VEDDER PRICE

Labor Law

We wish our many readers Happy Holidays and a Prosperous New Year

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

Vol. 26, No. 4
December 2006

Illinois Minimum Wage Increase Sent to Governor

On November 30, 2006, the Illinois legislature increased the state's minimum hourly rate to $7.50. This one-dollar increase is expected to be signed by the governor and will take effect July 1, 2007. The minimum wage will continue to increase by 25 cents a year until it reaches $8.25 on July 1, 2010. In order to lessen the impact on Illinois businesses, employers will be permitted to pay 50 cents less per hour to employees under the age of 18, and to new employees during the first 90 days of their employment.

This increase will place Illinois among the nation's highest in minimum wage rates. (The highest is Washington state at $7.63 an hour.) An estimated 650,000 full-time workers in Illinois can expect to earn at least $2,080 per year in extra wages. Wisconsin's minimum hourly wage is $5.70. Indiana's is $5.15, which is the current federal minimum wage and the standard for most states.

If you have any questions about Illinois' new minimum wage rate, or any other Illinois law, please call Angela Pavlatos (312/609-7541) or any other Vedder Price attorney with whom you have worked.

Tips for a Litigation-Free Holiday Party

Obviously, the safest parties are those that do not involve alcohol. Courts have held employers liable for accidents and injuries caused by intoxicated employees after attending company-sponsored events. Employers also risk liability for enabling underage employees to consume alcohol at these events.

If you plan to serve alcohol at a holiday function, there are measures you can take to help ensure that your employees do not become a danger to themselves or others. For example, provide a specific number of "drink tickets" to employees; instruct bartenders to check employees' identification to confirm they are old enough to drink; limit the number of drinks provided at each trip to the bar; decline to offer shots or exotic multiple-liquor drinks; and refuse to serve employees who appear intoxicated. Also, provide ample food to go with the drinks, and close the bar at a time certain prior to the end of the party.

To prevent employees from feeling like they have no choice but to drive home, despite their lack of sobriety, arrange for a car service and encourage sober drivers to step in and help their colleagues get safely home.

Problems may still arise if an employee or manager engages in inappropriate conduct toward another employee. Circulate memos well in advance of the party reminding employees that your zero-tolerance for workplace discrimination and harassment extends to company-sponsored parties. Instruct managers to pay attention to behavior at the party, and to be prepared to step in if a situation appears to be getting out of hand.

Consider allowing employees to bring their spouses, significant others and children to the party. People are more likely to keep their behavior in check if those they care about are within earshot. The cost of the extra guests is far outweighed by the good will that is generated and litigation avoided.

Even the most perfectly planned party cannot anticipate the inadvertent accident. What if your credit manager breaks her arm slipping on a spilled drink? State workers' compensation laws generally cover injuries "arising out of or in the course of employment." Some

courts have interpreted these laws to include injuries that occur at employer-sponsored parties, including injuries caused by employee intoxication. The Illinois Workers' Compensation Act generally excludes from coverage those injuries that arise from employees' participation in voluntary social events. However, the exclusion will not apply if employees are required to attend the party or are not clearly relieved of their work duties while in attendance.

Review your insurance policies for any alcohol-related exclusions, and purchase supplemental or "special event" insurance coverage if necessary. If the holiday party will occur off premises, confirm that the restaurant, banquet hall or building hosting the party is adequately bonded and insured.

Respect and accommodate employee diversity. Your workforce may encompass a variety of religions, beliefs, and cultures. You can demonstrate your appreciation for and sensitivity to employee diversity in a number of ways. Instead of focusing on Christmas or a specific December holiday, acknowledge the entire holiday season. A measure as small as renaming the annual "Christmas" party and calling it the annual "holiday" party will make employees who do not observe Christmas feel part of the celebration.

Be sensitive to the possibility that some employees may not want to engage in any holiday-related activities, either by choice or because their individual religious beliefs prohibit it. Given generally pervasive cultural pressures during the holiday season, you should be vigilant in protecting against harassment directed toward non-Christian employees.

If you have any questions or concerns about liability for employee conduct at company-sponsored events, please call Jim Spizzo (312/609-7705), Jenny Koerth (312/609-7786) or any other Vedder Price attorney with whom you have worked.

NY/NJ

New York's Highest Court Rebuffs Challenge to Contraceptive Coverage Law

New York's Court of Appeals has rejected a challenge by a group of religious-affiliated organizations to a state law requiring employers who provide prescription drug coverage for their employees to include coverage for contraceptive prescriptions.

The 2002 Women's Health and Wellness Act requires group insurance policies to include coverage for a variety of obstetric and gynecological services, including prescribed contraceptive drugs or devices. While acknowledging that the Act places a serious burden on the religious practices of the groups, the court held that the Act "does not literally compel them to purchase contraceptive coverage for their employees, in violation of their religious beliefs; it only requires that policies offering prescription drug coverage include coverage for contraceptives."

The Act provides an exemption for "religious employers" whose tenets forbid prescription contraceptive methods. A religious employer is defined as an entity that: (i) is a nonprofit organization as described in the Internal Revenue Code; (ii) has as its primary purpose the inculcation of religious values; (iii) primarily employs persons who share its religious tenets; and (iv) primarily serves persons who share its religious tenets.

The court noted that many employees of the groups challenging the Act do not share the religious beliefs of their employers: "The employment relationship is a frequent subject of legislation, and when a religious organization chooses to hire non-believers it must, at least to some degree, be prepared to accept neutral regulations imposed to protect employees' legitimate interest in doing what their own beliefs permit. This would be a more difficult case if plaintiffs had chosen to hire only people who share their belief in the sinfulness of contraception."

The fact that some religious organizations are exempt from the Act does not demonstrate that its provisions

are not "neutral." The high court held that "[t]o hold that any religious exemption that is not all inclusive renders a statute non-neutral would be to discourage the enactment of any such exemption—and thus to restrict, rather than promote, freedom of religion."

The groups are considering an appeal. However, in March 2004, the California Supreme Court upheld a similar law and the U.S. Supreme Court rejected a petition to review that decision.

If you have any questions about the Women's Health and Wellness Act, please call Daniel Hollman (212/407-7764) or any other Vedder Price attorney with whom you have worked.

NJ Whistleblower Statute: Recent Developments

New Jersey courts continue to broadly interpret the protections of the State's Conscientious Employee Protection Act. In line with an Appellate Division decision earlier this year holding that an independent contractor may be an "employee" under the Act (*D'Annunzio v. Prudential Ins. Co.*, reported in our April 2006 edition, Vol. 26, No. 2), a recent New Jersey Supreme Court decision holds that a shareholder-director of a professional association may be considered an "employee" for CEPA purposes. *Feldman v. Hunterdon Radiological Ass'n.* CEPA defines an employee as "any individual who performs services for and under the control and direction of an employer for wages or other remuneration."

Another recent New Jersey Supreme Court decision stretches the scope of CEPA's liberal protections. In *Nolte v. Merchants Mutual Ins. Co.*, the court allowed a plaintiff to withdraw his untimely CEPA claim and assert related statutory and common law claims. CEPA, which has a one-year statute of limitations, clearly states that the institution of an action "in accordance with this act" shall be deemed a waiver of the rights and remedies available under any state law or under common law. Because the plaintiff's CEPA claim was untimely, the court held that it was not instituted "in accordance with this act," and that the waiver provision thus had not taken effect. By the time the court decided the case, the plaintiff's related claims had also become untimely. Nevertheless, the court allowed the plaintiff to proceed with his new claims because they "related back" to his initial and untimely CEPA claim.

If you have any questions about CEPA or are concerned about its application to your operations, please call Charles Caranicas (212/407-7712) or any other Vedder Price attorney with whom you have worked.

NLRB Strikes Down Mandatory Arbitration Policy

In our April 2006 edition (Vol. 26, No. 2), we cautioned employers that agreements to arbitrate employment disputes may be invalid if they make arbitration prohibitively expensive for an employee. Now, employers have another reason to be concerned about the enforceability of such agreements. A divided National Labor Relations Board has ruled that mandatory employment arbitration policies applicable to nonunion employees must expressly exclude unfair labor practice charges which may be filed with the Board under the National Labor Relations Act. *U-Haul Co. of California*, 347 NLRB No. 34 (2006). The Board's decision has been appealed to the U.S. Court of Appeals for the District of Columbia, which has scheduled oral arguments this month.

U-Haul, a nonunion employer, adopted a mandatory arbitration policy in its employee handbook as a condition of employment for all employees. The policy was implemented at about the time the Machinists' Union launched an organizing campaign at one of the company's repair facilities. The union filed a charge asserting, among other claims, that the policy violated the NLRA.

Typical of arbitration policies used by many employers, U-Haul's policy covered all disputes relating to or arising out of employment with the company or the termination of that employment, including "claims and causes of action recognized by local, state or federal law or regulations." The policy made no reference to the NLRA or to filing charges with the NLRB. Moreover, there was no evidence that the policy had been enforced,

or that any employee had been disciplined for failing to consent to the policy.

The Board majority (Members Liebman and Schaumber) ruled that the policy violated the NLRA because it would reasonably tend to inhibit employees from filing charges with the Board, a protected activity under Section 7 of the Act. The Board was concerned with the breadth of the language making the policy applicable to any cause of action recognized by "federal law or regulations." The Board concluded that this language would be "reasonably read to require employees to resort to the Respondent's arbitration procedures instead of filing charges with the Board." As a remedy, the Board ordered U-Haul to rescind the policy and remove from its files all unlawful waivers of the right to take action signed by its employees.

In dissent, Chairman Battista urged that the policy was not unlawful because there was no evidence that it had been applied or was intended to be applied to the protected activity of invoking Board processes, and because the policy did not explicitly bar such activity. He noted that because a memo accompanying the policy stated that it was limited to claims that "a court of law" would be authorized to entertain, a reasonable employee would not consider the policy a bar to the filing of charges with the NLRB.

Even though *U-Haul* is on appeal, employers covered by the NLRA with mandatory arbitration policies for nonunion employees may want to amend the policies to expressly exclude from coverage the filing of NLRB charges. Employers facing union organizing campaigns should be especially cautious about introducing any new personnel policies during or shortly before union organizing campaigns. Those policies will be a magnet for union scrutiny and may be challenged as part of a broader effort to expose alleged unfair labor practices.

Employment arbitration programs continue to be a source of litigation, creating the very type of expense the programs are intended to avoid. If you have any questions about the *U-Haul* case or seek legal counsel on drafting, reviewing or implementing a mandatory arbitration policy, please call Kevin Hennessy (312/609-7868), Chris Nybo (312/609-7729) or any other Vedder Price attorney with whom you have worked.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C., is a national full-service law firm with approximately 230 attorneys in Chicago, New York City, Washington, D.C. 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).

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312/609-7500
Fax: 312/609-5005

New York
805 Third Avenue
New York, New York 10022
212/407-7700
Fax: 212/407-7799

Washington, D.C.
888 16th Street, N.W., Suite 800
Washington, D.C. 20006
202/355-1395
Fax: 202/355-1394

New Jersey
Five Becker Farm Road
Roseland, New Jersey 07068
973/597-1100
Fax: 973/597-9607

www.vedderprice.com