October 19 and submitted a form confirming that she was seen at a medical clinic on the 15th and was to be off work until the 19th. Her absence over those three days, coupled with two subsequent late starts, resulted in her termination under Quebecor's "no-fault" attendance policy. It was later discovered that Phillips was suffering from a head tumor.

Phillips sued Quebecor, claiming that it had been put on notice that her absence qualified as leave under the FMLA. The Seventh Circuit disagreed. It found that Quebecor had no notice of Phillips' head tumor because it was not discovered until months after her termination. Moreover, the only other information available to Quebecor was that Phillips was "sick" and had been seen at the health center. The failure to convey information regarding the nature of her medical condition was fatal to her case. Without mentioning *Byrne*, but in language seemingly designed to reduce employer concern about that earlier decision, the court concluded that a considerable and wasted investigative burden would be imposed on employers if they were required to determine whether leave is covered by the FMLA each time an employee is absent because of sickness.

If you have any questions about these cases or the FMLA generally, please call Bruce Alper (312/609-7890), Elizabeth A. Noonan (312/609-7795) or any other Vedder Price attorney with whom you have worked.

Q & A

Our Company is starting negotiations for a first labor contract. Should we insist on a management rights clause and a zipper clause?

A management rights clause reserves to the employer the right to act in its discretion with respect to matters related to operation of the business. A zipper clause relieves both parties of the obligation, during the contract term, to bargain over matters covered in the contract or, if so worded, matters that were or could have been discussed during bargaining, even if not embodied in the contract. Each clause operates as a waiver of the right to demand bargaining, over the life of the contract, on subjects covered by the clause.

A management rights clause may say generally that all the normal prerogatives of management are retained by the company, or it may provide considerable detail by enumerating specific powers to be exercised exclusively by management. The advantage of a detailed clause is that it offers more protection against NLRB charges of refusal to bargain and against a watering down of management's rights through arbitration.

Zipper clauses, by their nature, tend to be broad in scope. They often are scrutinized by the NLRB when refusal-to-bargain charges are filed protesting an employer's reliance on a zipper clause to take action unilaterally or to refuse to bargain over a union proposal. If a zipper clause clearly recites the parties' agreement to preclude further bargaining during the term of their contract, it will "shield" from refusal-to-bargain charges the party to whom such a bargaining proposal is made. At the same time, the clause cannot be used as a "sword" to accomplish a change in the status quo without bargaining. Thus, for example, a strong zipper clause coupled with a weak management rights clause could stymie a company's ability to relocate operations while the contract is in effect.

Negotiating a strong management rights clause and an effective zipper clause is usually easier to accomplish in a first contract. It becomes increasingly difficult in later negotiations to add such clauses or improve on existing wording. One size won't fit all, however. A management rights clause in particular should be written to meet your operating requirements. Zipper clauses come into play less frequently, and contracts without such a clause are not uncommon. Even if your proposed clauses are ideal, the dynamics of bargaining may not justify insisting to impasse on their inclusion as written.

Vedder Price labor attorneys have negotiated countless labor contracts. If you need assistance drafting a suitable management rights or zipper clause, or in preparing for or engaging in contract negotiations generally, please call Kevin Hennessy (312/609-7868) 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.

Questions or comments concerning the newsletter or its contents may be directed to its Editor, James S. Petrie (312/609-7660), or the firm's Labor Practice Leader, Bruce R. Alper (312/609-7890), or the Managing Shareholder of the firm's New York office, Neal I. Korval (212/407-7780), or in New Jersey, John E. Bradley (973/597-1100).

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