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Labor and Employment Law

A Virtual Minefield: The NLRB and Social Media

Contrary to what some people might think—especially those who purchase smartphones with dedicated "status update" buttons—the Declaration of Independence did not proclaim that among our unalienable rights is the right to post status updates on Facebook. However, there are limitations on what employers can do about employees who post derogatory messages about the companies for which they work, or the supervisors to whom they report. A recent flurry of activity at the National Labor Relations Board (NLRB) makes clear that online communications enjoy the same protections as any other protected concerted activity, and that the NLRB is ready and willing to take up the cause of those employees disciplined because of what they posted on Facebook or tweeted on Twitter. As a result, any employer rolling out a social media policy or issuing discipline in response to a social media post needs to understand the rules of the virtual road.

By way of background, the National Labor Relations Act (NLRA) provides employees—both union and nonunion—with the right to engage in concerted activities for the purpose of their mutual aid or protection. These protected concerted activities, also referred to as Section 7 rights, can involve two or more employees taking action on their own behalf regarding the terms and conditions of their employment, or a single employee taking action for the aid or protection of other employees. The definition of "terms and conditions of employment" is broadly construed, and includes such concepts as wages, safety, unfair or biased supervisors, and other workplace issues. Employers are prohibited from taking an adverse employment action against an employee who engages in an activity that is protected and concerted. If an employee believes that he or she was disciplined and/or discharged for taking part in protected concerted activity, the employee can file an Unfair Labor Practices (ULP) Charge with the NLRB, asserting a violation of their Section 7 rights.

Until recently it was not entirely clear how far the NLRB would extend the protections afforded by Section 7 to comments made on social media sites. With more than 125 cases coming before the NLRB for review over the past two years, the answer has

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been clear and unmistakable: while the medium may be different, the protections afforded to employees who speak out on workplace issues that concern more than just themselves remain the same. In an effort to illustrate the factors considered by the NLRB when evaluating employee charges, this article will discuss a handful of cases where the NLRB took action and several where it did not. The article concludes with a series of recommendations for employers seeking to stay off the NLRB's radar.

The NLRB Takes Action

- In the first decision of its kind, an NLRB administrative law judge (ALJ) ruled on September 6, 2011, that Hispanics United, a Buffalo, New York nonprofit organization, unlawfully terminated five employees for complaining about working conditions on their Facebook pages. The discussion started when one employee posted a coworker's allegation that employees did not do enough to help their clients. This post generated responses from other employees who defended their jobs and criticized working conditions. Hispanics United terminated the five employees from their posts. The ALJ found that it was of no consequence that the terminated employees were trying to neither change their working conditions nor to communicate their concerns to their employer. The ALJ emphasized that "[e]mployees have a protected right to discuss matters affecting their employment amongst themselves." Having found a violation of the NLRA, the ALJ ordered Hispanics United to reinstate the five employees and post a notice concerning employee rights and the violations found; he also awarded the five employees back pay.

- *Karl Knauz Motors, Inc. d/b/a Knauz BMW*, No. 13-CA-46452 (Sept. 2011). On September 28, 2011, another NLRB ALJ issued a decision finding that a Chicago area luxury car dealership *did not* violate Section 7 by terminating a car salesman because he posted information on Facebook that his employer deemed harmful to its reputation. The salesman posted two separate messages (both with accompanying photos) regarding the dealership, one criticizing the food and beverages served at a customer event and the other detailing how a salesperson at another Knauz dealership caused a Land Rover to end up in a pond on the property. Significantly, the ALJ concluded that the post regarding the customer event constituted a protected concerted activity because it related to a series of shared concerns raised by salespeople that the poor quality of the food and drinks might harm sales and thus impact their commissions. The ALJ, however, found no violation because he credited the dealership's explanation that the employee was discharged because of the mocking Land Rover post, not the customer event post. Although he found in favor of the dealership with respect to the discharge, the ALJ nevertheless found that a number of policies promulgated by the dealership requiring employees to be respectful, and prohibiting them from participating in unauthorized interviews or responding to outside inquiries, violated the Act. As a result, the ALJ ordered the dealership to post a notice and notify employees electronically that the offending policies had been rescinded.

- *American Medical Response, Inc.* (Oct. 2010). The company fired an employee who posted critical comments about her supervisor, and then continued to denigrate him in response to messages posted by her coworkers, going so far as to refer to him with a crude term in one post. Despite this, the NLRB alleged that the employee's posts constituted protected concerted activity and that American Medical Response (AMR) violated section 7 of the NLRA by discharging her. The matter was settled prior to hearing, after AMR agreed to revise what the NLRB described as its "overly broad" social media policy.

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No Action Is Taken

- On April 21, 2011, the NLRB's General Counsel concluded, in an Advice Memorandum, that the *Arizona Daily Star* did not violate the NLRA when it discharged a reporter who posted a number of inappropriate and offensive tweets, several of which reflected poorly on the newspaper and the City of Tucson. *Lee Enterprises, Inc., d/b/a Arizona Daily Star*, Case No. 28-CA-23267 (Apr. 21, 2011). After tweeting: "The *Arizona Daily Star*'s copy editors are the most witty and creative people in the world. Or at least they think they are," the reporter was told to refrain from airing his grievances or commenting about the paper in a public forum. He continued tweeting, however, shifting his attention to issues pertaining to his area of responsibility—namely, crime in Tucson—posting comments such as: "You stay homicidal, Tucson. See Star Net for the bloody deets," and "What?!?! No overnight homicide? WTF? You're slacking Tucson."

- *JT's Porch Saloon & Eatery, Ltd.*, No. 13-CA-46689 (July 7, 2011). An employee complained about his pay and disparaged customers on Facebook in response to a general question about his day. The General Counsel issued an Advice Memorandum concluding that while the post related to the employee's terms and conditions of employment, it did not grow out of prior conversations with coworkers about the pay policy, and there was no evidence of concerted activity. The Advice memo found that the employee was merely responding to a question from his stepsister about his day.

- *Wal-Mart Distribution Center 6018*, No. 26-CA-24000 (charge dismissed June 30, 2011). The NLRB dismissed an employee's charge that he was demoted in retaliation for protected concerted activity on his Facebook account. The employer discussed recent earthquakes with the employee on his Facebook page. During the conversation, the employee said he wanted the building to collapse while certain members of management were inside. The NLRB noted that the Facebook comments were such as to cause the employee to lose protection of the Act "inasmuch as the statements could reasonably be considered to be disloyal and unrelated to working conditions."

Lessons Learned

What an employee does or says on a social media site is not per se objectionable simply because it is said online, nor is it inherently protected because it is published in a public forum. If the posting involves work rules or issues related to compensation, discipline and the like, it is most likely protected regardless of how and where it is communicated. At the same time, if the message does not pertain to such issues that impact others beyond the author, employers can seek to curtail such postings or discipline the employee who posted them. Keep in mind, however, that firing someone because of a tweet or a Facebook post may garner far more attention for the underlying issue than ignoring the original posting ever would.

At a minimum, your organization should draft and issue a social media policy that clearly sets out what is expected of employees who use social media. You should be careful, however, not to cast too wide a net. Having an overly restrictive policy, particularly one that could be read as impinging on employees' rights to engage in discussions about the terms and conditions of their employment, will likely face strict scrutiny from the NLRB and could result in the filing of a complaint and the attendant publicity described in this article.

The flurry of NLRB complaints, however, does not mean that employers are powerless to act in the face of online comments that cross the line from protected concerted activity to improper unprotected conduct. The NLRB has, in past decisions, recognized that the failure to follow established procedures in an orderly manner is not protected; just as resorting to personal attacks and obnoxious obscenities will often lead to a forfeit of protection. Thus, the manner in which an employee exercises his or her rights may strip him or her of the protection of the NLRA. Still, the preceding examples indicate

that the current incarnation of the NLRB is more likely to fall on the side of the employee if there is any arguable basis to find that his or her online comments are protected.

If you have any questions about this article or social media issues in general, please contact **Aaron R. Gelb** at +1 (312) 609 7844, **Amy L. Bess** at +1 (202) 312 3361 or **Emily T. Collins** at +1 (312) 609 7572. ■

The Pros and Cons of Social Media Recruiting

The use of social media websites continues to increase. A recent survey shows that 85 million people currently use LinkedIn, 175 million use Twitter and 500 million use Facebook. Earlier this year, Facebook had one trillion page views in a single month. According to the Pew Research Center, the recent surge in social media use has been most pronounced among people over age 35, with 48 percent of those 36 and older using at least one social networking site.

These websites provide employers with a wealth of information about users' personal and professional lives. With this data, however, come new questions about how employers should use social media to recruit and screen potential employees. Here are a few tips employers should bear in mind when navigating the new social media frontier.

Use Social Media to Your Advantage

The top three social media networks, LinkedIn, Twitter and Facebook, all provide unique recruiting opportunities for employers. According to a recent Jobvite survey, 89 percent of companies are either using or planning to use social media to support their recruiting efforts in 2011. Of these employers, 64 percent have used two or more social media networks and 87 percent have used LinkedIn.

LinkedIn is perhaps the most well-known professional networking site on the web. Hiring managers can post jobs, set up automatic search alerts, contact candidates directly through InMail and interact with users through LinkedIn Groups and LinkedIn Answers. LinkedIn allows employers to target both active and passive candidates. The website is particularly useful for companies recruiting overseas, as approximately half its members reside outside the United States.

Twitter helps employers interact with users through the use of short personal messages. With its 140-character messaging limit, Twitter allows employers to notify followers of job vacancies and employment opportunities. Additionally, 63 percent of Twitter users provide profile data, which includes location, biography and website information. With 95 million tweets written per day, Twitter offers employers an easy and effective way to keep in touch with candidates.

Finally, with the largest cyber audience of any social media network, Facebook is a gold mine of user information. Although traditionally thought of as a personal networking website, Facebook can help employers establish a sustained presence on the web. Recruiters can post messages on the company's fan page, send direct messages to "friends" or place a Facebook Ad. The average user has 130 "friends," and on an average day 50 percent of all active users log onto Facebook. Given the extraordinary reach of this network, more employers are exploring ways to use Facebook in their outreach efforts.

Those employers who already use social media for recruiting report success, with 58 percent using a social network to hire a qualified candidate in the last year. Of those, 95 percent used LinkedIn, 24 percent used Facebook and 16 percent used Twitter. Investment in social media recruiting is also increasing, with 54 percent of respondents reporting a boost in social media investment for 2011, a higher rate of increase than that reported for any other recruiting method.

Understanding the Legal Landscape

With this increased use and investment come new questions about what types of social media practices violate the law. Although the law is still developing in this area, there are a few basic principles employers should keep in mind.

First, employers should be careful not to use as part of their hiring criteria any information that they would not normally consider during the hiring process. Social media websites often contain

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information about a candidate's race, religion, age, national origin, sexual orientation, disabilities, genetic information, marital status and political affiliation. Many of these characteristics are protected by federal, state or local law. The mere mention of a nonobvious protected characteristic during the hiring process could be sufficient to entangle the employer in costly litigation, regardless of whether the employer actually took the characteristic into consideration in making its hiring decision.

Employers must also be familiar with the "off-duty" laws in their states. At least 28 states currently prohibit employers from taking an adverse employment action based on an employee's lawful off-duty conduct. Many of these laws apply to potential employees as well. For example, in Minnesota, it is unlawful for an employer to require a prospective employee to refrain from using lawful consumable products, such as food, alcohol and tobacco, during nonworking hours. Minn. Stat. Ann. § 181.938. New York goes a step further by protecting all lawful recreational activities, including political activities, during nonworking hours. N.Y. Lab. Law § 2001-d. It is critical for employers to understand these laws and refrain from considering any protected activities in their hiring decisions.

Finally, an employer who makes an employment decision based on information randomly obtained on Google or social media networks could face a disparate-impact claim from applicants if it does not have a standard search policy in place. To overcome such a claim, the employer must prove that it treats all applicants in a similar manner, a showing that may be difficult to make if the employer does not have or follow a written search policy.

Limit Liability Through Use of Third-Party Providers

Fortunately, third-party Internet search providers are lining up to assist employers. For a fee, companies such as Social Intelligence Corp. and Tandem Select will conduct a comprehensive Internet search and compile a report about a potential employee's cyber footprint. These reports carefully omit any potentially discriminatory information. Employers can choose from a variety of predetermined Internet search criteria such as the presence of explicit photos, racist remarks or illegal activity. They can also request searches for positive attributes such as volunteer work, industry influence and professional accomplishments. These controlled searches provide employers with a way to capture relevant job-related information while avoiding some of the legal pitfalls of social media recruiting.

For more information on how to use social media in your screening and recruiting efforts please contact **Laura Sack** at +1 (212) 407 6960, **Sadina Montani** at +1 (202) 312 3363 or **Joseph K. Mulherin** at +1 (312) 609 7725. ■

Corporate Officers May Face the "Economic Reality" of Individual Liability for Misclassifying Workers Under the Fair Labor Standards Act

In recent years, the U.S. Department of Labor has increasingly prosecuted businesses for misclassifying their workers under the Fair Labor Standards Act (FLSA), a trend that is likely to continue and possibly expand as the federal government maximizes its efforts to increase tax revenues in the current economic climate. In a recent decision out of the Northern District of Illinois, *Solis v. International Detective & Protective Service, Ltd.* (N.D. Ill. May 24, 2011), the court made clear that damage awards for FLSA violations are not limited to businesses, but that corporate officers can also be held individually liable for misclassifying members of their workforce.

When evaluating whether a worker is an employee or an independent contractor under the FLSA, courts apply a six-factor "economic realities" test considering: (1) the degree and nature of control that the company has over the manner in which the worker performs the work; (2) the opportunity that the worker has for profit or loss depending on his or her skill; (3) the worker's own investment in the equipment or materials needed to complete the work; (4) whether the service at issue requires special skills; (5) whether the employment relationship is permanent; and (6) the extent to

which the alleged employee's service is an "integral part" of the employer's business.

In *Solis*, the court applied the "economic realities" test to the business relationship between security officers and the security company for which they worked. Even though each of the security officers signed Independent Contractor Agreements verifying their status as independent contractors, the court nevertheless concluded that the workers should have been classified as employees who were eligible for overtime at the time-and-a-half rate.

The court's decision was based on the following key factors:

- **Control.** The company controlled the manner in which work was performed because it provided its security officers with operating procedures for completing their tasks, conducted regular meetings to instruct its workers on those procedures, and monitored compliance with them. The court rejected the company's position that its clients, and not the company, controlled how the guards performed their work.

- **Opportunities for Profit or Loss.** The guards maintained time sheets and were paid by the hour, and thus had no opportunity to earn additional profit or share in the company's overall profits or losses based on their skill level.

- **Investment in Equipment.** The workers did not have a substantial investment in equipment where the company provided vehicles, gas, car insurance and cell phones; the guards worked under the company's security contractor license; and the company supplied liability insurance. The court discounted that the guards provided some of their own equipment (e.g., uniforms, firearms, bullets and handcuffs).

- **Special Skills.** The security guards' responsibilities, which included: (i) walking or driving around worksites to detect unauthorized activity; (ii) checking overnight parking and safety equipment such as fire extinguishers; (iii) completing reports detailing any incidents during the shift; and (iv) following procedures for providing security services, did not require a high degree of technical expertise or skill.

- **Permanency.** The incentive for promotion and advancement within the company evidenced an intent to have the guards continue their relationship for an extended period of time. A provision in the Independent Contractor Agreements, which specified that the work was performed at-will, had no bearing on whether the relationship was considered permanent.

- **Integral Part of Business.** The services provided by the guards were an integral part of the private security service's business, which includes monitoring worksites for criminal activity and protecting the client's property.

Having determined that the security guards were employees, and not independent contractors, the employer was liable for over $100,000 in unpaid overtime and liquidated damages. The court noted that awarding liquidated damages and doubling the amount of unpaid overtime is the "norm, not the exception."

Importantly, the court also concluded that corporate officers with significant ownership interests, day-to-day control of operations, and involvement in the supervision and payment of employees can be held personally liable for the corporation's failure to pay owed wages. Consequently, the court found that the president and sole owner of the company—who was responsible for payroll, accounting and invoicing, signing payroll checks and controlling the corporate activities—and the chief operating officer—who oversaw work assignments and maintained time records—fell within the definition of "employer" under FLSA § 203(d) and were individually liable for any unpaid overtime compensation.

Solis is yet another example of the risks and penalties associated with improperly classifying

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employees as independent contractors. Companies that regularly utilize independent contractors should evaluate whether their use of those contractors would pass muster if scrutinized by the Department of Labor or a federal court.

If you have any questions about this decision or other issues, please call **Neal I. Korval** at +1 (212) 407 7780 or **Megan J. Crowhurst** at +1 (312) 609 7622. ■

Restaurant Owners: Mistakes Can Cost You Money (Lots of It)

As detailed in our May 2011 Newsletter, employers in the hospitality and service industries face a steady stream of wage and hour lawsuits and must take certain proactive steps to minimize potential liability. Failing to take action may come with a steep price tag—a fact underscored by two recent developments, a sizable damages award resulting from a federal court lawsuit in Illinois, and a record-setting settlement of a state Department of Labor (DOL) investigation in New York.

Two Individuals Held Liable for Over $1.5 Million

In Decatur, Illinois, a sister owned and her brother managed three restaurants. A DOL investigation revealed that some servers were required to sign their paychecks over to the restaurants after they received them. The only payment they received was tips from customers. And, because the defendants did not provide notice to the servers that part of their minimum wage would be satisfied by tips from customers, the defendants could not offset the full minimum wage owed with any tips the employees received.

Moreover, the DOL also found record-keeping violations. Employees were often directed to punch in *after* they started working (i.e., "off-the-clock" work), which resulted in false payroll records.

After the investigation, the DOL sued the restaurants, and the owner and manager individually, in federal court in the Central District of Illinois. The court granted summary judgment in favor of the DOL. In total, the judge ordered that the defendants pay $574,851 to 64 workers for minimum wage and overtime compensation. The judge also ordered the defendants to pay an equal amount in liquidated damages. The defendants were held liable for a grand total of over $1.5 million. The judge also held that the owner and manager were employers under the FLSA, and thus were *individually* liable for the $1.5 million.

Record $5.1 Million Settlement in New York

The New York State Department of Labor and the restaurant chain Lenny's: The Ultimate Sandwich recently reached a record $5.1 million settlement for minimum wage and overtime violations at 11 restaurants, which was the largest settlement in the history of the state agency.

The New York State Department's investigation found that employees who worked ten to 12 hours a day, six days a week, received an average weekly salary of $275. That amount was far short of what state law mandates—the employees should have been paid at least $500 a week for the same number of hours, taking into account their overtime. The Department also found that Lenny's failed to keep accurate time records.

These cases highlight the significant costs hospitality employers may face for failing to comply with state and/or federal wage and hour laws. It is one thing to be taken to task when a manager intentionally violates the law—often, such actions are taken in contravention of company policy and in disregard of employer-sponsored training; it is an entirely different matter when a well-meaning employer discovers that it has been unknowingly violating wage and hour laws and now has a sizable penalty to pay, despite the best of intentions. Wage and hour compliance is an area where proactive steps like audits and policy reviews can pay real dividends.

If you have any questions about these or other issues affecting the hospitality and/or service industry, please contact **Jonathan A. Wexler** at +1 (212) 407 7732 or **Timothy J. Tommaso** at +1 (312) 609 7688. ■

The NLRB: Sending "Convicts" into Your Customers' Homes

The NLRB's prosecution of cases involving employee use of social networking sites has drawn recent attention, as discussed at length at pages 1–5 of this Newsletter. While social media sites such as Facebook and Twitter have expanded the reach of the National Labor Relations Act to the electronic realm, there are many other areas where the NLRB continues to aggressively pursue employers with regard to other aspects of protected, concerted activity as well. This is reflected in the NLRB's decision in *AT&T Connecticut*, a decision issued earlier this year.

In *AT&T Connecticut*, service technicians who conducted service calls at customers' homes wore T-shirts resembling prison uniforms to protest a months-long bargaining dispute between the company and the Communications Workers of America, the union representing the employees. The front of the shirts had the text "INMATE #" above a black box. The back of the shirt had bars and vertical stripes with the text "PRISONER OF AT&T."

The administrative law judge who conducted the evidentiary hearing determined that AT&T violated the National Labor Relations Act by disciplining employees for wearing the shirts. The judge noted that, under Supreme Court precedent, "employees have a protected right to make known their concerns and grievances pertaining to the employment relationship, which includes the wearing of union insignia while at work." The judge reasoned that because there were no "special circumstances" to justify the employer's refusal to allow the shirts—such as jeopardizing employee safety, damaging machinery or product, exacerbating employee tension, unreasonably interfering with an employer's public image, or that such a rule is necessary to maintain employee discipline and decorum—the judge ruled that the ban violated the National Labor Relations Act.

In a 2–1 decision, the NLRB affirmed the judge's decision, rejecting the company's argument that allowing the shirts would cause fear among AT&T's customers, since the phrase "prisoner" on the front of the shirt was relatively small. The NLRB's majority further concluded that customers would likely recognize that the employees actually worked for AT&T, given the lanyards they wore containing their company identification cards, and that the shirt was worn to publicize a labor dispute.

NLRB member Brian Hayes authored the dissenting opinion. He argued that AT&T demonstrated a legitimate concern—customer fear—especially in light of pretrial publicity in Connecticut regarding a 2007 home invasion by paroled felons resulting in three murders. He noted that a customer might have a subjective (albeit irrational) belief that the technician was instead a convict and not a technician, or that the customer would be upset with AT&T because the person wearing the "prisoner" T-shirt was actually an employee of the company.

The NLRB's decision in *AT&T Connecticut* provides another reminder of the current pro-union and pro-employee sentiment that is present in its decisions. Employers should keep in mind that Section 8(a)(1) of the National Labor Relations Act covers a broad range of employee activity, even that which might not be obvious. It is also worth remembering that the National Labor Relations Act applies to nonunionized workplaces, in addition to those where employees are represented.

If you have any questions about the NLRB's current decisions, including the implications for you and your business, please call **Lyle S. Zuckerman** at +1 (212) 407 6964 or **Mark L. Stolzenburg** at +1 (312) 609 7512. ■

Reminder: New York Employers Now Must Report Whether Health Insurance Is Available to Employees' Dependents

Recently, new reporting requirements under the Low Income Support Obligation and Performance Improvement Act of 2010 went into effect; they require all New York employers to report whether health insurance benefits are available to their employees' dependents in their quarterly wage reports. Previously, employers had only to disclose employees' names, social security numbers and gross wages. The reporting requirement also

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applies to newly hired and rehired employees. New York has accordingly updated Form NYS-45 (quarterly wage reporting) and Forms IT-2104 and 2104-E (new hire reporting). Employers who report information regarding newly hired employees only through submission of a Form W-4 will thus no longer be in compliance with the state's reporting requirements.

If you have any questions about these new reporting requirements, please call **Alan M. Koral** at +1 (212) 407 7750 or **Mark S. Goldstein** at +1 (212) 407 6941. ■

Amendment to the New York City Human Rights Law Clarifies Employers' Duty to Accommodate Employees' Religious Practices

On August 31, 2011, New York City Mayor Michael Bloomberg signed into law the Workplace Religious Freedom Act (WRFA). The WRFA defines "undue hardship" as that term is used in the New York City Human Rights Law (NYCHRL) in the context of an employer's duty to provide a reasonable accommodation for the religious practices of an employee or job applicant. The new law, which took effect when the Mayor signed it, clarifies that employers in New York City are more likely to be required to accommodate an employee or job applicant's religious practices under the NYCHRL than under analogous federal law.

Both Title VII and the NYCHRL prohibit workplace discrimination on the basis of religion. Under both laws, employers are required to provide reasonable accommodations for employees' religious practices, unless doing so would impose an undue hardship upon the employer. Before passage of the WRFA, the NYCHRL did not define the term "undue hardship" in the context of a claim of religious discrimination, and as a result, courts drew no analytical distinction between the use of that term in the Title VII context and its use as applied to the NYCHRL. In 2005, however, the New York City Council passed the Local Civil Rights Restoration Act (LCRRA), which emphasized that the scope of the civil rights protections afforded to employees under the NYCHRL is more expansive than the protections afforded by federal or state law. The LCRRA states, in part, that "federal and state civil rights laws [are to be viewed] as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."

Passage of the WRFA re-emphasizes the stated purpose of the LCRRA, by making it clear that employees have broader rights to reasonable workplace accommodation of their religious practices under the NYCHRL than under Title VII. Specifically, under Title VII, an employer may demonstrate that a requested religious accommodation would impose an undue hardship (and accordingly, need not be granted by the employer) if the employer would suffer more than a *de minimis* cost to its business operations by granting the accommodation. By contrast, under the WRFA, an undue hardship is defined as one that imposes a "*significant* expense or difficulty" upon the employer (emphasis added). The WRFA directs courts to consider the following nonexhaustive factors in determining whether such an expense or difficulty is significant:

- the identifiable cost of the accommodation, including the costs of loss of productivity and of retaining or hiring employees or transferring employees from one facility to another, in relation to the size and operating cost of the employer;
- the number of individuals who will need the particular accommodation to a sincerely held religious observance or practice; and
- for an employer with multiple facilities, the degree to which the geographic separateness or administrative or fiscal relationship of the facilities will make the accommodation more difficult or expensive.

Notwithstanding these new requirements, the WRFA makes clear that an employer need not grant any religious accommodation to an employee that would have the practical effect of relieving the employee of the duty to perform the essential functions of his or her job.

For New York City employers, the WRFA imposes a heightened duty to engage in an interactive

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process with an employee or job applicant who requests a reasonable accommodation for religious practices, since it may prove challenging for employers to establish that such requested accommodations would impose an "undue hardship" as defined in the WRFA. It is advisable for employers covered by the NYCHRL to consult counsel before denying an employee's requested accommodation of a religious practice on the grounds of "undue hardship."

Please contact **Laura Sack** at +1 (212) 407 6960 or **Michael Goettig** at +1 (212) 407 7781 for answers to questions about the Workplace Religious Freedom Act, the Local Civil Rights Restoration Act or the New York City Human Rights Law. ■

Benefits Development Alert

As we go to press, the Department of Labor has issued a technical release regarding the electronic disclosure of fee information that must be given to 401(k) (and similar) plan participants next year. An Employee Benefits Briefing on this topic was mailed to our client contacts and posted on Vedder Price's website. ■

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 120 countries around the world.

Recent Vedder Price Accomplishments

- ***Aaron R. Gelb*** **and** ***Megan J. Crowhurst*** **won a United States Fifth Circuit appeal affirming the Eastern District of Louisiana's prior decision granting summary judgment in a race discrimination and retaliation case. The appellant, a sales representative, alleged that he was put on a performance improvement plan because of his race and that the employer retaliated against him by terminating his employment several weeks after learning that he had filed a Charge of Discrimination.**
- ***Bruce R. Alper*** **and** ***Paige O. Barnett*** **won summary judgment in the U.S. District Court for the Northern District of Illinois on claims of national origin and race discrimination brought by a computer systems architect who accused his former employer of harassment and subjecting him to different terms and conditions of employment.**
- ***Michael G. Cleveland*** **and** ***Megan J. Crowhurst*** **won summary judgment in federal court in Wisconsin on ADA, ADEA, Rehabilitation Act and Railway Labor Act claims brought by a plaintiff alleging that he was terminated because of his age and because he suffered from gout and obesity.**
- ***J. Kevin Hennessy*** **and** ***Megan J. Crowhurst*** **won summary judgment in Illinois state court on claims of breach of an employment contract and promissory estoppel. The plaintiff, an accounting associate who had worked for the company for more than 30 years, alleged that she was terminated contrary to a layoff policy set forth in an employee handbook in 1978. Vedder Price successfully argued that the handbook included sufficient disclaimer language and that the policy included discretionary language that precluded contractual rights.**

Chicago Labor and Employment Group Members

Thomas G. Abram ..... +1 (312) 609 7760
Bruce R. Alper ..... +1 (312) 609 7890
Paige O. Barnett ..... +1 (312) 609 7676
Mark I. Bogart ..... +1 (312) 609 7878
Lawrence J. Casazza ..... +1 (312) 609 7770
Katherine A. Christy ..... +1 (312) 609 7588
Michael G. Cleveland ..... +1 (312) 609 7860
Steven P. Cohn ..... +1 (312) 609 4596
Christopher T. Collins ..... +1 (312) 609 7706
Emily T. Collins ..... +1 (312) 609 7572
Megan J. Crowhurst ..... +1 (312) 609 7622
Thomas P. Desmond ..... +1 (312) 609 7647
Aaron R. Gelb, *Editor* ..... +1 (312) 609 7844
Elizabeth N. Hall ..... +1 (312) 609 7795
Steven L. Hamann ..... +1 (312) 609 7579
Thomas G. Hancuch ..... +1 (312) 609 7824
Benjamin A. Hartsock ..... +1 (312) 609 7922
J. Kevin Hennessy ..... +1 (312) 609 7868
Scot A. Hinshaw ..... +1 (312) 609 7527
Jonathan E. Hyun ..... +1 (312) 609 7791
John J. Jacobsen, Jr. ..... +1 (312) 609 7680
John P. Jacoby ..... +1 (312) 609 7633
Edward C. Jepson, Jr. ..... +1 (312) 609 7582
Michael C. Joyce ..... +1 (312) 609 7627
Andrea Lewis ..... +1 (312) 609 7739
Philip L. Mowery ..... +1 (312) 609 7642
Joseph K. Mulherin ..... +1 (312) 609 7725
Christopher L. Nybo ..... +1 (312) 609 7729
Margo Wolf O'Donnell ..... +1 (312) 609 7609
Paul F. Russell ..... +1 (312) 609 7740
Richard H. Schnadig ..... +1 (312) 609 7810
Robert F. Simon ..... +1 (312) 609 7550
Patrick W. Spangler ..... +1 (312) 609 7797
Kenneth F. Sparks ..... +1 (312) 609 7877
James A. Spizzo ..... +1 (312) 609 7705
Kelly A. Starr ..... +1 (312) 609 7768
Mark L. Stolzenburg ..... +1 (312) 609 7512
Theodore J. Tierney ..... +1 (312) 609 7530
Timothy J. Tommaso ..... +1 (312) 609 7688
Thomas M. Wilde, *Chair* ..... +1 (312) 609 7821
Jessica L. Winski ..... +1 (312) 609 7678
Charles B. Wolf ..... +1 (312) 609 7888

New York Labor and Employment Group Members

Alan M. Koral ..... +1 (212) 407 7750
Neal I. Korval ..... +1 (212) 407 7780
Laura Sack ..... +1 (212) 407 6960
Jonathan A. Wexler ..... +1 (212) 407 7732
Lyle S. Zuckerman ..... +1 (212) 407 6964
Michael Goettig ..... +1 (212) 407 7781
Mark S. Goldstein ..... +1 (212) 407 6941
Daniel C. Green ..... +1 (212) 407 7735
Roy P. Salins ..... +1 (212) 407 6965
Michelle D. Velásquez ..... +1 (212) 407 7792

Washington, D.C. Labor and Employment Group Members

Amy L. Bess ..... +1 (202) 312 3361
Sadina Montani ..... +1 (202) 312 3363

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222 NORTH LASALLE STREET

CHICAGO, ILLINOIS 60601

T: +1 (312) 609 7500 | F: +1 (312) 609 5005

1633 BROADWAY, 47TH FLOOR

NEW YORK, NEW YORK 10019

T: +1 (212) 407 7700 | F: +1 (212) 407 7799

1401 I STREET NW, SUITE 1100

WASHINGTON, D.C. 20005

T: +1 (202) 312 3320 | F: +1 (202) 312 3322

200 ALDERSGATE

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T: + 44 (0)20 3440 4680 | F: + 44 (0)20 3440 4681

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