VEDDERPRICE®

Chicago ■ New York ■ Washington, D.C.

November 2010

Labor and Employment Law

We are pleased to welcome *Steven P. Cohn*, an attorney specializing in international labor and employment law, to the firm. Prior to joining Vedder Price, Steve was Managing Counsel, Global Labor and Employment Law, for McDonald's Corporation, where he spent more than 15 years providing advice and counsel on international labor and employment issues. Following is an article written by Steve that discusses global union federations and their impact on employers.

The New Union Front

Unions are engaged in their own version of globalization through global union federations. These are umbrella organizations that coordinate the efforts of national member union affiliates, often a hundred or more. Those efforts focus on nonunion workforces in major countries through classic "top-down" organizing strategies.

Global union federations target many industries, including transportation, retail, services, food production, restaurants and hotels, chemicals and energy, construction and metal trades. Their efforts have gained traction as of late with media attention often focused on subsidiaries and suppliers to multinational companies. They act independently, through their national affiliates and by joining forces with like-minded nongovernmental organizations, institutions and political actors.

Who Should Be Concerned About Global Union Federations?

If you are a company doing business globally, or are a subsidiary of or otherwise affiliated with one, you should take note. Similarly, companies that sell goods or services to multinationals, or who are part of their supply chains, have been targeted as part of their "top-down" organizing campaigns.

What Are the Objectives of Global Union Federations?

Global union federations have several stated objectives that they use for disguising their ultimate effort at organizing. These include:

In this issue...

- Negotiating global framework agreements, thereby committing companies to adhere to international labor standards concerning freedom of association and collective bargaining wherever they do business.
- Using "social dialogue" to establish themselves as permanent partners of businesses at the highest levels, which then becomes a springboard for leveraging neutrality agreements and other organizing concessions.
- Using the forum of European works councils to supplement these efforts by expanding union connections to nonunion worker representatives and through gaining access to key information.

On their face, these activities appear innocuous. However, they are the cover for the global union federations' ultimate objective of increasing their national affiliates' membership through organizing previously nonunion workforces.

How do we know that these global unions are really after organizing my nonunion workforce?

The real aim of global union federations is shown by the key provision in the global framework agreements they negotiate, the companies they target and the timing and activities in which they engage. Also, most if not all of the companies targeted already have publicly implemented codes of conduct or they have signed globally recognized statements of principles, such as the United Nations Global Compact, committing themselves to adhere to international labor standards consistent with national law. Further, if you listen carefully, the global union federations will tell you that is what they are up to.

Content of Framework Agreements

Buried within the wording of global framework agreements is a commitment by business to remain neutral in union organizing. On its face, the wording appears to say only that the business agrees to abide by international labor standards on freedom of association and collective bargaining, without subjecting those standards to national laws. But this seemingly innocuous wording is misleading because those standards—derived from conventions of the International Labor Organization—require employer neutrality in union organizing campaigns. This neutrality commitment—which takes away an employer's free speech rights under section 8(c) of the NLRA—is the keystone of these documents.

Whom They Target, When and How

By targeting companies that already publicly commit themselves globally to adhere to international labor standards consistent with national laws—either through their own codes of conduct or through signing the United Nations Global Compact or other international codes—the global unions are saying that such "good guy" corporate behavior is not enough for them. They are saying that a company cannot be a responsible corporate citizen unless it makes a compact with a global union, which will then monitor the company's behavior globally. They are saying that adhering to international standards consistent with national law is not enough. And the reason is that companies could still avail themselves of their free speech rights under section 8(c).

It is no coincidence that the businesses targeted by global unions have a history of successfully using free speech rights to lawfully resist unionization efforts in the United States or elsewhere. Nor is it a coincidence that once a business signs a global framework agreement, it can be quickly unionized. Examples include:

- Wackenhut had successfully resisted SEIU unionization for years. But once Wackenhut's UK parent, Group4 Securicor, signed a global framework agreement with Union Network International (UNI), Wackenhut's guards were quickly organized. Within days of the agreement, SEIU announced that Wackenhut had agreed to "work together" with it. Group4 Securicor had been targeted in a report by a nongovernmental organization, War on Want, for allegedly paying "poverty wages" to its South African workforce. This negative publicity jeopardized Group4 Securicor's ability to win the valuable contract to provide security services at the World Cup.
- A previously union-free Illinois facility of French-based chemical company Rhodia was recently unionized by the USW. The lever to unionize it: a global framework agreement

The New Union Front
continued from page 2

that Rhodia headquarters had signed with the International Chemical, Energy, Mining and General Workers Union mandating employer neutrality.

- A global agreement between UNI and Telefonica, the Brazilian telecom company, has been credited with enabling UNI affiliate SINTETEL to increase its membership from 25,000 employees before the agreement to 120,000 after it.
- Sodexo, the French-based global catering concern, has been a UN Compact signatory since 2003 and works with unions throughout Europe. But it has also been the target of SEIU unionization efforts in the United States for years. Backed by UNI, SEIU and CGT (a French union) have each sued Sodexo for allegedly violating the voluntary Guidelines for Multinational Enterprises on labor standards. SEIU has also begun to attack Sodexo's food safety record, tying provision of school lunches to the union's efforts. A union-supporter Congressperson has recently called for a General Accounting Office investigation of Sodexo's practices. At stake is the renewal of the $1.4-billion contract to provide food service on U.S. navy bases.
- Several European-based multinationals, including Deutsche Telekom, UK-based grocery chain Tesco, Saint Gobain Group (France), Gamma Holdings (Netherlands) and Kongsberg Automotive (Norway), were all targeted for the "inconsistency" they have shown between their working relationships with unions in Europe (mostly because they are necessitated by the legal structure) and the alleged antiunion behavior of their U.S. subsidiaries. Each has been a signatory of a global instrument concerning labor rights for years. Each of their U.S. subsidiaries has been the target of organizing efforts for years.

Global Unions Admit Their Real Objective Is Top-Down Organizing

UNI's 2008 revised global agreement with Danish cleaning services company ISS shows that a company's agreement and practices to "respect workers' rights" are not enough for a global union if those workers are not organized. Despite a 2003 agreement between UNI and ISS committing the company to "respect workers' rights," UNI's affiliates had not been able to unionize ISS workers in the United States and developing countries. Key provisions of the revised agreement: UNI unions get direct access to nonunion workers, ISS agrees to neutrality, and it will have to recognize unions who met minimal standards under national law; in short—access, neutrality and card check.

The International Transport Workers Federation's website, when discussing whether framework agreements help unions expand their organization in multinational employers, tout, "they certainly should" and point to neutrality provisions in these agreements.

An ILO Training Center Program for Workers presentation describes the purpose of a framework agreement as providing a "rights framework to encourage recognition and bargaining." It added that framework agreements help unions to get recognized within multinationals, including their supply chains.

How Should Companies Respond?

If you are connected to a multinational, including through being a subsidiary or member of a supply chain, or if you are in one of the target industries containing multinationals, you should consider the following:

- Educating senior management at global, regional and national levels on the issues. Provide a fact-based analysis tailored to your organization. Ensure that they are prepared if faced with a surprise by the media, a union official, employee or other person asking that the company sign a global framework agreement.
- Developing and gaining management commitment to a sound company position regarding global framework agreements.
- Conducting a detailed analysis of your current and near-term labor relations and business situation for each operating unit/subsidiary.
- Closely following trends in legislation, consumer sentiment and your industry that might affect the labor relations climate and your position.

The New Union Front
continued from page 3

- Establishing communications channels so that real-time information on events and plans is channeled to appropriate managerial personnel.

If you have any questions about this article, or any global labor and employment law issue, please contact **Steven P. Cohn** (312-609-4596). ■

Appellate Court Refuses to Apply "Participation Clause" to Internal Company Investigations

Title VII forbids an employer from retaliating against an employee who reports discrimination. Title VII's antiretaliation provision contains two clauses: the "opposition clause," which prohibits an employer from discriminating against an employee who has opposed any employment practice prohibited by Title VII; and the "participation clause," which prohibits an employer from discriminating against an employee who has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VII.

The U.S. Court of Appeals for the Seventh Circuit recently held that the participation clause of Title VII did not protect an employee who made disparaging comments about her supervisor during an internal company investigation. *Hatmaker v. Mem'l Med. Ctr.*, 2010 LEXIS 18098, at *13 (7th Cir. Aug. 30, 2010). Memorial Medical Center (MMC) launched an investigation after Hatmaker repeatedly voiced concerns about her supervisor's ability to work well with women. Hatmaker told investigators that her supervisor was a "Southern Baptist" and "good ole boy" and therefore inherently sexist. MMC eventually cleared the supervisor of any wrongdoing and terminated Hatmaker. Hatmaker filed suit, claiming MMC retaliated against her for participating in the company investigation. The Seventh Circuit disagreed, holding that the *participation* clause applied only to "official" investigations—those conducted by an official body authorized to enforce Title VII—and not to internal company investigations. Writing for the court, Judge Posner stated, "participation [in an internal company investigation] doesn't insulate an employee from being discharged for conduct that, if it occurred outside an investigation, would warrant termination." Hatmaker, the court found, was terminated not because she participated in the investigation, but because of comments she made that demonstrated bad judgment and a preoccupation with superficial characteristics of her boss, and for harping on irrelevant issues. Hatmaker's conduct was therefore unprotected, and she could not claim retaliation under Title VII. The court declined to consider, however, whether an internal company investigation would qualify as "official" if a charge had already been filed with the EEOC.

The Seventh Circuit's opinion comes on the heels of a U.S. Supreme Court decision that held that the *opposition* clause of Title VII did protect an employee who spoke out about discrimination in response to company questions during an internal investigation. *Crawford v. Metro. Gov't of Nashville & Davidson County, Tenn.*, 129 S. Ct. 846, 853 (2009). The Metropolitan Government of Nashville and Davidson County launched an investigation to determine whether Crawford's co-worker was sexually harassing women. At the company's request, Crawford disclosed several incidences of harassment. The employer, however, declined to discipline the co-worker and instead terminated Crawford. Crawford filed a retaliation lawsuit, claiming her comments were protected by the opposition and participation clauses of Title VII. The Court held that "a person can 'oppose' by responding to someone else's question just as surely as by provoking the discussion." As a result, Crawford's conduct was protected under the opposition clause, and the Court declined to consider whether the participation clause also applied.

The Seventh Circuit's ruling brings some clarity to when employees may claim retaliation under Title VII. Namely, an employee may not claim retaliation under the participation clause of Title VII simply because he or she took part in an internal company investigation, provided no EEOC charge was pending at the time of his or her participation. However, the line between "participation" and "opposition" is thin, and employers still must tread carefully when taking adverse action against employees who participate in internal investigations.

the line between "participation" and "opposition" is thin

Appellate Court Refuses to Apply "Participation Clause"
continued from page 4

If you have questions about whether to terminate an employee who participated in an internal company investigation, please contact **Bruce R. Alper** (312-609-7890) or **Michelle T. Olson** (312-609-7643). ■

Seventh Circuit Announces a New Standard for Retaliatory Discharge Claims Brought Under the Illinois Workers' Compensation Act

Workers' compensation-related absences pose a number of challenges for employers, including declining production, staffing shortages and employee morale problems. When confronted with these issues, employers should be mindful of the very real dangers posed by discharging an employee who has missed time due to a workers' compensation-covered injury, in particular the likelihood of an Illinois Workers' Compensation Act retaliatory discharge lawsuit.

Retaliation claims are more popular than ever. Juries regularly reject the underlying discrimination claims in Equal Employment Opportunity (EEO) cases, only to find in favor of the employee on the retaliation claim. It fits within popular perceptions of human nature that someone accused of a misdeed will strike back, especially when the allegation is unfounded. Similarly, it is not a particularly difficult leap for a jury to find that an employer wrongfully discharged an employee who reported a workplace injury, despite the employee causing problems for the company. Indeed, employees need not show that their initial workers' compensation claim was successful—it does not matter whether the initial claim was denied or even deemed frivolous—the employee need only prove that his or her termination was causally related to the exercise of his or her rights under the Act. Plaintiffs' attorneys often rely on the proximity of the termination to the exercise of rights under the Act, where simply telling the employer one is thinking of filing a claim, or seeing a doctor, can be enough to invoke the Act's protections.

> it does not matter whether the initial claim was denied or even deemed frivolous

Damages may include back pay, future lost wages, mental anguish, and attorneys' fees. Punitive damages may be awarded when the employee shows that the employer's actions were willful and wanton. In *Clark v. Owens-Brockway Glass Container Inc.*, for example, an employee was fired for fraudulent misrepresentation in connection with her workers' compensation claim after her employer hired a private investigator who videotaped her mowing her lawn after she claimed to have suffered a back injury. The trial court awarded summary judgment to the employee, finding that her termination was causally related to her injury, as she was fired because her employer believed her claim for benefits was exaggerated. "While an employer may discharge an employee claiming benefits for a valid and nonpretextual reason, a dispute about the nature and extent of the injury does not constitute such a valid reason." 697 N.E.2d 743 (Ill. App. Ct. 1998). A jury then awarded Clark $150,000, including front pay and damages for emotional distress.

A recent Seventh Circuit decision, however, provides a modicum of good news for employers. In *Gacek v. American Airlines, Inc.*, the Court of Appeals rejected the use of the *McDonnell Douglas* burden-shifting theory (used with Title VII and other EEO claims), which does not require the employee to prove causation when deciding workers' compensation retaliation cases under Illinois law. Instead, the Court applied the more rigorous Illinois standard, which requires proof of a causal link between the protected activity and a plaintiff's termination. This means that a plaintiff may no longer prevail on summary judgment by showing that the employer's stated reason for the discharge was false—instead he or she must show that his or her protected activity was the cause of his or her termination. This heightened burden may be the difference between winning and losing for an employer in a close case.

There is no magic formula to follow when dealing with employees who have engaged in activities protected by statute, whether filing a charge, blowing the whistle, or, in this case, exercising their rights under the Illinois Workers' Compensation Act. That said, it is essential that employers take a measured and deliberate approach, ensuring that such

Seventh Circuit Announces a New Standard
continued from page 5

employees are being treated in a manner consistent with other employees who have not engaged in such activities, documenting each step along the way, and monitoring the actions of the impacted supervisors who are most likely to be viewed as having a motive to retaliate.

If you have any questions about this article, or how to manage a current employee who has engaged in some form of protected activity, please contact **Aaron R. Gelb** (312-609-7844), **Emily T. Collins** (312-609-7572) or **Benjamin A. Hartsock** (312-609-7922). ■

New Law Creates Right to "Pump in Private" for Breastfeeding Mothers at Work

Unbeknownst to many employers, the recently passed Patient Protection and Affordable Care Act (the PPACA) includes provisions granting broad protections to working mothers who breastfeed and wish to express milk while at work. Most significantly, the PPACA requires employers to provide reasonable unpaid break time to nursing mothers to express their breast milk in a private space for up to one year after the child's birth. This section of the law, which amends the Fair Labor Standards Act, mandates that the private lactation room may not be a restroom or a bathroom stall. These requirements apply to all employers; however, those that employ fifty or fewer employees may be exempt if these requirements "impose an undue hardship by causing the employer significant difficulty or expense."

Employers Should Take Note of State Breastfeeding Laws

The PPACA merely sets the minimum expectations for how an employer treats breastfeeding employees; it does not disturb the laws of those states that provide greater protections to breastfeeding employees. Whether it is the PPACA or a state statute, employers must abide by the law that is more favorable to the breastfeeding employee. As such, employers should familiarize themselves with the PPACA, as well the breastfeeding laws in the states in which they operate. With twenty-eight states, including Illinois and New York, having passed laws protecting the rights of employees who breastfeed, the chances are good that employers with widespread operations will find it necessary to provide unpaid breaks, private rooms or similar accommodations to breastfeeding employees.

> employers must abide by the law that is more favorable to the breastfeeding employee

Illinois employers must comply with the Nursing Mothers in the Workplace Act, a law that imposes many of the same requirements as the PPACA. Because the Illinois Act requires that breastfeeding breaks must typically coincide with already-provided break time, Illinois employers should now modify their policies and practices to ensure they are in compliance with the PPACA and grant breastfeeding breaks at the mother's discretion.

New York State goes beyond the PPACA and requires that employers provide breastfeeding accommodations for up to three years after the child's birth, rather than the one-year requirement of the PPACA. In addition, New York has adopted a Breastfeeding Mothers Bill of Rights, which must be posted in all maternal health care facilities. Conversely, there are PPACA requirements that will impose increased responsibilities on New York employers as the New York law does not prohibit employers from using restrooms as lactation rooms (as the PPACA does), nor does it require employers with fewer than fifty employees to establish that compliance with the law would amount to an "undue hardship" (as the PPACA does).

Other states that provide greater rights than those afforded by the PPACA include: Indiana, which requires that lactation break time be compensable; Hawaii and Montana, both of which make it an illegal discriminatory practice to refuse to hire, withhold pay or terminate an employee because of the employee's breastfeeding practices; and the District of Columbia, which includes breastfeeding in its definition of discrimination on the basis of sex and requires that private lactation rooms be kept "clean" and "sanitary."

New Law Creates Right to "Pump in Private"
continued from page 6

How Do Employers Comply With These Laws?

Because the breastfeeding protections went into effect in March 2010, employers should act now to ensure they are in compliance with the law. Policies should be drafted and disseminated to demonstrate compliance with both federal and state lactation room laws.

Employers should also consider the following related issues:

1. Is the lactation room actually private? As noted above, restrooms or bathroom stalls are insufficient. The designated lactation room, according to the Department of Labor, does not have to be a permanent space, and it will meet the federal requirements if it is accessible as needed by the employee. Further, employers should provide that safeguards such as a key card or manual lock are in place to ensure compliance with privacy requirements.

2. Are there any superseding state laws with which I must comply? Workplace lactation laws vary greatly among the states, and employers should carefully examine the relevant state statutes to ensure compliance with both federal and state law.

3. Who has been informed of the lactation room policy? Be certain that all employees are aware of the company's lactation room policy. Some form of training, especially for supervisory employees, is suggested. In addition, be sure that the lines of communication are open for those employees who will use the lactation room.

4. Has a breastfeeding-related conflict arisen? Treat all allegations of discrimination and/or retaliation based on an employee's or potential employee's breastfeeding practices seriously and address them promptly.

If you have any questions about this new law, please contact **Laura Sack** (212-407-6960), **Megan J. Crowhurst** (312-609-7622) or **Mark S. Goldstein** (212-407-6941). ■

New York Extends Bereavement Benefits to Same-Sex Partners

Effective October 29, 2010, New York employers that offer bereavement leave to employees following the death of a spouse, or the child, parent, or other relative of a spouse, may not discriminate against, and must extend the same privileges to, employees in same-sex relationships. Thus, if an employee suffers the death of a same-sex partner, or of the partner's parent, child, or other relative, the employee will be statutorily entitled to the same type of unpaid leave available to employees in state-sanctioned marriages.

This new law does not require employers to provide bereavement leave to employees; rather, it merely requires that those employers that currently provide such leave to married employees extend the privilege to employees in committed same-sex relationships. A committed same-sex relationship is defined as one wherein the partners "are financially and emotionally interdependent in a manner commonly presumed of spouses." Unfortunately, the law provides little guidance for employers to use in determining whether a relationship satisfies this rather vague standard. From a practical standpoint, inquiring into the particular and presumably private details of an employee's domestic life in order to determine whether or not to allow them to take a few days of bereavement leave is probably unwise in many instances. Not only will the employer appear insensitive, and likely learn more about an employee's personal life than could be conceivably necessary, but the employer runs the risk of a discrimination claim. Of course, if there are clear indications of abuse of the leave policy, or other readily apparent reasons why the employee may not be eligible, the employer should absolutely request additional information, preferably after consulting with counsel.

As the law goes into effect later this month, employers currently offering bereavement leave, or those that plan to do so, should update and/or revise their employment handbooks in accordance with the new bereavement leave legislation. If you have any questions about this new law, or employee leave issues in New York, please contact **Alan M. Koral** (212-407-7750) or **Michael Goettig** (212-407-7781). ■

Uncle Sam (via the EEOC) Wants You! (To Mediate)

The U.S. Equal Employment Opportunity Commission (the EEOC) has, for the past several

Uncle Sam
continued from page 7

years, made a concerted effort to convince employers to mediate discrimination charges before they are referred to investigation. The EEOC reports that 70 percent of mediated charges are successfully resolved. Most employers decide whether to mediate charges on a case-by-case basis, usually refusing when emotions run high or the evidence is particularly strong in the company's favor, agreeing when there is exposure or some compelling reason to settle. Citing a number of benefits, which are discussed below, the EEOC is trying to encourage more employers to make mediation a standard operating procedure through the Universal Agreement to Mediate (UAM) program.

A UAM is an agreement between the EEOC and a company to refer all eligible charges to the EEOC's mediation unit, enabling the parties to get to the mediation table more quickly. Even though a UAM has been signed, however, the company (or the charging party) may nevertheless opt out of mediation on a particular charge. Charges ineligible for mediation include:

- Charges that contain a class or Genetic Information Non-Discrimination Act claim.
- Charges filed solely under the Equal Pay Act.
- Cases as to which the EEOC deems it serves the public interest to investigate the charge.
- Cases the EEOC deems to have insufficient merit to investigate (the charging party will receive a Notice of Rights (Right to Sue) during the initial processing stage).

Employers may agree to a local, regional or national UAM. Local UAMs exist between the employer and a particular EEOC office (e.g., Chicago) to mediate charges filed in the field office's geographic jurisdiction. Regional and national UAMs are agreements to mediate all the company's eligible charges in a multistate region, or on a nationwide basis. The EEOC reports that more than 200 companies have signed regional or national UAMs, and over 1,500 companies have signed local UAMs. Indeed, McDonald's USA, LLC just signed a regional UAM in August 2010.

Benefits of a UAM

- **Point of contact.** A UAM establishes a point of contact at the employer where all EEOC charges are to be served. This helps maintain the confidentiality of charges and limits charges from being "lost in the shuffle."
- **Speed and efficiency.** The initial step of contacting the company about mediation is shortened or eliminated. Further, the scheduling of a mediation should be expedited.
- **Flexibility.** Companies are not required to mediate every charge. UAMs allow companies to opt out of mediation on a case-by-case basis.
- **More time.** Companies are given 45 days, rather than the normal 15 days, to decide if mediation is appropriate.

Drawbacks of a UAM

- **Highlights decision not to mediate.** Because all charges are initially presumed to be subject to mediation, the decision to opt out of mediation may draw attention to the charge.
- **May be unnecessary.** For certain companies, especially small companies, UAMs may be unnecessary because few, if any, charges are filed against them. It is also not recommended for companies not inclined to settle except in the most unusual of circumstances.

Companies need to assess how many charges they receive and whether they are amenable to the EEOC's mediation program. This program will benefit companies that have a high charge volume; those that wish to explore settlement before the costs escalate, but without appearing overly interested in doing so; or those that have had success with mediation in a particular EEOC field office.

If you have any questions about the EEOC's mediation program or mediation in general, please contact **Jonathan A. Wexle**r (212-407-7732) or **Timothy J. Tommaso** (312-609-7688). ■

Massachusetts Employers Alert: New Law Impacts Application Process

Effective November 4, 2010, employers in Massachusetts may no longer inquire into an applicant's criminal background on an initial employment application. Employers may still, however, request information regarding an applicant's criminal history at any point later in the application process. Only employers that, under federal or state law, are barred from hiring employees with criminal backgrounds for specific jobs are exempt from Massachusetts' new prohibition.

Under the same law, beginning in February 2012, employers conducting more than five criminal background checks a year will be required to establish a written policy addressing the use of criminal background checks for job applicants. The mandated policy must advise applicants of potential adverse employment decisions based on criminal background information obtained by the employer. Employers will be required to provide applicants with a copy of the policy, as well as any criminal background information obtained during the application process (whether through Massachusetts' Criminal Offender Record Information ("CORI") system or from other sources) and information regarding how the applicant may correct an inaccurate criminal record.

Employers in Massachusetts will still be permitted to make adverse hiring decisions based on an applicant's criminal history, assuming the above requirements have been met.

Employers are currently permitted to request criminal background information from Massachusetts' CORI system. Starting in February 2012, such requests will require an applicant's signature. Information available through Massachusetts' CORI system will be limited to felony convictions that have been closed for less than ten years and misdemeanors closed for less than five.

When an employer has obtained information regarding an applicant's criminal background using Massachusetts' CORI system, the employer must destroy all electronic and hard copies no later than seven years following an adverse hiring decision. If an employer hires an individual for whom the employer received a CORI report—or if the employer requested a CORI report after an individual was hired—all electronic and hard copies of such report must be destroyed no later than seven years after the employee's last date of employment.

If you have any questions concerning this new law, please contact **Sadina Montani Boik** (202-312-3363) or **Joseph K. Mulherin** (312-609-7725). ■

Recent EEOC Lawsuits Reinforce Need for Flexible Extended Leave Policies

When the ADA Amendments Act went into effect in January of 2009, prudent employers shifted their focus from questioning whether an employee was truly disabled, and thus covered by the ADA, to responding to accommodation requests and engaging in the interactive process. A recent spate of EEOC-initiated lawsuits involving "extended leave of absence policies" serves as a stark reminder that those employers that fail to routinely explore reasonable accommodations before terminating disabled employees, even employees who have been off work for more than a year, do so at their own peril.

> employers that fail to routinely explore reasonable accommodations before terminating disabled employees . . . do so at their own peril

The outer limits are easy to define. Even the EEOC acknowledges that *indefinite unpaid leave* is not a reasonable accommodation. Beyond that absolute, however, there are no clear-cut answers as to how far employers are expected to go in accommodating employees who are unable to work. Providing additional unpaid leave beyond the 12 weeks required by the FMLA will, in most cases, be viewed as a reasonable accommodation that employers must grant. Indeed, the EEOC has taken the position that an employer must provide additional leave at the expiration of the FMLA-covered period as a reasonable accommodation *unless* (i) there is another effective accommodation that would allow

the disabled employee to return to work and perform the essential functions of the employee's position, or (ii) granting additional unpaid leave would create an undue hardship for the employer. Unfortunately, many employers have, in an effort to manage their way through the complex web of state and federal leave laws, workers' compensation statutes and short-term disability benefit programs, promulgated absence control policies with automatic termination thresholds, often at the one-year anniversary.

Seeking to put an end to, or at least significantly curtail, this approach, the EEOC is issuing probable cause findings and filing lawsuits against employers around the country. Spencer H. Lewis, Jr., director of the EEOC's New York District Office, announcing a lawsuit against the Princeton Healthcare System, explained that "too many companies discriminate against persons with disabilities by strictly applying blanket leave policies." Chicago District Office Regional Attorney John Hendrickson, announcing a $6.2 million settlement with Sears, warned: "[T]he era of employers being able to inflexibly and universally apply a leave limits policy without seriously considering the reasonable accommodation requirements of the ADA is over. . . . Just as it is a truism that never having to come to work is manifestly not a reasonable accommodation, it is also true that inflexible leave policies which ignore reasonable accommodations making it possible to get employees back on the job cannot survive under federal law." The common thread running throughout these class actions is an allegation that the employer's extended leave of absence policies were unlawfully inflexible and prevented engagement in the interactive process required by the ADA.

Also noteworthy is the fact that the EEOC has recently sought nationwide discovery regarding the employer's extended leave of absence policies in a number of cases initially brought on behalf of individuals, as opposed to a class of employees. Employers are well-advised to treat seriously any claim involving such a policy, lest they be caught unprepared, devoting minimal resources to what is perceived as an insignificant single party claim, only to end up facing a pattern or practice class action lawsuit by the EEOC.

Reducing Risk

Proactive employers should consider the following options:

- Amend your leave of absence policies that call for automatic termination following a specified leave term; instead it should provide that termination will only occur if no reasonable accommodation is available to assist the employee in returning to work.
- Eliminate any policy or practice requiring that the employee be 100% released for full duty before allowing the employee to return to work.
- Assign a dedicated HR representative, or team of HR representatives, trained on ADA issues and reasonable accommodations, to handle leave of absence returns and the associated return to work and accommodation process.
- Consider extending an unpaid leave of absence for a reasonable period if the employee represents he or she will soon be able to return to work. Other accommodation options that should be considered include allowing the employee to return to modified duty, part-time work, reassignment to a different position (with or without a reasonable accommodation) and assistive devices.
- Notify an employee that he or she is approaching the end of the leave period and invite the employee to engage in the interactive process to discuss whether reasonable accommodations are available to assist the employee in returning. Importantly, employers should document every communication with the employee during the interactive process, including every offer of a reasonable accommodation and every response from the employee.
- No termination decision should be made unless the employer has a documented record of attempting to engage the employee in an interactive process to explore reasonable accommodations, and has fairly exhausted all reasonable efforts to assist the employee in returning to work.

If you have any questions about this article, please contact **Amy L. Bess** (202-312-3361), **Neal I. Korval**, (212-407-7780), **Thomas M. Wilde** (312-609-7821) or **Aaron R. Gelb** (312-609-7844). ■

Recent Vedder Price Accomplishments

- *J. Kevin Hennessy* obtained a temporary restraining order ("TRO") in Illinois against a food manufacturer's former product development director. The TRO has been in place for nine months running.
- *Thomas M. Wilde* obtained summary judgment in the District Court for the District of Columbia on behalf of a global pharmaceutical company on age discrimination and breach of contract claims.
- *Thomas M. Wilde* and *Emily Collins* achieved early dismissal of race discrimination, hostile work environment and retaliation claims asserted in the Central District of Illinois against an international food and beverage company.
- *J. Kevin Hennessy* assisted a client with the implementation of a private employment arbitration agreement program for a nationwide food distributor with over 10,000 employees.
- *Laura Sack* delivered harassment-free workplace training in addition to training on how to conduct internal investigations to the human resources staff of a well-known entertainment company.
- *Aaron R. Gelb* and *Joseph K. Mulherin* obtained a directed finding on a former bus boy's same-sex sexual harassment claim against a large Chicago-area restaurant during a trial before the Illinois Human Rights Commission.
- *Valerie J. Bluth* obtained a favorable decision for the employer, a specialty hospital, in an unpaid wage claim brought by a former employee in a small claims arbitration in Bronx Supreme Court.
- *Lyle S. Zuckerman* and *Roy P. Salins* prevailed on a motion for summary judgment in the United States District Court for the Southern District of New York on behalf of an investment bank that was sued by a former Vice President for discriminatory discharge on the basis of gender and age, retaliation, and pay disparity on the basis of gender. The victory resulted in the dismissal of all of the plaintiff's federal claims.

Vedder Price Hosts National Association of Women Business Owners (NAWBO) Event

Vedder Price is proud to have been the recent host of a NAWBO monthly breakfast meeting. Labor and Employment associate *Elizabeth N. Hall* chaired the meeting.

Vedder Price is a longtime sponsor of the Chicago Area Chapter of NAWBO. Founded in 1975, NAWBO represents more than 10 million women-owned businesses, the fastest growing segment of the United States economy. The organization boasts more than 7,000 members and 80 local chapters across the nation.

Vedder Price is a founding member of the Employment Law Alliance—a network of more than 3,000 employment and labor lawyers "counseling and representing employers worldwide." Membership provides Vedder Price and its clients with network access to leading employment and labor counsel in all 50 states and over 100 countries around the world.

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
Steven P. Cohn 312-609-4596
Christopher T. Collins 312-609-7706
Emily T. Collins 312-609-7572
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
Benjamin A. Hartsock 312-609-7922
J. Kevin Hennessy 312-609-7868
Scot A. Hinshaw 312-609-7527
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
Philip L. Mowery 312-609-7642
Joseph K. Mulherin 312-609-7725
Christopher L. Nybo 312-609-7729
Angela P. Obloy 312-609-7541
Margo Wolf O'Donnell 312-609-7609
Michelle T. Olson 312-609-7643
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
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
Michael Goettig 212-407-7781
Mark S. Goldstein 212-407-6941
Daniel C. Green 212-407-7735
Roy P. Salins 212-407-6965

Washington, D.C. Labor and Employment Group Members

Amy L. Bess 202-312-3361
Sadina Montani Boik 202-312-3363

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 composed of 270 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.

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., Amy L. Bess (202-312-3361).