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of interest to our clients and other friends.

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Illinois Smoking Ban Effective January 1

On January 1, 2008, the Illinois Clean Indoor Air Act will be replaced by the Smoke Free Illinois Act (SFIA). Citing studies showing that secondary smoke causes serious diseases and cannot be reduced to safe levels by ventilation or air filters, the Illinois General Assembly has concluded that the only means of eliminating the health risks associated with indoor exposure to secondhand smoke is to eliminate smoking activities indoors. With very few exemptions, the new law will prohibit smoking in any public place or place of employment, and within 15 feet of any entrance to a public place or place of employment. Compliance with the new law is required by January 1, 2008.

Illinois law currently allows smoking in many public areas and workplaces, including bowling alleys, bars whose primary business is selling alcoholic drinks for consumption on the premises, private enclosed offices occupied by smokers even though visited by nonsmokers, and factories, warehouses and similar businesses not usually frequented by the general public. It also allows the establishment of posted smoking areas within public places (including workplaces). None of these exemptions will be allowed under the new law.

Scope of Ban

The SFIA will prohibit smoking in indoor public places and places of employment unless specifically exempted. It will also ban smoking in any vehicle owned, leased or operated by the State or any community, city or other political subdivision of the State. Under the Act:

- Smoking means carrying, smoking, burning, inhaling, or exhaling any kind of lighted pipe, cigar, cigarette, hookah, weed, herbs, or any other lighted smoking equipment.
- Public space means that portion of any building or vehicle used by and open to the public, including a minimum of 15 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited.
- Place of employment is any area under the control of a private or public employer that employees must enter, leave or pass through during the course of their employment, including a minimum distance of 15 feet from entrances, exits, windows that open, and ventilation intakes that serve an enclosed area where smoking is prohibited.
- Employer means a person, business, partnership, association, or corporation, including a municipal corporation, trust or nonprofit entity, that employs the services of one or more individuals.

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- Employee means a person who is employed by an employer or who volunteers his or her services for a nonprofit entity.

Exemptions

The SFIA will allow smoking only in the following four areas:

- Private residences or dwelling places unless used as a child-care facility or other home-based business open to the public.
- Retail tobacco stores that derive more than 80% of gross revenue from the sale of tobacco and related products, but not including the tobacco department or section of a larger commercial establishment, or any establishment having a liquor, food, or restaurant license.
- Private/semiprivate rooms in nursing homes and long-term care facilities occupied by one or more persons, all of whom are smokers and have requested a smoking room, provided the smoke does not infiltrate other areas of the facility.
- Hotel/motel sleeping rooms (comprising not more than 25% of the total number of available rooms) designated as smoking rooms, provided that all smoking rooms on one floor are contiguous and that smoke does not infiltrate nonsmoking rooms.

No-Smoking Signs and Ashtray Removal

The SFIA will require that "No Smoking" signs be clearly and conspicuously posted in each public place and place of employment where smoking is prohibited, and at every entrance to such public place or workplace. The signs may be the international "No Smoking" symbol. The owner, operator, manager or other person in control of the facility will be responsible for posting the signs and removing ashtrays from any area where smoking is prohibited.

Enforcement and Penalties

The SFIA will be enforced by the Illinois Department of Health, State-certified local public health departments, and local law enforcement agencies. Complaints of violations may be registered by any person, and the Department of Health will issue a telephone number to be called for this purpose.

A person who smokes in violation of the Act will be fined not less than $100 or more than $250 for each violation. A person who owns, operates, or otherwise controls a public place or place of employment that violates the Act will be fined not less than $250 for the first violation, not less than $500 for the second violation within a year of the first violation, and not less than $2,500 for each additional violation within that year. Each day that a violation occurs will be considered a separate violation.

Any of the departments or agencies that enforce the Act, or any individual personally affected by repeated violations of the Act, may file an action in a circuit court to enjoin further violations.

Impact on Employers

Many Illinois employers permit their employees to smoke indoors, often in a dedicated area such as a break room or portion of a cafeteria, or outside the facility next to a front or side entrance. Some employers also allow supervisors or managers to smoke in their offices or in meeting rooms. All of this will change under the SFIA, and employers should start making adjustments soon in order to be in compliance by January 1.

Employees should be advised of the new law, and of management's intent to change workplace policies and practices to comply with the new law. Employees should be reminded of any Company-sponsored programs available to help them quit smoking. If an employer sponsors a healthcare flexible spending account program (FSA), consideration should be given to reminding employees that the costs of smoking cessation programs and nicotine patches and gum may be reimbursed through the FSA.

If smoking will be permitted outside the facility, care should be taken to designate an area that is at least 15 feet from any entrance, exit, window that can be opened, or intake vent. "No Smoking" signs should be ordered, and responsibility should be assigned for posting the signs and removing any ashtrays prior to January 1.

Vedder Price has helped many employers create and implement a broad range of employment policies, including no-smoking policies. If you have any questions about the Illinois Smoke Free Act or how it will affect your establishment, please contact Bruce R. Alper (312-609-7890), Thomas G. Hancuch (312-609-7824), or any other Vedder Price attorney with whom you have worked.

Navigating the New EEO-1 Reporting System

The Equal Employment Opportunity Commission has made significant changes to its EEO-1 reporting system. Since 1966, private employers with 100 or more employees and federal contractors with more than 50 employees have reported annual data about the number of employees in occupational categories and subcategories. This year a revised EEO-1 report form will be in use. It contains a more complicated racial and ethnic classification system, reflecting data from the 2000 Census and changing workforce demographics, and redefines employees heretofore classified as "Officials and Managers." Although employers are not required to resurvey employees in 2007, they must report current data on the revised form starting with the report due on September 30, 2007. Employers should develop a new survey system as soon as possible to conform to the new classification system.

Racial and Ethnic Classification Changes

The new reporting system changes the racial and ethnic classification system used in prior reporting years.

- *Renamed Race Categories*—The new EEO-1 form renames "Black" as "Black or African American," and "Hispanic" as "Hispanic or Latino." Also, "Asian or other Pacific Islander" is now separated into "Asian" and "Native Hawaiian or other Pacific Islander." If an employer does not resurvey employees for the 2007 report, it should report employees who previously self-identified as "Asian or Other Pacific Islander" as "Asian" for purposes of the 2007 report.
- *Two-question Format*—In order to yield more accurate data about Hispanic and Latino employees, the revised EEO-1 form requires employers to give employees who self-identify their ethnic background as "Hispanic or Latino" or "Not Hispanic or Latino" the opportunity to self-identify according to race. Although the race information obtained will not be reportable on the new EEO-1, such information that corresponds to the racial categories in the "Not Hispanic or Latino" category must be preserved as an employment record.
- *New "Two or More" Race Category*—To obtain more accurate information about individuals with multiracial backgrounds, the EEO-1 form now requires employers to report the number of employees who claim "Two or More Races." An employer may ask such employees to specify particular races, but is not required to do so. Employers should preserve any specific race information as an employment record.

Job Classification Changes

The new EEO-1 form creates new categories for reporting "Officials and Managers." Previously, employers have reported "Officials and Managers" in one category without regard to differing levels of responsibility, compensation and skills. Now the category "Officials and Managers" is separated into "Executive/Senior Level Officials and Managers" and "First/Mid Level Officials and Managers." Also, nonmanagerial individuals in business and financial occupations previously reported in the "Officials and Managers" category must now be reported in the "Professional" category.

- *Executive/Senior Level Officials and Managers*—This category includes employees who plan, direct and formulate policy, set strategy and provide overall direction. They reside in the highest levels of organizations and plan, direct or coordinate activities with the support of subordinate executives and staff managers. In larger organizations, they include CEOs and individuals within two reporting levels of the CEO whose responsibilities require frequent interaction with the CEO. Examples are: CFOs; COOs; presidents or executive vice presidents of functional areas or operating groups; chief marketing officers; chief legal officers; and managing partners.

- *First/Mid Level Officials and Managers*—This category includes the next lower level of managers who oversee and direct the delivery of products or services at a regional or divisional level, and who typically lead major business units. They implement policies, programs and directives through subordinate managers and within the parameters set by top management. Examples are vice presidents and directors; regional or divisional controllers; treasurers; and human resource, information systems, marketing and operational managers. They also include employees who report directly to middle managers. Examples are first-line managers; team managers; unit managers; operations and production managers; call center or customer service managers; technical support managers; and branch or product managers.
- *Categorization of Business and Financial Occupations*—Nonmanagerial individuals in business and financial occupations previously reported in the "Officials and Managers" category must now be reported in the "Professional" category.

Compliance

To comply with these changes, employers will need to resurvey their workforces to gather the necessary racial and ethnic data. However, for the EEO-1 report due on September 30, 2007, employers are not required to resurvey and may use employment data from any one pay period between July and September 2007. Nevertheless, the EEOC encourages employers to resurvey as soon as possible using the new classification system. Employers must resurvey employees under the new classification system for the 2008 reporting year. Even if an employer decides not to resurvey for 2007, it must still report data on the revised EEO-1 form, and new hires should be surveyed according to the new system.

OFCCP

The new EEO-1 reporting system does not yet apply to affirmative action program reporting required of federal contractors by Executive Order 11246 and enforced by the Office of Federal Contract Compliance Programs. Recognizing the possibility of inconsistent burdens on federal contractors, the OFCCP is reviewing its classification system and may promulgate changes designed to track the new EEOC system.

Vedder Price regularly advises employers subject to EEO-1 and OFCCP reporting obligations and can help your company make the transition to the new EEO-1 reporting system. If you have any questions about these matters, please call Thomas G. Abram (312-609-7760), Thomas M. Wilde (312-609-7821), Patrick W. Spangler (312-609-7797), or any Vedder Price attorney with whom you have worked.

Supreme Court FLSA Decision Relieves Domestic Service Industry: Deference to DOL Regulations a Good Sign

The companionship service exemption spares from the FLSA's minimum wage and overtime provisions employees who provide in-home companionship services to elderly or infirm persons unable to care for themselves. Companionship services include making beds and washing clothes, but do not include care from trained personnel, like registered nurses or licensed practical nurses who are entitled to overtime. As stated in two separate Department of Labor ("DOL") regulations, the exemption applies to companions hired directly by the persons to whom they provide services (29 C.F.R. § 552.3) and to those hired through a third-party employer (29 C.F.R. § 552.109).

The third-party exemption was challenged in *Coke v. Long Island Care at Home, Ltd.*, 462 F.3d 48 (2006), a case decided by the Second Circuit Court of Appeals. A retired domestic companion sued her employer for unpaid overtime, arguing that the FLSA's companionship service exemption applies only to employees of the individual receiving the care, not to companions who provide the same type of care but are employed by a third party. The plaintiff argued that the "general" regulation exempting companions employed by the infirm or elderly conflicts with the "interpretive" regulation exempting companions employed by third parties. The Second Circuit adopted the plaintiff's argument, jettisoning years of prior interpretations and throwing the companionship services industry into a panic.

In June 2007, the U.S. Supreme Court unanimously reversed the Second Circuit, holding that companionship employees employed by third parties are exempt (127 S. Ct. 2339). The Court acknowledged that while the applicable regulations are conflicting, the DOL's interpretation of those regulations deserves controlling deference. The Court relied on the legal maxim "The specific governs the general," reasoning that the "general" regulation describes the type of work necessary to qualify for the exemption whereas the "interpretive" regulation extends the exemption to third-party employers. The Court also relied on a 2005 DOL advisory memorandum affirming that third-party companionship service employees are exempt and warning that a decision to the contrary would remove the exemption from companions paid by a family member living outside the home of the person receiving the care, a result that the Court found absurd.

In rejecting the plaintiff's arguments, the Court noted that Congress had specifically delegated to the DOL broad authority to fill in gaps in the FLSA, and thus had charged the agency with responsibility for making key interpretive decisions, such as whether companionship employees of third-party employers are exempt.

The Court's decision is important as a practical matter. It prevents a further opening of the floodgates to wage and hour litigation and avoids a financial crisis in the companionship service industry. A contrary result likely would have raised the cost of home care to levels that only the wealthiest could afford, causing countless infirm or elderly individuals who rely on Medicare and Medicaid reimbursements to forgo in-home care and move into nursing homes or assisted living facilities.

The decision should not be viewed as a sign that the Court is narrowing the FLSA's protective scope. Nevertheless, employers may find some consolation in the fact that the Court deferred to the DOL's interpretation of the FLSA. This deference will be of special interest to finance and mortgage companies currently embroiled in litigation over the exempt status of stock and mortgage brokers. As we discussed in the last issue of this newsletter, the DOL's revised regulations provide that financial service industry employees who analyze customer financial situations and recommend appropriate financial products generally satisfy the administrative exemption. 29 C.F.R. § 541.203(b).

A word of caution: Some states do not defer to the DOL's interpretation of exempt status under the FLSA. In Illinois, for example, employers must pay minimum wage and overtime to companion employees regardless of whether they are employed directly or through a third-party employer. Thus, employers of companion employees should review their state's laws in determining whether companion employees should be paid overtime.

Vedder Price is very experienced in auditing employer wage and hour practices, preparing employer policies and successfully defending against FLSA and state law individual lawsuits and collective actions at all stages of litigation. If you have any questions about the FLSA or your state's wage and hour laws, or have received notice that an employee is suing you for unpaid overtime, please call Joeseph A. Mulherin (312-609-7725), Thomas M. Wilde (312-609-7821), Michael G. Cleveland (312-609-7860), or any other Vedder Price attorney with whom you have worked.

More Uncertainty Over Releases

In past issues (January 2006, September 2006), we have reported on litigation by individuals successfully claming that releases they have signed are not legally enforceable. Typically, these claims are made after the individual has received severance pay and benefits from the employer in exchange for what the employer believes is a final and nonadversarial separation. Two recent court decisions may give employers more cause for concern.

On July 3, 2007, the Fourth Circuit Court of Appeals reconsidered and reaffirmed its prior decision on the enforceability of agreements purporting to release claims under the Family and Medical Leave Act. *Taylor v. Progress Energy, Inc.,* No. 04-1525, 2007 WL 1893362 (4th Cir. July 3, 2007). Rejecting the DOL's position, the court held that parties to a private release agreement cannot waive claims under the FMLA. The court drew no distinction between claims for past conduct and future claims. Noting that neither past nor future claims under the Fair Labor Standards Act can be waived except with governmental or court supervision, the court characterized FMLA claims to be of the same type and purpose—prescribing minimum labor standards—and thus distinguishable from claims under employment discrimination laws, which can be waived retroactively. Under the court's decision, parties in states covered by the Fourth Circuit (Maryland, Virginia, West Virginia, North Carolina and South Carolina) cannot waive claims under the FMLA by agreement unless the Department of Labor or a court approves the agreement.

In a further setback to the private resolution of employment claims, a federal district court in Minnesota recently invalidated the release of age discrimination claims in agreements signed by over 700 employees. *Pagliolo et al. v. Guidant Corp. et al*., No. 06-943DWFSRN, 2007 WL 1567617 (D. Minn. Apr. 4, 2007). The employees were selected for job elimination in a workforce reduction affecting 8,100 employees companywide. A plaintiff class successfully argued that Guidant's release violated numerous requirements of the Older Worker's Benefit Protection Act, which sets forth technical requirements for age discrimination releases in both individual separation agreements and, in this case, group termination programs. Although the decision affects only the parties to the litigation, the defects in the release identified by the court provide a road map for other employers to consider.

Avoid material misrepresentations. Guidant had identified 196 employees selected for job elimination who were given the opportunity to find and did find other jobs in the organization. The court concluded that listing these individuals as eligible to participate in the severance program was a misrepresentation because their redeployment disqualified them for severance.

Fully disclose "age" and "job classification" data. The law requires the employer to identify, by age and job classification, persons terminated and not terminated. Guidant had provided birth dates and job titles. The court concluded that it should have provided each person's actual age (without saying whether the age should be as of the date of selection or the date of termination), and should have differentiated within job titles by job grades, since many job titles contained multiple grades that corresponded to different jobs.

Accurately describe the "decisional unit." For employees being asked to sign a release, it is critical to identify the group of employees who are being terminated and those not being terminated within the employee's decisional unit. Guidant had identified the entire group of 8,100 employees considered for termination from six subsidiaries and 84 domestic locations. The court concluded that the failure to distinguish among different decisional units made the information useless to the average employee asked to sign a release.

Use selection criteria as the "eligibility factors." The law requires the employer to inform employees of the "eligibility factors" for participation in the termination program. Guidant had simply identified those employees whose jobs were being eliminated. The court found this to be inadequate, and held that "eligibility factors" means the criteria the decision-makers used to select the employees who would and would not be terminated.

Although the decisions discussed above have limited application outside their respective jurisdictions, they provide future litigants in other jurisdictions with ammunition to challenge release agreements on similar grounds. In this developing and complex area of the law, employers should proceed cautiously if they want to maximize the likelihood that the release agreements they enter into will provide the closure they seek.

If you have any questions about the enforceability of your company's releases, please contact Bruce R. Alper (312-609-7890), Elizabeth N. Hall (312-609-7795), or any Vedder Price attorney with whom you have worked.

NY/NJ

New Jersey Now Prohibits Gender Identity Discrimination

In June 2007, New Jersey amended its Law Against Discrimination (LAD) to cover "gender identity and expression." The LAD now protects individuals who have or are perceived as having "a gender related identity or expression . . . not stereotypically associated with a person's assigned sex at birth, including transgender status," from discrimination in employment, housing, public accommodation and qualification for loans.

Because the amendment has not been in effect long enough to produce any major decisions, the limits of its protection remain unclear. Employers should exercise caution when implementing policies with implications for gender identity or when making personnel decisions regarding specific individuals. The amendment allows an employer to enforce workplace attire and grooming standards as long as employees are permitted "to appear, groom and dress consistent with the employee's gender identity or expression." Employers should also revise their handbooks and workplace policies to reflect the amendment, and take steps to ensure that managers are aware of it.

Only a handful of states have laws prohibiting gender identity discrimination in employment. However, passage of such laws is a growing trend, and gender identity is an issue that employers likely will have to deal with in the future. California, Illinois, Maine, Minnesota, New Mexico, Rhode Island, and Washington are among the states that currently treat gender identity as a protected trait, and dozens of cities and municipalities also do so, including New York City. Pending federal legislation will, if passed and signed into law, render gender identity a protected trait at the federal level. Although gender identity disorder is not recognized as a disability under the Americans with Disabilities Act, it is considered a disability under certain state laws, including the laws of New Jersey, New York and Connecticut.

If you have an issue of gender identity in the workplace, or any other EEO issue, please contact Alan M. Koral (212-407-7750), Daniel C. Green (212-407-7735), Charles S. Caranicas (212-407-7712), or any other Vedder Price attorney with whom you have worked.

Supreme Court Limits Time Period for Filing Pay Discrimination Charges

Before bringing a discrimination lawsuit against an employer, employees must file a charge with the Equal Employment Opportunity Commission ("EEOC") within 180 days from the date of the alleged discrimination (300 days if the employee is filing a charge for a violation of both federal and state or local antidiscrimination laws). Question: When an employee claims that the basis for discrimination is wage-related, does the 180-day time period begin to run on the date the employer made the pay-setting decision and communicated it to the employee, or does it begin anew with each paycheck that reflects the allegedly discriminatory decision?

The U.S. Supreme Court recently answered this question in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, 127 S. Ct. 2162 (2007): the limitations period for filing an EEOC charge of pay discrimination begins to run on the date a discrete discriminatory decision involving pay is made, and does not restart each time the employee receives a paycheck affected by that prior discriminatory act.

Lilly Ledbetter, a Goodyear employee, filed an EEOC charge of sex discrimination alleging that each paycheck she received carried forward intentionally discriminatory disparities in pay from pay-setting decisions made over the course of her career. She claimed that, after nearly 19 years of service, she was earning less than the lowest-paid man in her department. She argued that each paycheck reflected the company's discriminatory intent to pay her less than her male counterparts, and therefore each paycheck she received initiated a new 180-day period to file an EEOC charge.

The Supreme Court disagreed, holding that each pay-setting decision is a discrete act, and that the period for filing an EEOC charge begins when that act occurs, and does not renew with each subsequent payment. An EEOC charge, filed after 180 days from the date the allegedly discriminatory pay decision is made and communicated to the employee, is therefore untimely.

Congress is already taking steps to overturn the *Ledbetter* decision. On July 31, the U.S. House of Representatives passed the Lilly Ledbetter Equal Pay Act of 2007, which would restart the 180-day clock each time a paycheck is issued. On July 20, the U.S. Senate introduced similar legislation in the Fair Pay Restoration Act of 2007.

If you have any questions about pay discrimination issues, please contact Megan J. Crowhurst (312-609-7622) or any other Vedder Price attorney with whom you have worked.

Q & A

Our Company wants to train supervisors on recognizing and responding to workplace sexual harassment. What should we cover?

Apropos of your question, California recently issued final regulations governing mandatory sexual harassment prevention training for supervisors at companies with 50 or more employees. The regulations require training on the following subjects: the elements of unlawful harassment under state and federal law; the essential components of an antiharassment policy; steps to take when harassing behavior is observed; how to respond to and report harassment complaints; the employer's obligation to investigate harassment complaints; the effect of harassment on harassed employees, coworkers, harassers and employers; and what constitutes retaliation and how to prevent it.

Questions about workplace harassment issues may be directed to any Vedder Price attorney with whom you have worked.

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

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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 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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