

Labor and Employment Law

Better Safe than Sorry: Five Commonsense Considerations for Employers in the Face of the H1N1 Outbreak

Panic or pandemic? Right now, nobody can say for certain what course the H1N1 virus will take in the upcoming months. It may end up like the Bird Flu scare, having little discernible impact. Or, our worst fears may be realized with a widespread pandemic and disruption to our daily lives. One thing is certain, we are already feeling the effects with mass school closings, long lines for flu shots, and chaos in many pediatricians' offices. And the government is getting in on the act. The EEOC recently released a "technical assistance document" entitled *Pandemic Preparedness In The Workplace And The Americans With Disabilities Act* (www.eeoc.gov/facts/pandemic_flu.html). OSHA is in the process of issuing a directive enforcing the Centers for Disease Control's H1N1 Guidance for Healthcare Organizations that will prescribe a set of procedures governing how OSHA will inspect such institutions for H1N1 exposure. Most recently, several Democrats in the U.S. House of Representatives introduced legislation that would give five days of paid leave to workers sent or told to stay home due to a contagious illness like H1N1. The Emergency Influenza

Containment Act would apply to entities with 15 or more employees that do not otherwise provide at least five paid sick days, and would expire two years after passage.

Regardless of what ultimately happens, there are a number of steps employers should consider taking to prepare for a possible outbreak and hopefully minimize their exposure—to both the flu and legal action.

First, consider how your organization intends to handle the various attendance and/or leave issues associated with a rash of contagious illnesses in the workplace. What will happen to employees who claim to be sick but do not yet have or have already exhausted their paid time off? Taking a hard line may cause them to come to work when sick and infect others, resulting in widespread absences. Being overly lenient may enable those looking for additional time off to feign illness, particularly around the holidays. If feasible, employers may wish to offer additional paid leave for employees diagnosed with influenza. An employer may also consider offering additional unpaid leave to those employees who provide proof of illness. Whatever your organization decides, be sure to document

the steps taken and issue a temporary policy statement to your employees so they

In this issue...

Better Safe than Sorry: Five Commonsense Considerations for Employers in the Face of the H1N1 Outbreak.....	1
Update on the Employee Free Choice Act	2
Opening Pandora's Box: Employers and Social Networking Sites.....	3
The Independent Contractor Conundrum.....	5
Supreme Court to Hear Five Labor and Employment Cases	6
Expanded Whistleblower Protections under the Amended FCA.....	8
Defamation Lawsuits Remain a Concern for Employers.....	9
Congress Expands FMLA—Again	10
Comment Period Open for Proposed Regulations to the ADA Amendments Act of 2008	10
Recent Vedder Price Accomplishments	11

understand the options available to them.

Second, decide what you will do if and when employees appear ill while at work. The EEOC acknowledges in its technical assistance publication that sending an employee home because he or she appears to have the flu is not a disability related action, and even if it were, it would be acceptable behavior if there is a pandemic. You may also ask the employee questions about his or her condition if he or she seems ill. As with any such inquiry, however, your questions should be limited to determining if the employee has the flu, and should not extend into any other areas unless justified by business necessity. Keep in mind that sending home employees covered by a collective bargaining agreement may result in a grievance. Accordingly, you should consider approaching your union(s) in advance in an effort to determine if both sides can agree on how obviously ill employees should be handled in the workplace. Additionally, keep in mind that H1N1 may qualify as a serious health condition entitling the employee to FMLA leave.

Third, assemble an influenza response team that can coordinate your organization's response to an outbreak. If applicable, include representatives from corporate health, operations and any other department that would likely be involved in formulating a plan to deal with large-scale absences. Not only will having such a team in place better enable you to react more effectively and

promptly, but it can be used to show that your organization was not negligent in the event such a claim is brought against the organization.

Fourth, keep in mind that even though the flu is, by and large, a temporary condition, there may be reasonable accommodation issues that arise under the Americans with Disabilities Act ("ADA"). Employees or applicants with compromised immune systems may request additional time off so they can stay home and avoid exposure (in the workplace or on mass transit) to the contagion, or they may ask for personal protective equipment such as face masks and/or gloves to reduce the chance of infection. In the event your organization expands, even temporarily, its tele-work options, an employee with a modified workstation or computer may need to have comparable modifications made to his or her home work area.

Fifth, do not forget to implement commonsense measures. There is a reason that our parents and teachers always told us to wash our hands before we ate and cover our mouths when we cough. Hand washing is one of the best ways to prevent the infection. And coughing into one's sleeve or hands reduces the spread of germs. Employers would be well advised to follow suit and issue reminders to their workforces by sending memos and posting notices (with illustrations or photos) reinforcing the importance of such etiquette requirements. The Centers for Disease Control website (www.cdc.gov) is a good source of practical information about H1N1, including guidance

designed specifically for employers.

If you have any questions about H1N1, please call **Aaron R. Gelb** (312-609-7844), **Neal I. Korval** (212-407-7780) or any other Vedder Price attorney with whom you have worked. ■

Update on the Employee Free Choice Act

Although the contentious health care debate remains front and center—both in Congress and in the media—significant labor law changes appear close at hand as well. Do not let the lack of headlines fool you—the Employee Free Choice Act ("EFCA") remains a priority for the Obama administration and the Democratic-controlled Congress. Informed observers expect that EFCA will be the next hot-button issue taken up by Congress.

Earlier this year, several Democrats, including Arlen Specter of Pennsylvania, announced that they could not support a version of the bill that included "card check" recognition, a process that circumvents the traditional election process by allowing a union to become the bargaining representative of a group of employees by showing authorization cards. Over the past several months, Congressional leaders have been working toward a compromise. In mid-September, Senator Specter announced that proposed modifications to EFCA should allow it to garner enough support to avoid a filibuster during debate in the Senate.

Update on the Employee Free Choice Act
continued from page 2

The compromise version of EFCA no longer includes card check. Under the reported compromise, elections will remain but will occur on a much faster timetable, probably within about two weeks of a union filing a petition for representation. The compromise includes an equal-access provision, guaranteeing access to employees by union organizers if employers hold mandatory campaign meetings on company time. In addition, penalties for unfair labor practices during union organizing campaigns will triple, with additional civil fines of up to \$20,000 per violation, a holdover from EFCA's original draft.

These restrictions on an employer's ability to communicate with its employees will make it difficult for employers to inform employees about the choices they face in a union election. Compressing the schedule for an election—from six weeks to about 14 days—greatly reduces the amount of time that an employer has to present its side of the story. In addition, requiring equal access to union organizers when an employer meets with its employees will likely necessitate allowing them onto an employer's premises to speak with employees. Not only does this call into doubt an employer's ability to control its own property, but it may also provide unions with an opportunity to disrupt operations.

A provision of EFCA that has not garnered as much attention but is just as important (and troubling) to employers involves "interest arbitration." That is

where a government-appointed arbitrator decides what a collective bargaining agreement should include when an employer and union cannot reach agreement. The initial version of EFCA did not explain how interest arbitration would work; it simply provided for interest arbitration after 90 days of bargaining and 30 days of mediation. The reported compromise bill provides for "baseball-style" interest arbitration, where an arbitrator decides between the final offers presented by the employer and the union. Although this is a marginal improvement over the interest arbitration process set forth in EFCA's original draft, which allowed an arbitrator to pick and choose what he or she thought a contract should contain, it still means that an outsider will be dictating the terms of a collective bargaining agreement.

While organized business interests, such as the National Association of Manufacturers and the U.S. Chamber of Commerce, continue to lobby on behalf of their members' interests pertaining to EFCA, proponents of the bill have expended little effort to forge a version that would engender support in both the business and labor communities for an Act that most management-side attorneys view as bringing about the most radical changes to labor law since the passage of the Wagner Act in 1935.

With Congress' apparent willingness to pass a compromise version of EFCA, and the President's repeated promise that he will sign it into law, now is the time to formulate (or review) a plan for how your

organization will respond to a possible union organizing effort. It is imperative to take a proactive approach, update policies, and train managers and supervisors to ensure they will recognize the early signs of organizing activities and know how to respond effectively and legally.

If you have any questions about EFCA, including what steps you can and should be taking now to prepare, please call **J. Kevin Hennessy** (312-609-7868), **James A. Spizzo** (312-609-7705), **Mark L. Stolzenburg** (312-609-7512), **Lyle S. Zuckerman** (212-407-6964) or any other Vedder Price attorney with whom you have worked. ■

Opening Pandora's Box: Employers and Social Networking Sites

As the law struggles to keep pace with the frenetic world of online networking, employers must be mindful of the risks they face by allowing employees to access social networking sites such as Facebook, Twitter and LinkedIn. Using these social networking sites to "check up" on an employee, identify or assess potential employees, or simply "friend" or link up with a subordinate entails risks.

The use of LinkedIn may well pose the greatest risk for employers. There, individuals offer information about their work history and experience and often identify current or previous managers who can serve as references during a job search. Those managers are able to post their assessments

*Opening Pandora's Box
continued from page 3*

of the referenced individual directly on LinkedIn, where they may be viewed by someone who searches for that individual.

Imagine a discrimination lawsuit in which the company contends that it terminated the plaintiff for poor performance. During discovery the plaintiff's attorney finds that the plaintiff's manager "recommended" the plaintiff on LinkedIn, raving about the plaintiff's work record at the company. Such evidence could be used to show that the plaintiff was not really terminated for poor performance. Similarly problematic are managers who become Facebook "friends" with their subordinates or who "tweet" about them and their achievements on Twitter. Unfavorable statements posted online by a manager about a current or former employee—particularly if represented as the opinion of the company—may lead to possible defamation claims against both the manager and the employer.

As discussed in a separate article in this issue, defamation claims are on the rise, and technology, including social networking sites, is making it easier to disseminate hurtful and damaging information about employees. For instance, in *Pendergrass v. ChoicePoint Inc.*, a former Rite Aid employee, who was fired for alleged theft, sued the company and an online screening service, claiming that he was wrongfully portrayed as a thief in the online database that tracks employees. The judge allowed the case to proceed, noting that the company allegedly submitted

an unfounded accusation to the online screening company.

defamation claims are on the rise, and technology, including social networking sites, is making it easier to disseminate hurtful and damaging information about employees

Limiting the dissemination of information about a termination or disciplinary action in the electronic social networking age is difficult. Even composing an e-mail and hitting "send" requires a modicum of deliberation. When a manager has his or her own Twitter account, there is a far greater likelihood that he or she will fire off an intemperate "tweet" about an employee who was just fired.

Additionally, accessing an employee's social networking account or viewing his or her personal profile also presents privacy concerns that place employers in a precarious situation. On the one hand, employers have an interest in objecting to the content of certain off-site or online communications by their employees. For example, if an employee disparages the company or reveals confidential information in an online post, his or her employer has an interest in objecting to this. However, new laws and evolving legal doctrines place limits on how far an employer can encroach on the private activities of its

employees. For example, Illinois and New York have enacted laws that protect employees from discrimination based on their off-duty, lawful activities. Under these laws, participating on social networking websites and blogging are likely protected leisure-time activities. As a result, an employer's interest in objecting to the content of particular communications must be carefully weighed against the employee's privacy interest.

Pietrylo v. Hillstone Restaurant Group, a recent case decided by the U.S. District Court for the District of New Jersey, illustrates this delicate balance. In *Pietrylo*, a restaurant manager browsed through a MySpace group created by restaurant employees for the purpose of complaining about their workplace. The manager was appalled by what he found in the password-protected group: a repository of vulgar and offensive comments about life at the restaurant. After discovering the group, several managers read the messages because they felt the forum's content contradicted the restaurant's operating principles. The employees sued, and the court, in awarding both compensatory and punitive damages, held that the employer violated the federal Stored Communications Act by accessing two employees' MySpace accounts without authorization.

Additionally, taking action against a group of employees who band together on a social networking site may expose an employer (unionized or not) to National Labor Relations Act

*Opening Pandora's Box
continued from page 4*

claims of retaliation for protected concerted activities.

Employers can attempt to minimize such risks through targeted manager training, neutral reference policies and policies that inform managers of the dangers associated with using social networking sites. Employers should beware, however, of drafting any policies that threaten to discipline or terminate managers for engaging in legal, off-duty conduct (such as generally posting on a social networking site).

Employers should also be mindful of risks tied to recruiting applicants from social networking sites. Some employers rely on sites such as LinkedIn and Twitter to fill positions. While this may be an efficient way to hire, it can be problematic if it is the only search tool, since the population using these sites is often limited and, in some instances, highly selective. For instance, the latest data from Quantcast shows that only 4 percent of LinkedIn users are African American and only 2 percent are Hispanic. As a result, using professional networking sites such as LinkedIn carries with it the risk that hiring based on the use of this method will be challenged on a disparate impact basis.

Similarly, the use of social networking sites to screen or hire candidates may expose employers to information about the applicant that identifies him or her as a member of a protected group under federal or state law. For example, on many sites such as Facebook, MySpace or LinkedIn, individuals indicate their race,

gender, sexual orientation, religion, age or pregnancy status. When a recruiter visits an applicant's page, this information is readily apparent. However, because of discrimination concerns, this is information that employers generally do not ask on an application or discuss in a properly conducted interview. Consequently, employers should think carefully about whether they want to expose themselves to this information, since it creates a risk of litigation.

Social networking is a phenomenon that has grown in popularity with amazing speed. Because blogging and social networking sites have become a common source of communication for millions of people, employers must be cognizant of the potential pitfalls associated with them. If you have any questions about this article or need assistance drafting appropriate policies, please contact **Elizabeth N. Hall** (312-609-7795), **Katherine A. Christy** (312-609-7588), **Laura Sack** (212-407-6960) or any Vedder Price attorney with whom you have worked. ■

The Independent Contractor Conundrum

As the recession lingers on, employers continue to search for ways to manage operating costs. One common (but increasingly risky) cost-cutting measure is the use of independent contractors in positions that are normally filled by employees. These types of arrangements provide immediate savings in federal and state income tax withholdings, unemployment and workers' compensation insurance contributions, employee benefits,

overtime, vacation and sick time or personal time wages. Independent contractors are also unable to vote in union elections. What is the downside, you ask?

An increasing number of employers who misclassify individuals as contractors when they are in fact "employees" are being hit with large tax and other liabilities, as well as stiff penalties. Indeed, the federal and state governments, also feeling the effects of the recession and looking for sources of tax revenue, have targeted employers that rely heavily on independent contractors. According to the General Accounting Office, such misclassification reduces federal income tax revenues by approximately \$4.7 billion each year. The University of Missouri-Kansas City Department of Economics estimates that from 2001 through 2005, Illinois lost \$124.7 million annually in income taxes as a result of misclassification, including \$8.9 million in the construction sector alone. A recent Cornell University study also found that other states, including New York and Massachusetts, suffered significant revenue losses.

To address this "tax gap," Congress has proposed several bills within the last few years that seek to eliminate safe-harbor provisions, based upon long-established industry practices, and increase enforcement efforts. In 2007, Senator Durbin (D.-Ill.) and then-Senator Obama introduced the Independent Contractor Proper Classification Act, which would have accomplished these goals and authorized the

Department of Labor to investigate entire industries where misclassification is prevalent, such as the construction industry. The Act also would have required employers to notify independent contractors about the legal benefits available to employees. Although the proposal died in committee, another bill was introduced this August with similar goals. Odds are good that a bill will be passed.

In the last few years, the Illinois, Massachusetts, New Hampshire, New Jersey and New Mexico state legislatures have enacted new laws targeting misclassification. The Illinois Employee Classification Act, which became law in 2007, authorizes the Illinois Department of Labor to assess penalties of up to \$1,500 per initial misclassification violation and up to \$2,500 for each repeat violation.

independent contractor
issues often start out
with an individual
claiming unemployment
benefits, and then
escalate into a full-
blown IRS audit

In the meantime, federal and state administrative agencies have also stepped up enforcement efforts. The Internal Revenue Service recently announced plans for an initiative to audit more than 5,000 randomly selected businesses in the next three years, in an effort to address

the “tax gap” and reduce the number of independent contractors overall. Similarly, the Illinois Department of Employment Security is auditing more small businesses because the agency views them as more likely to misuse independent contractors. Because many federal and state agencies share information, it is likely that if one agency initiates an audit, others will follow. Moreover, independent contractor issues often start out with an individual claiming unemployment benefits, and then escalate into a full-blown IRS audit.

Going forward, employers should be especially careful in using independent contractors. Employers can no longer rely on industry standards, independent contractor agreements, or a representation by the worker that he or she is an independent contractor. Before entering into any independent contractor arrangement, we recommend that you contact legal counsel to inquire whether an individual can legitimately be so classified. Independent contractor inquiries are extremely fact-specific and require analysis of numerous federal and state laws. We also recommend that you verify with your legal counsel that your current independent contractors are correctly classified.

Vedder Price has significant experience in representing employers in “independent contractor” litigation and audits. Our lawyers are adept at counseling employers on independent contractor issues as well as drafting independent contractor agreements. Please contact **Joseph K. Mulherin** (312-609-7725), **Jonathan A. Wexler** (212-407-7732) or any

other Vedder Price attorney you have worked with if you have any questions about these issues. ■

Supreme Court to Hear Five Labor and Employment Cases

The United States Supreme Court began its latest term on October 5, with five cases on its docket that will directly impact employers. Two of the cases deal with labor arbitration; a third deals with the degree of deference due an ERISA plan administrator; a fourth addresses the amount of time a plaintiff has to file a discrimination charge; and the final one involves allegations of whistle-blowing and the attorney-client privilege.

In the first of two cases involving labor arbitration, the Court has already heard oral arguments in *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen General Committee of Adjustment, Central Region* (case number 08-604), a case involving several grievances dismissed by the National Railroad Adjustment Board (“NRAB”) because the union lacked written evidence that a required settlement conference had occurred. The district court upheld the dismissal, but the Seventh Circuit Court of Appeals reversed, finding that the dismissal was a denial of the union’s right to due process. While the Supreme Court may confine its decision to an interpretation of the Railway Labor Act, the decision may impact arbitrations in other contexts.

Supreme Court to Hear Five Labor and Employment Cases
continued from page 6

The second of the labor cases, *Granite Rock Co. v. International Brotherhood of Teamsters et al.* (case number 08-1214), arose when an assistant to the president of the international union, which was not a signatory to the collective bargaining agreement (“CBA”), directed striking workers not to return to work even though the local members ratified a new CBA containing a no-strike clause. Granite Rock sued, alleging breach of the no-strike clause and that the international union tortiously interfered with the contract. The district court found that no contract had actually been formed and that it lacked jurisdiction over the parent under the Labor Management Relations Act because the parent was not signatory to any alleged contract. The Ninth Circuit Court of Appeals held that the district court did not have jurisdiction and that that issue should be determined by an arbitrator. It also affirmed the dismissal of the tort claim against the international union. If upheld by the Supreme Court, this decision may clear the way for arbitrators to determine their own jurisdiction, which may make it easier for international unions to derail the bargaining process, while hiding behind the fact that they are not technically signatories to the agreement at issue.

In *Sally L. Conkright et al. v. Paul Frommert et al.* (case number 08-810), the Court will consider the degree of deference owed an ERISA plan administrator by the courts after the Second Circuit held that the federal courts must defer to a plan administrator’s reasonable

interpretation, if that interpretation was reached outside of an administrative claim for benefits (in this case, the calculation of an offset for rehired employees who had previously taken a lump-sum distribution). The Second Circuit also held that the courts possess discretion to adopt any reasonable interpretation of an ERISA plan’s terms when the issue arises in the context of calculating further benefits due as a result of an ERISA violation. Upholding the Second Circuit’s decision will likely open the door to an increase in litigation challenging plan administrators’ discretion and lead to multiple, or even conflicting, “reasonable” interpretations rendered by different courts considering the same plan.

The lone employment discrimination case on the docket, *Anthony J. Lewis et al. v. City of Chicago* (case number 08-974), presents the question of whether a prospective plaintiff’s time to file a charge of discrimination with the EEOC begins to run as soon as an employer announces a policy that has a disparate impact, or not until the employer actually applies the policy. The Seventh Circuit, where this case originated, along with the Third and Sixth Circuits, have held that the period begins to run as soon as the policy is announced, while the Second, Fifth and Ninth Circuits have held that the clock begins to run anew each time the employer makes a decision based on the policy. Even if the Supreme Court adopts the more employer-friendly counting method, nobody should be surprised if Congress steps in

just as it did after the Court’s 2007 *Ledbetter* decision.

Finally, there is *Mohawk Indus. Inc. v. Carpenter* (case number 08-678), a whistleblower case in which a Mohawk shift supervisor alleges he was terminated because he complained that the company employed illegal immigrants. The plaintiff, before being terminated, met with one of Mohawk’s outside attorneys. He later asked for information about the meeting after Mohawk claimed, in a related case, that the purpose of the meetings was to investigate his complaints about the employment of illegal immigrants. Mohawk argued the information was protected by the attorney-client privilege, but the district court held that Mohawk had waived the privilege by placing the meetings at issue in the related case. Mohawk appealed, but the Eleventh Circuit determined that it lacked jurisdiction because a discovery ruling, even one involving the attorney-client privilege, is not eligible for immediate appeal. Although the question before the Supreme Court is limited to if and when a discovery order may be appealed, a decision in favor of Mohawk may give the Eleventh Circuit the opportunity to clarify the scope of the privilege in workplace investigations.

If you have any questions about these cases, please contact **Aaron R. Gelb** (312-609-7844), **Neal I. Korval** (212-407-7780) or any other Vedder Price attorney with whom you have worked. ■

Expanded Whistleblower Protections under the Amended FCA

With examples of corporate malfeasance dominating the news, blowing the whistle is more popular than ever. Retaliatory discharge lawsuits brought by whistleblowers, however, are nothing new. Such claims have an understandable jury appeal; nobody seems surprised that a company, or a rogue manager, strikes back after accusations of wrongdoing. Sound policies and conscientious compliance departments can go a long way towards minimizing liability for whistleblower claims. Employers may face more whistleblower claims following the passage of the Fraud Enforcement and Recovery Act of 2009 (“FERA”), which amends the False Claims Act (“FCA”).

The FCA authorizes private citizens to file complaints and, under certain circumstances, bring suit on behalf of the U.S. government to punish corporate fraud involving federal contracts. The law protects whistleblowers (i.e., employees) from retaliation and rewards them with a percentage of the government’s recovery. Since 1986, private “whistleblower” claims have recovered \$12.6 billion in federal funds paid through government contracts and programs, with \$2 billion going to the individual whistleblowers. The FERA amendments raise the stakes, and employers should take note.

First, FERA removes several obstacles to prosecuting FCA claims. While the FCA has always protected

whistleblowers, FERA significantly extends both the scope of protection of whistleblowers as well as the kinds of actions that can give rise to a claim under the FCA. Where the FCA protected only the employees of the accused company, FERA adds contractors and corporate agents.

FERA significantly extends both the scope of protection of whistleblowers as well as the kind of actions that can give rise to a claim under the FCA

Second, the available remedies include reinstatement, double back pay plus interest, and any “special damages” resulting from the retaliation.

Third, while FCA only protected actions taken in conjunction with an FCA investigation or prosecution, such as initiating, aiding, or testifying in FCA litigation, FERA covers employees, contractors and agents who make “any lawful attempt” to expose or thwart fraudulent conduct.

Additionally, FERA authorizes the government attorneys to disclose information collected through the Civil Investigative Demand (“CID”) process to whistleblowers, a break from previous policy that will likely speed up investigations as whistleblowers are given access to government-obtained information. Previously, the Attorney General had to obtain

permission from a court to share such information. Whistleblowers and the federal government can also provide a copy of the complaint or any other pleading to a local or state government named as a co-plaintiff in the action. Most states have “mini” FCA legislation.

Last, but certainly not least, the FERA amendments will likely save claims that once would have been untimely. When the government intervenes in an FCA proceeding, it “relates back” to the original filing date of the whistleblower’s claim. In the past, whistleblower claims often remained under seal without any action taken, while the statute of limitations ran against the government. With government interventions now relating back to the original filing date, these cases will more likely be within the FCA’s statute of limitations.

The FERA amendments expand the protections afforded to whistleblowers, protect more possible whistleblowers, and enlarge the scope of actions covered. As a result, more whistleblower claims, and swifter prosecution of those claims, can be expected. To minimize risk and put your organization in a better position to defend itself against such claims, you should, at a minimum: (1) ensure you have the necessary policies in place, including a “Code of Conduct” that references fraud and includes a detailed description of how an employee can report concerns internally; (2) provide employees with a 24-hour, toll-free, anonymous complaint line; (3) have a designated

Expanded Whistleblower Protections
continued from page 8

individual (or team) trained and experienced in conducting investigations; and (4) train your managers on fraud issues relevant to your business and what is expected of them as agents of the organization.

If you have any questions about this article, please contact **Alan M. Koral** (212-407-7750), **Edward C. Jepson, Jr.** (312-609-7582) or any other Vedder Price attorney with whom you have worked. ■

Defamation Lawsuits Remain a Concern for Employers

Although many employers today are warily watching the legislative horizon for laws creating new protected classes (sexual orientation, whistleblowers) and expanding limitations periods (*Ledbetter*), they would do well to remember that increasing numbers of employees are turning to defamation claims to redress damage allegedly done to their reputation by discipline and discharge decisions. Because these claims are often filed in state court, where the judges are often more hesitant to grant summary judgment, the juries typically more generous, and the damages uncapped, there is significant risk for employers.

To prove defamation in most states, an employee must establish that: (1) the employer made a false statement about the employee; (2) there was an unprivileged publication of the defamatory statement to a third party; and (3) the employee's reputation was damaged. In the employment context, such claims usually involve

allegations that the employer has defamed an employee in connection with discipline or discharge.

A recent Seventh Circuit decision, *Farr v. St. Francis Hosp. & Health Ctrs.* (2009), illustrates how even an employee fired for what appears to be an ironclad reason may find a way to claim defamation. In *Farr*, a hospital supervisor discovered that one of her subordinates had been accessing pornographic websites from a work computer and fired him after the hospital investigated. Despite admitting that he had visited many of the sites, the employee sued for defamation, claiming that hospital administrators told his co-workers that he had accessed pornography at work. Even though the hospital prevailed, the case stands as a stark reminder to use caution when handling employee misconduct and performance problems, particularly in the context of an investigation involving numerous employees.

While workplace communications are ordinarily protected as privileged in defamation cases, the failure to conduct a proper investigation may jeopardize the privilege. For example, an Illinois jury awarded a plaintiff \$300,000 in defamation-related damages in 2005 after finding that the defendant employer failed to fully investigate allegations of the employee's misconduct and thus recklessly disregarded the true reasons for his termination. *Popko v. CNA Financial*, No. 01-03-3389 (Ill. App. Ct. 2005). More recently, a Connecticut court ruled that an employer forfeited the privilege that

normally applies to workplace communications in a defamation case where the supervisor who discharged the plaintiff had actual knowledge that the given reason was false. *Gambardella v. Apple Health Care, Inc.*, No. SC 17977 (Conn. May 19, 2009).

To minimize such risks, employers investigating allegations of misconduct should gather all relevant facts, assess the credibility of those involved, then determine the accuracy of the accusations and the appropriateness of the remedy.

Employers should also be mindful of the language used to discipline or terminate employees, steering clear of broad character assessments such as whether an employee lacks integrity, because it may be easier to prove defamation in connection with such statements. Instead, employers should limit communications, as much as possible, to provable conclusions, avoiding the use of inflammatory adjectives, and staying clear of overly broad conclusions.

Finally, employers should try to maintain as much confidentiality as possible in dealing with employee misconduct situations. For example, it is not advisable to conduct investigatory or disciplinary meetings or searches where coworkers can observe what is happening. Likewise, employers should limit the scope of company communications to only those parties who need to know, and avoid any non-essential dissemination.

Vedder Price can assist employers in reviewing

procedures, conducting misconduct investigations and defending against defamation cases in any forum. For assistance, you may contact **Christopher L. Nybo** (312-609-7729), **Roy P. Salins** (212-407-6965) or any other Vedder Price attorney with whom you have worked. ■

Congress Expands FMLA—Again

For the second time in the last two years, Congress has expanded the scope of the Family and Medical Leave Act (“FMLA”). On October 28, 2009, President Obama signed into law the National Defense Authorization Act for Fiscal Year 2010 (the “Act”). The Act amends the FMLA to expand the two new types of leave—qualifying exigency leave and military caregiver leave—that first were created as part of the National Defense Authorization Act for Fiscal Year 2008. These new provisions are effective immediately. See the Vedder Price LABOR LAW BULLETIN from February 4, 2008, for a description of the 2008 changes.

Qualifying Exigency Leave. The FMLA, as amended in 2008, allows eligible employees to take up to 12 weeks of leave each year for a “qualifying exigency” arising out of a family member’s active duty or call to active duty as a member of the National Guard or Reserves in support of a declared “contingency operation.” The Act expands this type of leave to cover those serving on active duty in any regular component of the Armed Forces (i.e., Army,

Navy, Air Force, Marines), who are deployed in a foreign country.

Military Caregiver Leave.

The Act also expands the FMLA’s military caregiver provisions to cover veterans. The FMLA allows eligible employees to take up to 26 weeks of leave to care for a member of the Armed Forces, National Guard or Reserves who is undergoing treatment for, or recuperating from, a serious injury or illness incurred in the line of duty while on active duty. As amended, the Act allows eligible employees to take leave to care for any former member of the Armed Forces, National Guard or Reserves during the first five years following his or her discharge from military service if the veteran is undergoing treatment for, or recuperating from, a serious injury or illness incurred in the line of duty while on active duty. The Act also expands the definition of “serious injury or illness” for military caregiver leave to include injuries and illnesses that are “aggravated by” active duty service.

As noted above, these new provisions are effective immediately. Employers that are subject to the FMLA (generally those with 50 or more employees) should update their FMLA policies, procedures and administrative forms accordingly. In addition, employers that are using the Department of Labor’s model FMLA notices should begin using the updated models as soon as they become available.

If you would like further information, please contact **Thomas G. Hancuch** (312-609-7824), **Alan M. Koral** (212-407-

7750) or any other Vedder Price attorney with whom you have worked. ■

Comment Period Open for Proposed Regulations to the ADA Amendments Act of 2008

The U.S. Equal Employment Opportunity Commission (“EEOC”) and the U.S. Department of Justice (“DOJ”) will be hosting a town hall meeting in Chicago to invite comments on the proposed regulations to the ADA Amendments Act of 2008 found at www.eeoc.gov. The agencies are encouraging input on the regulations from the perspectives of both the business and disability advocacy communities.

The meeting will be held on Tuesday, November 17, 2009 at Access Living, 115 West Chicago Avenue, Chicago, Illinois 60654. Individuals can address the panel during five-minute time slots between 9:00 a.m. and 4:00 p.m., and slots will be assigned by either advanced registration or on a first-come, first-served basis. For more information, or to register as a speaker, contact Rita Coffey at 312-353-7254 (TTY 312-353-2421) or at rita.coffey@eeoc.gov.

The EEOC and DOJ are also accepting written comments through November 23, 2009. Comments may be submitted by mail to Stephen Llewellyn, Executive Secretariat, EEOC, 131 M Street, N.E., Suite 4NW08R, Room 6NE03F, Washington, D.C. 20507, by fax at 202-663-4114 or through the Federal eRulemaking Portal at <http://www.regulations.gov> (ID#3046-AA85). ■

Recent Vedder Price Accomplishments

Mike Cleveland and **Mark Stolzenburg** prevailed in a jury trial in the Northern District of Illinois in October 2009. The plaintiff, a former human resources manager, alleged that she was denied the right to return to her job after an FMLA leave. The company's position was that her job was eliminated due to a corporate restructuring and that the company deferred informing her of the elimination of her position until she returned. After a three-day trial, the jury returned a verdict for the company on all of the plaintiff's claims.

Dick Schnadig and **Sara Kagay** obtained a favorable decision from the Seventh Circuit Court of Appeals, upholding summary judgment in favor of a national publishing company. The plaintiff claimed she was sexually harassed during several years of her employment, but the Seventh Circuit agreed with the District Court that her sexual harassment claim was untimely.

Jon Wexler obtained summary judgment in the Southern District of New York on behalf of a regional grocery operator. The plaintiff alleged race and national origin discrimination, retaliation and a hostile work environment.

Kevin Hennessy and **Ken Sparks** led a national food distributor to victory in defeating a union organizing campaign involving the company's truck drivers.

Kevin Hennessy and **Larry Casazza** successfully defeated a union organizing campaign involving a health care institution's mechanics.

Tom Wilde and **Tim Tommaso** obtained summary judgment on behalf of a national grocery chain on claims of gender, national origin, age and disability discrimination.

Jim Spizzo assisted a client with a complicated relocation of its manufacturing and corporate headquarters. The client will move production to one location and its corporate headquarters to another, losing an incumbent union and collective bargaining agreement in the process. Effects bargaining were completed with a modest stay bonus and no unfair labor practice charges filed.

Vedder Price is a founding member of the Employment Law Alliance—A network of more than 2,000 employment and labor lawyers “counseling and representing employers worldwide.”

**Chicago Labor and
Employment Group Members**

Thomas G. Abram..... 312-609-7760
 Bruce R. Alper..... 312-609-7890
 Paige O. Barnett..... 312-609-7676
 Mark I. Bogart..... 312-609-7878
 Lawrence J. Casazza..... 312-609-7770
 Katherine A. Christy..... 312-609-7588
 Michael G. Cleveland..... 312-609-7860
 Christopher T. Collins 312-609-7706
 Megan J. Crowhurst 312-609-7622
 Thomas P. Desmond 312-609-7647
 Aaron R. Gelb..... 312-609-7844
 Elizabeth N. Hall..... 312-609-7795
 Steven L. Hamann 312-609-7579
 Thomas G. Hancuch..... 312-609-7824
 J. Kevin Hennessy..... 312-609-7868
 Jonathan E. Hyun 312-609-7791
 John J. Jacobsen, Jr. 312-609-7680

John P. Jacoby..... 312-609-7633
 Edward C. Jepson, Jr. 312-609-7582
 Michael C. Joyce..... 312-609-7627
 Sara J. Kagay 312-609-7538
 Philip L. Mowery 312-609-7642
 Joseph K. Mulherin 312-609-7725
 Christopher L. Nybo 312-609-7729
 Margo Wolf O'Donnell 312-609-7609
 Angela P. Obloy 312-609-7541
 James S. Petrie 312-609-7660
 Paul F. Russell 312-609-7740
 Richard H. Schnadig 312-609-7810
 Robert F. Simon 312-609-7550
 Patrick W. Spangler 312-609-7797
 Kenneth F. Sparks 312-609-7877
 James A. Spizzo 312-609-7705
 Kelly A. Starr 312-609-7768
 Mark L. Stolzenburg 312-609-7512
 Lawrence L. Summers ... 312-609-7750
 Theodore J. Tierney 312-609-7530

Timothy J. Tommaso..... 312-609-7688
 Thomas M. Wilde, *Chair*.. 312-609-7821
 Jessica L. Winski..... 312-609-7678
 Charles B. Wolf 312-609-7888

**New York Labor and
Employment Group Members**

Alan M. Koral..... 212-407-7750
 Neal I. Korval..... 212-407-7780
 Laura Sack 212-407-6960
 Jonathan A. Wexler 212-407-7732
 Lyle S. Zuckerman 212-407-6964
 Valerie J. Bluth..... 212-407-7739
 Charles S. Caranicas..... 212-407-7712
 Michael Goettig..... 212-407-7781
 Daniel C. Green..... 212-407-7735
 Roy P. Salins 212-407-6965

VEDDERPRICE®

222 NORTH LASALLE STREET
 CHICAGO, ILLINOIS 60601
 312-609-7500 FAX: 312-609-5005

1633 BROADWAY, 47th FLOOR
 NEW YORK, NEW YORK 10019
 212-407-7700 FAX: 212-407-7799

875 15th STREET NW, SUITE 725
 WASHINGTON, D.C. 20005
 202-312-3320 FAX: 202-312-3322

www.vedderprice.com

About Vedder Price

Vedder Price P.C. is a national business-oriented law firm with 250 attorneys in Chicago, New York City and Washington, D.C. 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, health-care, trade and professional association, and not-for-profit law.

© 2009 Vedder Price P.C. The LABOR AND EMPLOYMENT LAW newsletter is intended to keep our clients and interested parties generally informed

on labor law issues and developments. It is not a substitute for professional advice. For purposes of the New York State Bar Rules, this newsletter may be considered ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome. Reproduction is permissible with credit to Vedder Price P.C. For additional copies or an electronic copy of this newsletter, please contact us at info@vedderprice.com.

Questions or comments concerning the newsletter or its contents may be directed to the Editor, Aaron R. Gelb (312-609-7844), the firm's Labor Practice Leader, Thomas M. Wilde (312-609-7821), the Managing Shareholder of the firm's New York office, Neal I. Korval (212-407-7780), or, in Washington, D.C., Theresa M. Peyton (202-312-3360).