

# Labor Law

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

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### *Editor's Note*

House Bill 1795, a legislative proposal pending before the Illinois General Assembly, would severely penalize employers engaged in construction-related activity who misclassify employees as independent contractors. The bill is expected to pass and be signed into law by the governor, with an effective date of January 1, 2008. Vedder Price is preparing and will soon issue a bulletin describing the bill in detail and urging Illinois contractors, subcontractors and other affected businesses to carefully audit their utilization of independent contractors.

### **Miranda Warning to Employers: What You Say May Be Used Against You**

Experienced counsel for an employer defending against a discrimination lawsuit will look for an opportunity to file a motion for summary judgment from the court. Summary judgment ends the litigation without the time and expense of a trial, and is granted when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law.

In determining whether there are key facts in dispute requiring a trial, courts ruling on summary judgment motions are taking a closer look at what employers have said in position statements submitted in response to charges filed with the EEOC or state administrative agencies, and comparing those statements to what is being said about the same subjects in the lawsuit.

In *Hernandez v. Hughes Missile Systems Co.*, 362 F.3d 564 (2004), the Ninth Circuit Court of Appeals held that an issue of material fact was created when an employer offered differing justifications for its failure to rehire a former employee. In a position statement to the EEOC, a manager for the employer had said the plaintiff was not rehired because he had a history of on-the-job substance abuse and failed to show he

was rehabilitated. However, in a pre-trial deposition that same manager said the plaintiff's application was rejected because of the company's policy not to rehire individuals terminated for misconduct (such as on-the-job substance abuse). The court held that a jury could reasonably conclude that the employer's new explanation, never presented to the EEOC, was a pretext for discrimination. Consequently, the employer's motion for summary judgment was denied.

A similar result was reached recently by a federal district court in the Northern District of Illinois.

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These cases are a warning to employers responding to agency investigations to carefully evaluate and articulate the reason or reasons for having taken an adverse employment action. As a possible additional safeguard, we encourage including a disclaimer in any position statement to the effect that the company is not waiving its right to present new or additional facts or arguments based on subsequently acquired information, and that the position statement is not an affidavit or intended to be used as evidence in litigation. While not foolproof, the disclaimer may assist you in your efforts to obtain summary judgment in a subsequent lawsuit.

If you have any questions about the subjects discussed in this article, please contact Elizabeth Noonan (312-609-7795) or any other Vedder Price attorney with whom you have worked.

### **FLSA Status of “Financial Services Industry” Employees Still at Issue Despite Helpful DOL Opinion Letters**

In our April 2006 newsletter, we discussed the outbreak of class-action lawsuits against financial and mortgage brokerage firms, and the hefty settlements being negotiated by the plaintiffs in these actions and their attorneys. A year later, the battle continues. The main issue continues to be whether financial advisors, stock brokers and mortgage loan officers fall under the Fair Labor Standards Act’s administrative exemption or, instead, are non-exempt “inside” sales employees entitled to overtime.

An employee qualifies for the administrative exemption if:

- (1) the employee is paid on a salary basis at a rate not less than \$455 per week;
- (2) his/her primary duty is the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer’s customers; and

- (3) the primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

DOL regulations state that employees in the financial services industry will generally satisfy the duties test if they perform:

work such as collecting and analyzing information regarding the customer’s income, assets, investments or debts; determining which financial products best meet the customer’s needs and financial circumstances; advising the customer regarding the advantages and disadvantages of different financial products; and marketing, servicing or promoting the employer’s financial products. 29 C.F.R. §541.203(b).

#### ***Recent DOL Opinion Letters***

In September and November 2006, the Department of Labor issued opinion letters that appeared to provide support for the employers involved in these class-action lawsuits. In its September letter, the DOL concluded that, under the facts presented to it, “mortgage loan officers” (a title that includes mortgage loan representatives, consultants, originators and bankers) were exempt; they work with their “employer’s customers to assist them in identifying and securing a mortgage loan that is appropriate for their individual financial circumstances and designed to help them achieve their financial goals, including home ownership.”

An employee whose primary duty is *selling* financial products does not qualify for the administrative exemption. Although the mortgage loan officers engaged in some sales-related activities, they were of a promotional and marketing nature and did not comprise more than fifty percent of the officers’ working time.

The mortgage loan officers exercised requisite discretion and independent judgment because they evaluated various loan products, options and variables, and decided which product fit the customers’ needs. Their reliance on computer programs was not problematic

because the programs merely “enhance[d] the mortgage loan officers’ ability to evaluate products, options and variables to determine which mortgage products might serve the customer’s needs.”

In its November 2006 letter, the DOL applied similar reasoning in finding that “registered representatives” (comprising jobs titles such as account executives, broker-representatives, financial executives, financial consultants, financial advisors, investment professionals and stock brokers) also were exempt. The DOL explained that the registered representatives “have a primary duty other than sales, because their work includes collecting and analyzing a client’s financial information, and advising the client about the risks and the advantages and disadvantages of various investment opportunities in light of the client’s particular financial status, objectives, risks, tolerance, tax exposure, and other investment needs.” They exercise requisite discretion and independent judgment because they evaluate their customers’ individual financial circumstances and investment needs and assess and compare the alternatives before making recommendations for investment options to the client.

An issue addressed only in the registered representatives’ opinion letter was whether the employees’ compensation plan, comprised of a salary/draw plus a commission or fee, satisfied the “salary basis” test. Employees satisfy this test when they regularly receive a predetermined amount that exceeds \$455 per week and is not subject to reduction because of variation in the quality or quantity of the work performed. The DOL concluded that the registered representatives’ pay plan would satisfy the test as long as the salary component was never reduced below \$455 per week. The opinion suggests that the pay plan would *not* satisfy the salary basis test if, for example, amounts deducted for cancelled trades, trade errors or expenses brought the salary/draw below the \$455 per week minimum. Such deductions could be made from the

Concerned employers in the financial services industry should therefore carefully examine whether their employees are primarily engaged in exempt work, and whether their compensation plans are structured to satisfy the “salary basis” test.

employees’ commissions without the employee losing exempt status.

### ***What Should Employers Take From The Opinion Letters?***

The DOL opinion letters bolster the argument that financial and mortgage industry leaders have been making for the past several years; mortgage loan officers and registered representatives qualify for the administrative exemption. However, two federal courts have so far refused to apply the DOL’s September 2006 mortgage loan officer opinion letter. In *Pontius v. Delta Financial Corporation d/b/a Fidelity Mortgage Inc.*, No. 04-1737 (W.D. Pa. Mar. 20, 2007), a magistrate judge denied the employer’s summary judgment motion because the class-action plaintiffs performed work different from the work performed by the mortgage lenders discussed in the opinion letter. Likewise, in *Oetringer v. First Residential Mortgage Network, Inc. d/b/a Surepoint Lending*, No. 3:06CV-381-H (W.D. Ky. March 6, 2007), the court distinguished the facts before it from the facts relied upon by the DOL in denying the

employer’s motion to dismiss a wage-hour class action. Although the court found that the opinion letter was “thoughtful, obviously well-researched, and addresses thoroughly the issue at hand,” the defendants had not presented facts sufficient for the court to find that the employees in dispute fell within the group of mortgage brokers covered by the opinion letter. The judge gave the defendants 30 days to make that showing.

Courts likely will give deference to the DOL’s opinion letters if the employer can show that the duties performed by their mortgage loan officers, registered representatives and other employees in related jobs are akin to the duties described in the letters. Concerned employers in the financial services industry should therefore carefully examine whether their employees are primarily engaged in exempt work, and whether

their compensation plans are structured to satisfy the “salary basis” test.

Vedder Price is highly experienced in auditing employer FLSA practices, preparing employer policies, and defending against FLSA individual lawsuits and collective actions, having successfully 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), Tom Wilde (312-609-7821), Mike Cleveland (312-609-7860), or any other Vedder Price attorney with whom you have worked.

## Courts Set Out the Welcome Mat for Illinois Retaliatory Discharge Claims

### Background

In Illinois, employment is presumptively “at will,” meaning that, absent a written contract, the employee or employer may end the relationship at any time, with or without notice, and for any reason as long as the reason is not illegal.

Beginning in 1978, the Illinois Supreme Court began recognizing an exception to the at-will principle called “retaliatory discharge.” Retaliatory discharge is a common law tort in which an employee alleges that he was discharged for certain activities and that the discharge therefore violates a “clear mandate of public policy.”

Much of the retaliatory discharge litigation in Illinois has been over what constitutes “a clear mandate of public policy.” Such a mandate has been found where employees have been discharged for filing a workers’ compensation claim, assisting with a criminal investigation or refusing to violate the law, or for “whistleblowing.”

However, courts generally have declined to recognize retaliatory discharge claims where the cited public policy is associated with social or economic regulation rather than public health and safety, or where the claim involves private and individual grievances

rather than what affects citizens collectively. Examples of where a clear mandate of public policy was not found include discharge for filing a claim for wages due under the Illinois Wage Payment and Collection Act, and for exercising rights under the federal Family and Medical Leave Act. *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 130 (1981); *McGrath v. CCC Information Servs., Inc.*, 314 Ill. App. 3d 431, 440 (1st Dist. 2000).

### Recent Decisions

Two recent decisions suggest a favorable reception for Illinois plaintiffs bringing new forms of retaliatory discharge claims.

In *Carty v. The Suter Co., Inc.*, No. 03-L-45, 2007 WL 529914 (1st Dist. Feb. 14, 2007), an Illinois appellate court held that an employee could claim retaliatory discharge where he allegedly was fired for complaining to his plant manager that he was not receiving his lunch break, in violation of Illinois’ One Day Rest in Seven Act. The court reasoned that because the law requires such lunch breaks, “we are not declaring public policy; the legislature already has done so.”

The court did not explain how Carty’s complaint about his lunch breaks affects the citizens of the State collectively, or implicates concerns beyond his individual grievance.

The court said that “to disallow plaintiff’s claim based on this statute would be to relieve defendant of its obligations under it.” However, the court did not mention the enforcement measures already written into the One Day Rest in Seven Act, or explain why these measures are insufficient to enforce the company’s obligations under the Act.

In *Daoust v. Abbott Labs.*, No. 05 C 6018, 2007 WL 118414 (N.D. Ill. Jan. 11, 2007), a federal district court made a preliminary determination that an employee allegedly terminated for complaining that he was “subjected to physically threatening behavior by a subordinate employee” stated a claim for retaliatory discharge. The court cited a number of Illinois statutes designed to protect citizens’ safety, including in the workplace, and reasoned that allowing employers to

discharge employees because they reported an incident of workplace violence “would directly contravene Illinois’ efforts at promoting and protecting violence-free work environments, to the detriment of Illinois’ working citizenry.”

### ***Impact on Employers***

Most employers are aware that employees may not be discharged in retaliation for reporting discrimination or harassment or for filing a workers’ compensation claim. However, the *Carty* and *Daoust* decisions have expanded the tort of retaliatory discharge to insulate employees from discharge for complaints not previously considered legally protected. To prevent and defend against potential claims, employers should review any contemplated discharge carefully to ascertain whether the employee has recently made any arguably protected complaints and to ensure that the motivation for the action is not retaliatory.

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

## **Jury Service is a Protected Activity**

It is against federal law for an employer to “discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee’s jury service.” 28 U.S.C. § 1875. In the event of a violation, the employer may be ordered to reinstate the employee and may face liability for back pay, attorneys’ fees and costs, and a civil penalty of up to \$1,000.

Illinois law also protects the employment rights of jurors, and allows the State’s Attorney to bring civil and criminal contempt actions against employers who violate the law. 705 ILCS 305/4.1.

On March 14, 2007, the United States District Court for the Northern District of Illinois issued a press

release stating that Chief Judge James F. Holderman had appointed counsel for two jurors who had informed the court that they had been fired for serving on a grand jury. In both cases the employees claimed that, before being fired, supervisors had discouraged them from performing grand jury service.

If the employees choose to file suit, it will be the first time such claims have been brought in the Northern District.

Judges and court clerks routinely inform potential jurors of their employment rights under the law, so employees serving as jurors can be expected to be well informed. Although lengthy absences from work can be disruptive, employers should avoid discouraging employees from performing jury service and carefully consider any adverse employment action taken near the time an employee serves or is scheduled to serve on a jury.

If you have any questions about compliance with the federal or state laws prohibiting juror discrimination and retaliation, please contact Patrick W. Spangler (312-609-7797) or any other Vedder Price attorney with whom you have worked.

## **NY/NJ**

### ***New York’s Highest Court Applies Federal “Constructive Discharge” Test to State’s “Employee Choice” Doctrine***

In a recent decision that should assist companies seeking to bind former employees to noncompete agreements, the New York Court of Appeals has adopted the federal “constructive discharge” test as the appropriate legal standard for determining whether or not an employee voluntarily left his or her employment. *Morris v. Schroder Capital Management, Int’l*, 7 N.Y.3d 616, 859 N.E.2d 503, 825 N.Y.S.2d 697 (N.Y. 2006).

***Please note:*** Our New York office is moving. By April 23, 2007, our new address will be 1633 Broadway, 47th Floor, New York, New York 10019. Telephone and fax numbers will not change.

The plaintiff, Morris, sued his former employer, Schroder, in federal district court, alleging breach of contract for failing to pay him deferred compensation benefits. The district court dismissed the action, finding that Morris had forfeited the benefits by violating a covenant not to compete. The court held that the covenant was valid pursuant to New York's "employee choice" doctrine, which permits denial of deferred compensation under such covenants to employees who *voluntarily* leave a company's employment.

On appeal, the Second Circuit Court of Appeals certified to New York State's highest court the question whether the federal "constructive discharge" test—where an employer deliberately makes an employee's working conditions so intolerable that the employee is forced to resign—is the appropriate legal standard to apply in determining whether Morris had voluntarily left his employment. Morris contended that the appropriate standard is whether the employer had failed or refused to keep him at the same high-level job with the salary, responsibilities and career potential he had previously enjoyed.

The court concluded that the "constructive discharge" test was the appropriate standard. In order to receive deferred compensation that otherwise would be forfeited because of a breach of a noncompete agreement, an employee must show that the employer "intentionally" made the employee's work environment so intolerable that it compelled him or her to leave.

This decision benefits New York employers by clarifying the law and adopting the more employer-friendly standard. However, it is still advisable to be mindful of potential complications in enforcing noncompete agreements, no matter how clearly they appear to be worded, and to consult an attorney in connection with enforcement efforts.

If you have any questions about this case, noncompete agreements, or New York employment law in general, please contact Alan Koral (212-407-7750),

Daniel Green (212-407-7735), or any other Vedder Price attorney with whom you have worked.

### ***NJ Senate Sends Plant Closing Bill To Governor***

On March 15, 2007, the New Jersey Senate passed a plant closing bill (A-1044) which now heads to the desk of Governor Jon Corzine. The bill, which its sponsors say will combat "take-the-money-and-run" plant closings by major corporate employers in the state, would require all New Jersey employers with 100 or more employees to give 90 days' notice before initiating a termination or transfer of operations or a mass layoff. By comparison, the federal Worker Adjustment and Retraining Notification Act (WARN Act) requires 60 days' advance notice of a plant closing or mass layoff.

Notice under the New Jersey bill would need to be provided to the state Commissioner of Labor and Workforce Development, the local municipality, the employees, and any union representatives. Such notice would trigger action by a response team which would provide appropriate information, referral and counseling, as rapidly as possible, to affected workers.

The bill contains punitive measures for noncompliance. Companies failing to abide by the notice requirements would have to pay terminated full-time employees one week of severance pay for each full year of employment with the company, in addition to any severance provided by the company for other reasons (e.g., pursuant to a labor contract).

Governor Corzine may sign the bill, veto it or modify it in the form of a conditional veto. If the bill is signed into law, Vedder Price will prepare a newsletter for our New Jersey readers describing the requirements in more detail. Meanwhile, if you have any questions about A-1044 or the WARN Act, please contact Charles Caranicas (212-407-7712) or any other Vedder Price attorney with whom you have worked.

This decision benefits New York employers by clarifying the law and adopting the more employer-friendly standard.

## Discovering Child Pornography on Workplace Computers

Possession of pornography is not a crime, but possession of *child* pornography is. Employers may be held liable for possession of child pornography discovered on company-owned workplace computers, and, in some states, for not reporting to proper law enforcement agencies that employees are engaging in activity related to child pornography.

Employers who “knowingly possess” images of child pornography on their computers can be held liable under federal law. The law provides a defense if the employer takes reasonable steps to destroy the visual depiction or reports the matter to the proper law enforcement agency.

States like Illinois, Wisconsin and Indiana also make possession of child pornography a crime, including images stored on a computer. It is a defense that the material was not knowingly possessed, but that defense begins to evaporate once the material is discovered.

Arkansas, Michigan, Missouri, Oklahoma, South Carolina, and South Dakota go a step farther. They require computer technicians to report child pornography detected on workplace computers to law enforcement officials or risk facing individual criminal charges. These states do not require employers to search for such material, but do require reporting if computer technicians discover the images in the scope of their professional capacity.

There can be a right of privacy in equipment (such as laptop or desktop computers) furnished to an employee for his use in the workplace. However, if an employer puts employees on notice that it may inspect or monitor such equipment, no reasonable expectation of privacy in the use of such equipment can exist. *Muick v. Glenayre Electronics*, 280 F.3d 741 (7th Cir. 2002).

Employers should be familiar with the requirements of applicable child pornography laws and act promptly to remove (and, where required, report) any images of child pornography found on workplace computers. To protect against possible invasion of privacy claims, employers should also have a policy in place informing employees

that the company has the right to monitor at any time the use of electronic communication equipment and systems, including the printing and reading of all e-mail.

If you have any questions about the subjects discussed in this article, please contact Megan Crowhurst (312-609-7622) or any other Vedder Price attorney with whom you have worked.

## Q & A

### ***Are there situations where an employer cannot require an employee to substitute accrued paid leave for unpaid FMLA leave?***

Yes. This substitution is limited by a Department of Labor regulation found at 29 C.F.R. §825.207(d)(1). The regulation provides that if the leave is pursuant to a temporary disability benefit plan, the substitution of accrued paid leave is not permitted. A recent decision of the Court of Appeals for the Seventh Circuit (*Repa v. Roadway Express, Inc.*, No. 06-2360, Feb. 26, 2007) discusses the application of this regulation.

Repa, an employee of Roadway, suffered a non-work-related injury that forced her to be off work for six weeks. Roadway is a party to a multiemployer labor contract with the Teamsters that requires the employers to contribute to a health and welfare plan providing temporary disability benefits to covered employees. Repa separately applied for and was granted disability benefits and FMLA leave for six weeks. Roadway notified Repa that she was required to substitute accrued paid leave for her FMLA leave, which was unpaid in the sense that she was receiving no money directly from Roadway. Upon her return to work, Roadway paid her for five sick days and two weeks of vacation in addition to the weekly disability benefits she had received from the Teamster plan.

Repa sued Roadway, alleging that it had violated the FMLA by requiring her to use her accrued sick and vacation days when she was receiving disability benefits during her FMLA leave. The trial court decided in Repa’s favor, and the decision was affirmed on appeal. The Court of Appeals rejected Roadway’s argument that

the DOL regulation applies only to paid disability leave for the birth of a child. It also rejected the argument that the regulation does not apply when the disability leave benefits are paid by a third-party plan managed by a board of trustees rather than by the employer, finding no language in the regulation to support this position.

It should be noted that when accrued paid leave cannot be substituted because the employee on FMLA leave is being paid benefits under a temporary disability plan, the regulation permits the employer to count the leave as running concurrently for purposes of both the benefit plan and the FMLA leave entitlement.

It also should be noted that many employers will not *permit* employees to use accrued paid leave while they are receiving disability benefits in order to avoid a situation where the employees receive more pay while off on disability than when they are working.

If you have any questions about the substitution of accrued paid leave or the FMLA in general, please contact Tom Hancuch (312-609-7824) 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 240 attorneys in Chicago, New York, 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.

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