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Labor and Employment Law

Changing the Rules of the Game: The NLRB Is Making Union Organizing Easier

As discussed in previous Client Alerts and newsletters, employers may expect change under the National Labor Relations Board (NLRB) appointed by the current administration. Although recent developments in Congress make it unlikely that the Employee Free Choice Act (EFCA) will be passed any time soon, the NLRB has indicated that it will exercise its power to implement union-friendly rules. These changes will affect almost every private employer nationwide.

The Board recently issued a proposed rule requiring all private employers to post a prominent notice to employees informing them of their rights to organize and to strike and picket and that contains the NLRB's contact information. The proposed rule also requires that the notice be distributed electronically if the employer customarily communicates with employees by such means. Failure to post the notice will be considered an independent violation of Section 8(a)(1) of the National Labor Relations Act.

The newly appointed General Counsel for the National Labor Relations Board has already implemented new rules encouraging local NLRB offices to obtain injunctions requiring "real time" reinstatement of employees terminated during union organizing drives and extending such injunctions to lesser offenses, such as unlawful promises or threats made to employees during campaigns. The General Counsel has also issued guidelines authorizing the NLRB to seek broader remedies on unfair labor practice cases, such as union access to the facility and to company bulletin boards, as well as turning over addresses and phone numbers of employees.

There are indications that the Board is also considering shortening the time between the date of a petition for an election and the election itself. Currently, internal Board rules provide that the period should not exceed 45 days, but it is possible that the Board will reduce that to 14 days. The Board is also looking at implementing electronic voting in elections.

The Board is currently reconsidering some past precedents under the new administration. For example, the Board is already reconsidering standing precedent on (1) use of company-provided e-mail

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systems to disseminate pro-union information to coworkers, (2) how long a successor employer must continue to recognize the union, and (3) whether a bargaining unit consisting of only certified nursing assistants is appropriate, rather than requiring all nonprofessional employees to be included.

The Board has also dived into the electronic water cooler. In a highly publicized case arising out of Connecticut, the Regional Office has issued a complaint against an ambulance company for its termination of an employee who posted derogatory comments about his supervisor on his Facebook page, which was accessed by coworkers who also posted similarly negative comments. At issue is whether those comments were protected concerted activity. A trial before the administrative law judge is set for early this year.

Employers may expect that 2011 will bring continued changes in the NLRB rules, many of which will assist unions in organizing employees. Although many employers are reluctant to mention "union" to their nonunionized workforce, once the proposed NLRB rule requiring posting of union organizing rights is finalized, the word will be out. Many employers are therefore proactively considering positive employee relations communications regarding the subjects of unions and their impact on employees, customers and their businesses.

If you have any questions about this article or would like to discuss the NLRB's recent changes, along with those that may be on the horizon, please contact **J. Kevin Hennessy** (312-609-7868) or **Mark L. Stolzenburg** (312-609-7512). ■

Social Media: More Reasons to Pay Close Attention to What Your Employees Say and What Your Company Does About It

When your employees say nice things about your company, its products or services in their blogs, posts and tweets, they may be running afoul of the Federal Trade Commission. How your company reacts when employees say not-so-nice things about the company, their bosses or even the human resources department can get you into hot water with the National Labor Relations Board.

Disciplining Employees Because of Online Comments

In past Newsletter issues (August 2010, April 2010 and November 2009), we highlighted the pros and cons of monitoring social media websites and the importance of well-drafted employment policies. Although a handful of states (including New York and Illinois) have passed laws protecting employees from disciplinary action for engaging in lawful off-duty conduct, most employers felt secure in the belief that they could discipline or even fire an employee who said bad things about the company online. However, a recent complaint filed by the National Labor Relations Board (the "NLRB" or "Board") in October 2010 calls into question the ability of employers to take adverse action based on online postings. (*American Medical Response of Connecticut, Inc. and International Brotherhood of Teamsters, Local 443*, Case No. 34-CA-12576.)

According to the NLRB, an American Medical Response (AMR) manager asked one of his employees to write a report in response to a customer complaint about that employee's work. The employee requested but was denied union representation, and later posted critical comments about the manager on her Facebook page. The employee's statements attracted supportive posts from her coworkers, some of whom echoed her complaints about the manager. AMR discharged the employee approximately three weeks later.

The NLRB issued a complaint alleging that the employee's Facebook postings constituted protected concerted activity and that AMR violated the National Labor Relations Act (NLRA) by firing the employee for her postings. The Board further contends that AMR's blogging and Internet policy interfered with its employees' statutory right to engage in concerted activity by prohibiting "employees from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors."

The complaint must be reconciled with the Board's position taken in a December 2009 memorandum by its General Counsel's Division of Advice. In that memorandum the Division analyzed whether a social media policy that prohibited employees from disparaging the company's products, management and employees violated the NLRA. Concluding it did not, the Division focused on the fact that the policy forbade a variety of activities, such as discussing confidential company information or posting explicit sexual references on social media sites. In light of those additional restrictions and because there was

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no evidence that the policy was issued in response to union activity or was enforced because of it, the Division of Advice determined that a reasonable employee would understand that the policy did not prohibit activity protected by the NLRA.

Employers should watch the *AMR* case to see whether it reflects a shift in the Board's position. Meanwhile, employers may want to revisit their social media policies and consider whether they should be revised to prohibit a narrower range of communications that are not simply "disparaging" but are discriminatory or harassing; in short, the same type of comments that would be impermissible in the workplace. Before taking disciplinary action for online postings, employers must consider not only whether the employee's comments are protected under the NLRA but also under EEO and other laws giving employees the right to oppose unlawful employment practices.

Finally, employers should keep in mind that violations of social media policies will be treated no differently than other policy violations. Recently, an arbitrator ordered the reinstatement of a reporter for Radio Free Asia who was terminated for a series of indiscreet tweets regarding the subjects of one of his stories. *Washington-Baltimore Newspaper Guild, Local 32035 & Radio Free Asia* (Arb. Fishgold). The reporter used Twitter to respond to complaints from the subjects of one of his stories, despite being warned against using the site in that manner by his supervisor. Finding these warnings to be unclear, the arbitrator reinstated the reporter with full back pay. This decision reminds us that while electronic communication policies reflect employer attempts to keep pace with our rapidly evolving technology, violations of those policies are new to arbitrators, administrative agencies and courts, who may view them as employers overreaching into off-duty activities that are accepted forms of personal expression.

Monitoring Employees Who Make Online Endorsements

Although the NLRB's October 2010 complaint puts at risk employer attempts to control negative comment in the blogosphere by employees, companies also must keep in mind that employees who say good things about their employer's products and services on the Internet can inadvertently cause problems unless accompanied by proper disclosures and disclaimers.

The Federal Trade Commission ("FTC") released guidelines in December 2009 (called "Guidelines Concerning the Use of Endorsements and Testimonials in Advertising") which state that employers can be held liable for: (1) false or misleading statements an employee or paid endorser makes while posting about the company's products and services online and (2) the failure of the employee or paid endorser to disclose his or her connection to the company when making these posts. Liability can attach even if the employer is unaware of what the employee is posting.

The FTC Guidelines are intended to protect consumers from deceptive online endorsements and advertising. Endorsements are "any advertising message . . . that consumers are likely to believe reflects the opinions, beliefs, findings, or experiences of a party other than the sponsoring advertiser." 12 C.F.R. § 255.0 (2009). Connections between the endorser and the seller of the advertised product "that might materially affect the weight or credibility of the endorsement" must be disclosed. The Guidelines suggest that employees' endorsements of their employers' products or services can fall within the rules. For example, if an employee of Company X, a large diaper manufacturer, posts how much he loves X's diapers on an online message board designated for discussions about parenthood, that employee needs to disclose that he works for the company. If he doesn't, both he and the company could be legally liable if a consumer later claims he was misled by the advertisement. The disclosure needs to be clear to the average online reader and can be as simple as, "I work for Company X." *See Federal Trade Commission, The FTC's Revised Endorsement Guides: What People Are Asking*, http://ftc.gov/bcp/edu/pubs/business/adv/bus71.shtm.

The FTC recognizes that employers cannot police every employee's online communication. However, an employer should make a reasonable effort to educate and train its employees about what they can and should say if they intend to discuss the company's products or services online. Written policies should either prohibit online posts about the company altogether or require employees to clearly disclose their employment relationship when making these types of comments. Putting forth a good-faith effort to prevent the type of misleading endorsement the FTC Guidelines are designed to address should be a relatively easy task to accomplish.

For further information please contact **Aaron R. Gelb** (312-609-7844), **Elizabeth N. Hall** (312-609-7795) or **Emily T. Collins** (312-609-7572). ■

Recent EEOC Lawsuits Suggest a Prudent New Year's Resolution for HR Professionals

As we reported several years ago, the EEOC has shifted its focus towards so-called "systemic" litigation (*EEOC Gearing Up for High-Impact "Systemic" Litigation*, August 2006). This initiative targets a pattern or practice, policy, or class case where the alleged discrimination has a broad impact on an industry, profession, company or geographic area. Examples, according to the EEOC, include "discriminatory barriers in recruitment and hiring; discriminatorily restricted access to management trainee programs and to high level jobs; exclusion of qualified women from traditionally male dominated fields of work; disability discrimination such as unlawful pre-employment inquiries; age discrimination in reductions in force and retirement benefits; and compliance with customer preferences that result in discriminatory placement or assignments." The EEOC will likely be able to carry out its plans, having received a $23 million budget increase in 2010 for increased enforcement (including "systemic" discrimination), and requesting an $18 million budget increase for this year.

Several recently filed cases suggest that the EEOC is keeping its word. Last September, the EEOC filed a lawsuit alleging that a steel company's alcohol testing policy violates the Americans with Disabilities Act (the "ADA") (www.eeoc.gov/eeoc/newsroom/release/10-5-10.cfm). The allegedly objectionable test is conducted pursuant to a nationwide policy of randomly administering alcohol breath tests to employees who are within their 90-day probationary period. Unlike testing for the use of illegal drugs, alcohol testing is considered a medical examination under the ADA, meaning that it is permitted only when the outcome is "job related" and "consistent with business necessity." It can only be conducted when employers have a "reasonable belief, based on objective evidence, that a particular employee will be unable to perform the job or will pose a direct threat due to a medical condition." Likewise, random alcohol testing will not pass muster unless it is limited in frequency and duration to address the employer's legitimate safety concerns, conditions that the EEOC does not believe are met in this case.

More recently (December 2010), the EEOC sued a nationwide provider of postsecondary education, alleging that it had engaged in a pattern or practice of discrimination by refusing to hire a class of African-American job applicants with poor credit histories (http://www.eeoc.gov/eeoc/newsroom/release/12-21-10a.cfm). The defendant allegedly has a practice of running background checks on all prospective employees, which the EEOC contends has an unlawful disparate impact on African-Americans. Asserting that this hiring practice is neither job-related nor justified by business necessity, the EEOC has accused the defendant of violating Title VII of the Civil Rights Act of 1964.

Although these two lawsuits involve two very different legal theories, the EEOC's decision to file them should serve as a reminder for HR professionals. First, both lawsuits challenge HR practices that some might consider fairly routine and common. Also, unlike other areas of recent EEOC scrutiny such as English-only policies or religious discrimination, the practices challenged do not appear to have been on the EEOC's radar until fairly recently.

But perhaps most importantly, the cases involve the sorts of practices that HR professionals may face increasing business pressures to adopt, given current economic conditions. With an unprecedented number of people looking for work, many job candidates have experienced credit troubles. Already reluctant to hire new employees, companies are especially cautious about hiring employees who may bring additional risks. Similarly, the federal government recently announced that the level of substance abuse is increasing for the first time in years.

Given these factors, it logically follows that employers are increasingly considering the use of tools like credit checks and drug and alcohol testing to screen prospective and current employees. Companies adopting aggressive employment screening measures that tend to reduce or eliminate the opportunities available will continue to be the subject of close scrutiny by the EEOC and other federal and state agencies.

As a result, companies should take the opportunity now to review their current HR practices and minimize their exposure to "systemic" discrimination claims. With its vast experience in counseling employers on background checks, drug testing and related HR administrative practices, Vedder Price is well equipped to assist any client with the methods it uses to recruit, hire and retain employees. And the firm's nationwide litigation practice is well prepared to deal with any EEOC or administrative investigation into such measures. If you would like more information or have

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any questions, please contact **Lyle S. Zuckerman** (212-407-6964), **Amy L. Bess** (202-312-3361) or **Christopher L. Nybo** (312-609-7729). ■

Misclassified Maintenance Worker Figures to Clean Up: Judge Holds He Was Not an Independent Contractor

Staffing flexibility and efficiency. Reduced liability for federal and state employment laws. Cost savings. There are many reasons why companies use independent contractors. But the bottom line is that these benefits, particularly in today's economy, can make the difference between remaining competitive in the market place and falling behind. As a result, many employers push the envelope, classifying individuals as independent contractors when they are truly regular employees. Government agencies like the U.S. Department of Labor (the "DOL") and the plaintiffs' bar have taken notice and are challenging employers who break the rules. A recent case in the Northern District of Illinois, *Bulaj v. Wilmette Real Estate & Mgmt. Co.*, N.D. Ill. Oct. 21, 2010, highlights some of the mistakes employers make and the risks associated with misclassifying employees as independent contractors.

Bulaj worked for Wilmette, a property management firm, for over 12 years as a building maintenance worker. After losing his job in 2008, Bulaj filed a lawsuit claiming that he worked 66 hours per week and that Wilmette failed to pay him overtime, in violation of the Fair Labor Standards Act (the "FLSA") and Illinois state law. The Court granted summary judgment to Bulaj, finding that he was improperly classified as an independent contractor. Unable to dispute the key allegations, Wilmette essentially had no defense to the allegations.

While some of the mistakes Wilmette made suggest that the company made no real effort to comply with the law, the case is nonetheless instructive. Following a six-factor test used by the Seventh Circuit Court of Appeals (Illinois, Indiana and Wisconsin), the Court cited the following factors in finding Bulaj to be an employee rather than an independent contractor:

- Bulaj was engaged in the core work of Wilmette's business. As a maintenance worker charged with the upkeep and repair of the buildings managed by Wilmette, Bulaj was doing what the company does, as opposed to a graphic designer, for example, engaged to create a new corporate logo. As the judge noted, Wilmette would likely lose customers if the buildings it managed fell into disrepair because Bulaj did not do his job.
- Wilmette treated Bulaj like an employee, setting his schedule, monitoring the quality of his work, and disciplining him whenever his work fell below the company's expectations. And while Bulaj came to the position with prior experience in skilled trades like carpentry and plumbing, much of the work he performed was basic janitorial work that did not require any special training or abilities.
- Bulaj had no opportunity for profit or loss as part of the engagement, as he received a regular salary every two weeks.
- Bulaj worked in the same capacity for more than 12 years, during which Wilmette withheld federal and state taxes from his paychecks and reported his earnings on a W-2 rather than a 1099 Form.

Employers would do well to recognize that loyalty and tenure mean little when employment relationships end. Oftentimes, contractors themselves are fine with being classified as such—until something goes wrong and the relationship ends. Bulaj, for example, worked in this capacity for 12 years—apparently without complaint or concern—until he was fired in 2008. Then he sued. Employers should never assume that their classification decisions are risk free simply because nobody has objected to them or filed suit in the past. Even a long-term, model employee may turn around and sue when the relationship sours or ends. There are no guarantees.

What to do? There is a series of factors that one can evaluate and assess to determine whether someone should be classified as an employee or independent contractor. Because the potential liability can be significant, it is best to be proactive and review any questionable classification decisions before the DOL comes calling or a lawsuit is filed. A simple audit can be conducted for far less than it would cost to respond to a lawsuit. Short of that, there are several steps companies can take, including:

- **Put it in writing.** Make sure you enter into a written agreement with anyone who will be performing services as an independent contractor, and include in that agreement all the appropriate bells and whistles.
- **Use "real" contractors.** If the individual has his or her own business, with an office, company

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name, business cards and the like, the greater the likelihood that person will not be viewed solely as your employee. By the same token, do not preclude him or her from working for other companies. The contractor should have his or her own tools; if you are providing the tools and supplies, or reimbursing him or her, that suggests the person is an employee, not a contractor.

- **Keep your distance.** Although you can and should insist upon a certain level of service, refrain from trying to oversee the day-to-day functioning of contractors as far as the methods used to reach the end result for which you contracted with them. Do not insist they perform the work on your premises, or work specific hours. Do not discipline them or give them formal performance evaluations.
- **Compensate appropriately.** Structure the arrangement so the worker has an opportunity for profit or loss rather than paying an hourly rate or salary.
- **Use common sense.** Do not give them business cards for your company. Do not invite them to your employee-only holiday party. Issue a 1099, rather than a W-2. Do not retain former employees as contractors and do not allow the agreement to renew automatically at the end of each term.
- **Be realistic and trust your gut.** If the contractor will be doing "the business of your business" and there really is no way around it, there simply may not be any way to use the individual as a contractor without violating the law. The question then becomes how much risk you can tolerate.

If you have any questions about this article, or about the use of independent contractors in general, please contact **Aaron R. Gelb** (312-609-7844), **Joseph K. Mulherin** (312-609-7725) or **Roy P. Salins** (212-407-6965). ■

EEOC Issues Regulations on Use and Disclosure of Genetic Information

On November 9, 2010, the Equal Employment Opportunity Commission (EEOC) issued its Final Rule implementing the employment provisions found in Title II of the Genetic Information Nondiscrimination Act (GINA). The Final Rule, which went into effect on January 10, 2011, prohibits employers from using genetic information in making employment decisions and from requesting, procuring or disclosing such information. GINA will be enforced by the EEOC under the same procedures and remedies applicable to Title VII.

GINA has the same coverage as Title VII, meaning that it protects applicants, employees and former employees, and it applies to any employer or other entity now covered by Title VII (meaning employers with 15 or more employees).

"Genetic information" is defined as information relating to: (i) the genetic tests of an employee or the employee's family members; (ii) family medical history; (iii) an employee's request for, or receipt of, genetic services, or participation in clinical research that includes genetic services by the employee or a family member; and (iv) the genetic information of a fetus carried by an employee or by a pregnant woman who is a family member of the employee.

The regulations make clear that "genetic information" may not be used in making any type of employment decision.

It is a separate violation for an employer to request or obtain genetic information, with the following exceptions:

- When the information is obtained inadvertently ("water cooler talk")
- As part of health or genetic services (including a wellness program) that a covered entity provides on a voluntary basis
- In the form of family medical history to comply with the Family and Medical Leave Act, state or local leave laws or certain employer leave policies
- From sources that are commercially and publicly available, such as newspapers, books, magazines and electronic sources, but the information may not be used and the employer may not intentionally seek out such information
- As part of genetic monitoring that is either required by law or provided on a voluntary basis

Because family medical history is now considered genetic information, employers and their health care providers are expressly prohibited from asking applicants and employees about their family's medical history during post offer medical examinations, fitness for duty evaluations and accommodation or most

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leave requests. Although family health information may be requested to support an FMLA or other leave to care for a *family member's* serious health condition, it may not be obtained if an employee is requesting time off for his or her own medical condition or to request an accommodation under federal or state disability laws. The regulations provide safe harbor language that an employer should send to health care providers (or insert in appropriate forms) instructing them not to request genetic information during pre-employment and fitness for duty examinations and in connection with most leave or accommodation requests.

Genetic information may be disclosed under limited circumstances:

- To the employee or family member upon receipt of the employee's or family member's written request
- To a health researcher conducting federally regulated research
- In response to court order (not otherwise discoverable)
- To government officials investigating compliance with Title II of GINA
- In accordance with the certification process for FMLA leave or state family and medical leave laws
- To a public health agency concerning a contagious disease that presents an imminent hazard of death or life-threatening illness

As to storage, genetic information obtained after November 21, 2009 should be maintained separately and confidentially like other employee medical information. Genetic information obtained prior to November 21, 2009 may be retained in a personnel file, but the best practice would be to keep it in a separate medical file.

GINA complaints will be investigated by the EEOC, and the remedies available under GINA are the same as those under Title VII. Note that many jurisdictions do not have state or local laws prohibiting discrimination based on genetic information, which may make the charge-filing period under GINA only 180 days.

With the GINA regulations now in effect, employers should consider the following action items:

(i) Revise nondiscrimination and antiharassment policies to include protection against discrimination and harassment based on genetic information.

(ii) Revise forms or otherwise send the safe harbor instructions to internal and external health care providers, directing them not to request genetic information.

(iii) Educate your employees, particularly management and HR staff, to avoid inquiry into family history even when well intended.

(iv) Maintain separate and confidential medical files.

If you have any questions, please contact **Bruce R. Alper** (312-609-7890) or **Amy L. Bess** (202-312-3361). ■

Struggling with Intermittent FMLA Leave

It's not unusual. An employee calls in one day, and he reports that he has kidney stones. He says the pain is so great that he has to stay home. He tells you that he has had the condition for a while but was too embarrassed to talk about it. When he comes to work the next day, he tells you that he's probably going to have to call in or come in late a few more times until he's better. What do you do?

By now, the general requirements of the Family and Medical Leave Act (FMLA) are well known to employers. One issue, however, that continues to challenge employers (and lawyers, too) is how best to manage an employee who takes intermittent FMLA leave for his or her own serious health condition, or the serious health condition of a family member. This includes occasional leave for doctors' appointments for a chronic condition, treatment (e.g., physical therapy, psychological counseling,chemotherapy), or temporary periods of incapacity (e.g., severe morning sickness, asthma attack).

Here are some things to keep in mind when dealing with intermittent leave requests and to help limit abuse of this type of leave:

Don't Be Fooled

Intermittent leave doesn't mean that your employees may start showing up late to work and just say it's for intermittent FMLA leave. They have to follow your normal FMLA approval process. Where the need for leave is unforeseeable, an employee must provide notice as soon as possible and practical, taking into account the circumstances of the situation. It should be practical for an employee to provide notice of the need for FMLA leave either the same day or the next

business day after becoming aware of it. Moreover, you should establish and enforce reasonable call-in and attendance policies for all absences, as the FMLA provides that employees on FMLA leave must follow the employer's usual and customary call-in procedures for reporting an absence.

If the intermittent leave is foreseeable, the employee must give you 30 days' notice. If they give fewer than 30 days, you may delay the leave until at least 30 days after the date you actually receive notice. But be sure your policies or postings alert employees that they must provide the 30 days' notice for foreseeable leaves and enforce the advance-notice role for all leaves, not just FMLA leave. And remember that you may not deny an employee's permission to take FMLA leave if they don't give the proper notice—you may only delay it.

An employee is not entitled to take intermittent leave for the birth, adoption or placement of a healthy child, unless the employer agrees. Of course, if the child has a serious health condition, then FMLA leave must be permitted if all the other requirements are satisfied.

Get a Certification

This is your best weapon in preventing intermittent leave abuse. There must be a medical need for intermittent leave, and a certification is the proof of it. Be sure to give the employee written notice designating the leave as FMLA and explaining his or her rights and responsibilities. You have five business days to do this. An employee must secure a medical certification for the leave and return it to you within 15 calendar days, unless it is not practicable under the circumstances despite the employee's good-faith efforts.

If the certification makes a blanket statement, like, "Intermittent leave should be provided," ask for more concrete details. Often, doctors are in a hurry and will not fill in the certification completely or they provide vague or unreadable information. If you get a certification that's not complete, vague or nonresponsive, advise the employee in writing what additional information or clarification is needed. The employee has seven calendar days to get the certification fixed and return it to you. If the resubmitted certification is insufficient, you may deny FMLA leave protection until a sufficient certification is obtained. A certification that is not returned at all means the employee has no FMLA protection.

You may also require that a certification set forth the reasons for the work restrictions, why the employee cannot do his or her job except intermittently (or on a reduced schedule), and the likely duration the intermittent leave will be necessary. You may also seek an estimate of the frequency and duration of the episodes of incapacity. In fact, you may wait to approve the leave until you have this information.

Remember, you may not request additional information from the healthcare provider directly, other than for clarification and only after you have given the employee a chance to fix the certification. However, if you get the employee's permission, you may have a company doctor or nurse or a human resources employee speak with the employee's doctor in an effort to better understand the condition, the need for leave and possibly scheduling treatment around work. Just like with any FMLA leave situation, you may seek a second and third opinion if you have doubts about the certification.

Each time the employee uses the intermittent leave, make a limited inquiry about the reasons. You're entitled to verify that it's for the reasons stated in the original certification. You generally may request recertification of the employee's condition every six months. The employee has to pick up the cost of the recertification. You may ask for a recertification sooner if things start to change with the intermittent leave. For example, if the employee requests an extension of the intermittent leave or reduced schedule, or if the duration or frequency of the absences changes significantly (e.g., if the certification gives the employee one or two days off for migraines, but the employee starts taking four days). You may also seek a recertification if new information casts doubt on the employee's reasons for the leave or the validity of the certification.

You Have Some Negotiating Power

A need for intermittent leave does not mean an employee suddenly gets to set his or her own new work schedule. An employee seeking intermittent leave or a reduced schedule for purposes of foreseeable treatment or medical procedures, including office visits, must make a reasonable effort to schedule the treatment so as not to disrupt unduly the employer's operations. Employees may be required to consult with their employers prior to the scheduling of treatment in order to work out a schedule that best suits the needs of both the employer and the employee. If the employee fails to make a reasonable effort to do this, the employer may start the discussion and require the employee to make proper arrangements.

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The clarified certification information from the healthcare provider about the need and schedule for intermittent leave gives you the information you need to have this conversation. Use it to create a schedule that the employee will stick to—if possible. This will cause less confusion and problems in the long run. This includes having the employee try to schedule appointments or treatment during off-duty time or on his or her days off. Depending on the employee's health condition, it may not be possible to create this much certainty in the situation. But you have the right to try.

You may also temporarily transfer an employee during the period of intermittent leave or reduced schedule to another position for which the employee is qualified and better accommodates recurring periods of leave than does the employee's regular position if the leave is for scheduled medical treatment. Of course, the position may not be punitive and must have equivalent pay and benefits. Once the FMLA leave is over, the employee must be reinstated to the same or an equivalent job as he or she had before the leave request.

Keep Records

As with the usual FMLA leave situation, employers should record all intermittent FMLA leave taken. This includes time for doctor's appointments prior to the birth of a child or retroactive designation of days taken off that should have been for FMLA reasons. You want to be sure you know how much leave has been taken, you're recording it all against an employee's allotted leave, and you're not being taken advantage of by employees hoping to take more leave than permitted. You may retroactively designate leave as FMLA leave as long as you inform the employee and it does not cause them harm.

FMLA should be "accounted for" in increments no larger than the shortest period of time accounted for other types of leave, as long as that is not greater than one hour. And, if the employee takes half a day off, you need to let them come back to work for the other half. There are exceptions for certain industries like airline or train employees who cannot return to their job halfway through the day.

If the employee has exhausted any paid leave, an employer may dock the employee's pay for the intermittent absences, including for salaried exempt employees, without destroying the exemption. While employees are entitled to ask you how much FMLA leave they have exhausted while on intermittent leave, they may not ask any more often than every 30 days and only if they actually took leave during that time period. If you tell them verbally how much FMLA leave they've exhausted, be sure you follow up in writing. Here's another reason it's important to keep these records—if an employee doesn't work 1,250 hours in the leave year, then he or she is not eligible for FMLA leave the next year.

Supervisors and Human Resources Employees May Be Individually Liable

As if the threat of a lawsuit or Department of Labor complaint were not enough of an incentive to take the steps necessary to ensure that your company is complying with the requirements of the FMLA, a recent decision from the U.S. District Court for the Eastern District of Pennsylvania should grab your attention, as well as the attention of other managers and supervisors. In *Narodetsky v. Cardone Indus., Inc.*, the court held that the FMLA's definition of "employer" was broad enough to encompass the actions of a president and CEO, a human resources director, a human resources representative, a benefits manager and a plant manager, holding all five liable under the Act.

The facts are instructive, if for no other reason than to show how individual managers may find themselves in hot water when handling an FMLA claim. After the plaintiff was diagnosed with a leg injury that required surgery, his wife called the company's benefits manager and requested short-term disability leave for him. Shortly thereafter, members of the human resources department conducted a forensic search of the plaintiff's computer, uncovering an e-mail he allegedly forwarded to a former employee in violation of company policy. Three weeks later, the human resources director, human resources representative and plant manager terminated the plaintiff for sending the prohibited e-mail. The plaintiff filed suit, claiming he was terminated for requesting FMLA leave and alleging that members of the human resources department searched his computer with the goal of finding a reason to justify his termination.

In evaluating the merits of personal liability under the Act, the court noted that other circuits had upheld liability where the individual in question had authority to hire or fire the plaintiff or had sufficient control over the terms and conditions of the plaintiff's employment. According to the court, in the present case, all five individual defendants exercised sufficient control to warrant personal liability under the Act. The president and CEO had operational control over the company; the human resources director and representative and the plant manager had authority to fire employees, as

Struggling with Intermittent FMLA Leave
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evidenced by their presence at the plaintiff's termination meeting; and the benefits manager participated in the decision to terminate the plaintiff. Thus, all five were personally liable under the Act.

The *Narodetsky* court is not alone in upholding personal liability; the two circuit courts that have considered the issue have opined that individuals working in the private sector may be held liable as employers under the FMLA. *See Mitchell v. Chapman*, 343 F.3d 811, 827 (6th Cir. 2003) ("This Court has interpreted the [Fair Labor Standards Act's] 'any person who acts, directly or indirectly, in the interest of the employer' language to impose liability on private-sector employers. The presence of identical language in the FMLA tends to support a similar finding.") (internal citations omitted); *Darby v. Bratch*, 287 F.3d 673, 681 (8th Cir. 2002) ("[T]he plain language of the statute . . . includes persons other than the employer itself."). Lower courts have also come to the same conclusion. *See, e.g., Cantley v. Simmons*, 179 F. Supp. 2d 654, 658 (S.D. W.Va. 2002) ("[I]ndividual liability is permitted under the FMLA."); *Richardson v. CVS Corp.*, 207 F. Supp. 2d 733, 741 (E.D. Tenn. 2001) ("The majority of courts that have considered the issue have found that individuals can be subject to liability under the FMLA."); *Morrow v. Putnam*, 142 F. Supp. 2d 1271, 1275 (D. Nev. 2001) ("[T]he plain language of the FMLA clearly contemplates individual liability.").

In light of these and other cases, employers are advised to proactively limit FMLA liability for their employees by, for example, including only necessary personnel in employment decisions and training human resources personnel on the litigation risks. Employers should also review their insurance policies to ensure that liability coverage extends to managers and other key personnel. Employees named as individual defendants in an FMLA lawsuit will expect indemnification from the company and require access to their own legal counsel. Any settlement between the company and the plaintiff should also address claims against individual managers. Failure to extend protection to individual managers, therefore, could result in substantial personal damages to the employee and strained relations within the company.

If you have any questions about intermittent leave requests, or are otherwise concerned that you may not be fully complying with the requirements of the FMLA, contact **Thomas G. Hancuch** (312-609-7824), **Scot A. Hinshaw** (312-609-7527) or **Michelle T. Olson** (312-609-7643). ■

Recent Vedder Price Accomplishments

- ***Neal I. Korval*** **won a contract interpretation arbitration against the NYSNA for a large New York hospital. The victory allowed the hospital to unilaterally eliminate a waiver of health insurance coverage payment that was previously made to all nurses who elected to opt out of the hospital's medical plan.**

- ***Neal I. Korval*** **and** ***Roy P. Salins*** **advised a large New York hospital during the course of a union election campaign involving security officers. The hospital won the NLRB election by a wide margin.**

- ***Thomas M. Wilde*** **and** ***Katherine A. Christy*** **obtained dismissal of a complaint filed against a national retailer by a former employee who was terminated for poor performance. The Cook County Circuit Court determined that the employee failed to exhaust administrative remedies and waived claims by virtue of a release signed in connection with her termination.**

- ***Aaron R. Gelb*** **and** ***Joseph K. Mulherin*** **won a trial before an administrative law judge at the Illinois Human Rights Commission in December 2010. The complainant accused our client, a nationally recognized restaurant, of subjecting him to a sexually hostile work environment and retaliating against him when he complained about it. The ALJ, who recommended dismissal of the sexual harassment claim at the close of the complainant's case (as reported in our last newsletter), found in favor of our client on the retaliation claim after the parties submitted post-hearing briefs.**

- ***Aaron R. Gelb*** **and** ***Megan J. Crowhurst*** **successfully fought off a plaintiff's attempt to depose the President, General Counsel, and Vice President of Human Resources for a client with operations in all 50 states.**

Recent Vedder Price Accomplishments
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The court granted the defendant's motion to quash the deposition notices of all three deponents, requiring the plaintiff to pursue other, less intrusive, means of discovery before attempting to depose such high-ranking officers. This is the third time in the past five years that a plaintiff has attempted to depose the highest-ranking officers of this corporation, illustrating the importance of ensuring that your executives understand that they, too, run the risk of being drawn into the discovery process, particularly if they take a hands-on role in personnel matters or communicate (particularly by e-mail) with employees about such matters.

- *Richard H. Schnadig* and *Elizabeth N. Hall* obtained the dismissal of a plaintiff's intentional infliction of emotional distress, assault and battery claims pending in the Northern District of Illinois, arguing that they are preempted by the Illinois Workers' Compensation Act.

- *J. Kevin Hennessy* assisted a client in the military supply manufacturing industry, in Sacramento, California, in winning a union election despite aggressive union organizing tactics.

- *Lyle S. Zuckerman* and *Roy P. Salins* won dismissal on summary judgment of federal race, religion, and retaliation claims filed against a major New York metropolitan university. Notably, the court dismissed the retaliation claim despite that the protected activity (a complaint to human resources) occurred days prior to the plaintiff's discharge.

- *Charles B. Wolf*, *Thomas G. Hancuch* and *Jessica L. Winski* successfully assisted a client in securing an initial reimbursement of over $1.5 million through the Early Retiree Reinsurance Program (ERRP). The ERRP, the first major piece of the health care reform law to become effective, reimburses approved employers for a portion of the cost of providing health benefits to early retirees. Additional ERRP reimbursements for benefits paid in 2011, and perhaps 2012, are expected.

- On behalf of a Brooklyn-based gourmet specialty market, *Alan M. Koral* and *Michael Goettig* successfully obtained approval of a settlement of a putative FLSA collective action and New York state law class action from a federal judge who was initially reluctant to allow the putative class representative to withdraw the complaint. The putative representative alleged that he and other similarly situated employees, who were allegedly undocumented immigrants, were not compensated in accordance with the Fair Labor Standards Act and New York state wage payment law.

- *Laura Sack* and *Roy P. Salins* prevailed on a motion for summary judgment in the U.S. District Court for the Southern District of New York on behalf of a cable television station and the company that sells advertising on its air that was sued by a former ad saleswoman for discriminatory discharge on the basis of gender, race and national origin, retaliation, hostile work environment on the basis of sexual harassment, hostile work environment on the basis of race, pay disparity, and quid pro quo sexual harassment under federal, New York state, and New York City law. The victory resulted in the dismissal with prejudice of all of the plaintiff's claims.

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.

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Vedder Price P.C. is a national business-oriented law firm composed of more than 260 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.

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