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Labor and Employment Law

Making the Grade: Employers Face Increased Scrutiny of Pre-Employment Testing Programs

Employers frustrated with the poor training or skill level of new employees, employee turnover and the increased number and cost of workers' compensation claims may turn toward pre-employment tests to assess a potential employee before hiring the individual. However, if your company administers a test as part of its hiring process, you should ensure that it passes the "sniff test."

The Office of Federal Contract Compliance Programs (OFCCP) recently filed a complaint with the Department of Labor's Office of Administrative Law Judges against mozzarella cheese producer Leprino Foods Company, a federal contractor. In its complaint, the OFCCP claims that Leprino utilized a pre-employment test that adversely affected minority applicants and was not shown to be valid or job related. In its news release, the OFCCP stated that it found that only 49 percent of otherwise-qualified minority applicants passed the exam, while more than 72 percent of nonminority applicants passed the exam. Furthermore, the OFCCP stated that Leprino could not substantiate its claim that the test "measured applied math, workplace observation and information location skills related to the essential functions" of the applied-for position, that of an on-call laborer.

The OFCCP seeks at least 17 job offers for the original applicants, back wages and interest for at least 270 class members, that Leprino's existing federal contracts be canceled and the company be debarred from entering future contracts until the alleged violations are resolved.

With regard to the complaint brought against Leprino Foods, OFCCP Director Patricia A. Shiu stated that "Leprino Foods' hiring process simply doesn't pass the sniff test. When workers are denied employment because of factors that have nothing to do with their ability to perform the job, something is not right. Our message to the company is clear: Correct your discriminatory practices and make restitution to the victims, or lose your lucrative federal contracts."

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The message is also clear to those in the contractor community: Tests used during the hiring process will be scrutinized during a compliance review, and tests that adversely impact minority candidates may lead to OFCCP findings of discrimination and substantial liability if the contractor cannot demonstrate that skills tested are required to perform the job in question and are properly vetted through a validation study. Employers using a test as a pass/fail screen that eliminates a failing applicant from further consideration are particularly exposed to possible adverse impact challenges.

The OFCCP has been especially active in this area. In 2009, Kraft Foods Global paid $227,500 and Gerber Products Co. paid $900,000 to settle findings of hiring discrimination based on conclusions that the pre-employment tests used by the employers had an adverse impact on minority applicants with insufficient evidence of validity for the positions at issue.

Federal contractors are not the only ones who need to worry about employment testing issues. The EEOC has also been active in challenging pre-employment testing and, because employer tests can impact a large number of employees or applicants, disputes related to employer testing are susceptible to class action and pattern and practice lawsuits.

The Uniform Guidelines on Employee Selection Procedures (the Uniform Guidelines) adopted by both the EEOC and OFCCP and relied upon by the courts set technical standards for establishing job-relatedness and the validation of employer tests. These standards apply to all enforcement actions brought under Executive Order 11246 and enforcement actions or private litigation brought under Title VII. Pre-employment tests that have an adverse impact on employment, based on an individual's race, sex or national origin, will constitute employment discrimination unless the pre-employment test is job related for the position in question and consistent with business necessity.

A validation study, which includes an assessment of the knowledge, skills and abilities required for the position, is a critical component to successfully defend any employer test, whether the test is administered on a pre-employment basis or as part of an internal transfer or promotion process. Although engaging a qualified test publisher is an important part of the equation, employers should not simply accept the publisher's conclusions or assertions of validity. For instance, the publisher of the test used by Leprino is a well-respected major test publisher. Although the Uniform Guidelines authorize employers to rely on the "generalized validity" of a test, based on the publisher's validation studies drawn from data on the test's use by other employers, each employer must be prepared to demonstrate that the test is valid for use in selecting hires or promotions in its own workforce. To do so, an employer must show that the skill requirements and job responsibilities of the jobs used in the test publisher's general validity studies are sufficiently similar to its own jobs' skill requirements and duties. The key to this showing is the performance of an underlying job task analysis that identifies the essential job duties and skill requirements of the jobs for which the test is used as a selection tool.

Even having an appropriate validation study in hand may not be a sufficient defense to an adverse impact challenge to a pre-employment test. The EEOC and OFCCP interpret the Uniform Guidelines as also requiring an employer who uses a test with demonstrated adverse impact to investigate whether there are alternative selection tools or uses of the test, e.g., a lower pass score or use on a non-pass/fail basis that serves its business needs but has no or a lesser adverse impact.

Vedder Price attorneys regularly assist in-house counsel and human resources professionals in designing employer testing procedures and assisting in the testing validation process. In addition, Vedder Price attorneys have successfully defended numerous enforcement actions brought by the EEOC and OFCCP related to employer testing. If you have any questions about test

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validation or general testing issues generally, please feel free to contact **Thomas G. Abram, Patrick W. Spangler**, **Benjamin A. Hartsock** or any other Vedder Price attorney with whom you have worked.

Updated FMLA Forms

The US Department of Labor (DOL) recently posted updated versions of its model Family and Medical Leave Act (FMLA) notification and certification forms, effective through February 28, 2015. The updated model forms are as follows:[1]

- Certification of Health Care Provider for Employee's Serious Health Condition (WH-380-E)
- Certification of Health Care Provider for Family Member's Serious Health Condition (WH-380-F)
- Notice of Eligibility and Rights & Responsibilities (WH-381)
- Designation Notice (WH-382)
- Certification of Qualifying Exigency for Military Family Leave (WH-384)
- Certification for Serious Injury or Illness of Covered Servicemember—for Military Family Leave (WH-385)

The forms do not contain any substantive changes, but the previous forms expired December 31, 2011; so, going forward, employers who use the DOL forms should begin utilizing the new ones. In the alternative, employers using their own forms may continue to do so, provided they do not ask for more information than required by the FMLA.

Notably, the new forms still do not include the "safe harbor" language recommended by the Equal Employment Opportunity Commission's (EEOC) regulations, to prevent the disclosure of genetic information as prohibited by the Genetic Information Nondiscrimination Act of 2008 (GINA). Thus, regardless of whether employers use the DOL forms or their own forms, they should always add the following language in requests for employee health-related information to avoid liability under GINA for an inadvertent disclosure of genetic information:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of any individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.[2]

New GINA Regulations

Last month, the EEOC implemented a rule requiring that employers retain all personnel and employment records for potential investigations into compliance with GINA. Title II prohibits discrimination against employees or applicants on the basis of genetic information. Specifically,

1 All forms can be found at http://www.dol.gov/whd/fmla/.

2 29 C.F.R. § 1635.8(b)(1)(B).

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employers may not request, require, purchase or disclose the genetic information of an applicant or employee, except under very limited exceptions.

The EEOC's new rule takes effect on April 3, 2012, but existing employers with 15 or more employees will not need to create any new documents. Nor does the rule impose a reporting requirement. The retention requirements will be as follows:

- Private employers must maintain personnel and employment records for one year.
- Educational institutions and governments must retain such records for two years.
- Labor unions must retain all membership and referral records for one year.
- Apprenticeship committees must retain all apprenticeship records for two years.

Further, if an employee files a charge of discrimination under GINA, the employer must retain all records relating to the charge until the action is complete. Employers should note that this record retention requirement is the same as under the Title VII regulations, so this rule will not place a heavy additional burden on employers. Clients are encouraged to contact Vedder Price with any questions.

Watch Out for New Employment Laws in California

Several new laws in California are placing new or additional requirements on employers. We have highlighted several of them.

Independent Contractors

A new law prohibits the "willful misclassification" of individuals as independent contractors. The law defines willful as "avoiding employee status for an individual by voluntarily and knowingly misclassifying that individual as an independent contractor." The law also prohibits the deduction of fees or other charges from the compensation paid to misclassified individuals that could not be deducted from regular employees. For example, employers sometimes deduct from independent contractors' compensation the costs of renting workspace, licensing individuals and providing equipment.

The penalty for violating the law ranges from \$5,000 to \$15,000 per violation, or \$10,000 to \$25,000 when a repeated pattern or practice of violations is found. In addition, an employer could be forced to post a scarlet letter (notice of violation) on its website or in a public area at its business for one year. Joint and several liability can be assigned to individuals who knowingly advise an employer to misclassify an individual as an independent contractor to avoid employee status. The exceptions are employees providing the employer advice internally and advice from legal counsel.

Wage Theft Prevention Law

This new law requires employers to provide nonexempt employees with a notice detailing the employee's rate of pay, the basis upon which the wages are calculated (whether hourly, daily, commission, etc.), and the applicable overtime rate, and allowances, if any, claimed as part of the minimum wage (e.g., meals or lodging). The notice must be provided at the time of hire or in the event of changes in a current employee's wage. It must also include the employer's name (including any fictitious or trade names), physical and mailing address, telephone number and designated regular payday, as well as the employer's workers' compensation insurance carrier information, including name, address and telephone number. A template of the notice can be found at www.dir.ca.gov/dlse/LC_2810.5_Notice.pdf. If any changes are made to this information, the employer must inform each employee in the form of a new notice within seven days after the changes become effective.

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The law also clarifies that, in addition to the applicable civil penalties, employers are required to provide restitution to employees paid less in wages than the minimum required by the California Industrial Welfare Commission. It also criminalizes, as a misdemeanor, willful violations of specified wage statutes or orders, or the willful failure to pay wages due under a final court order or order of the Labor Commissioner. The statute of limitations to collect statutory penalties has also increased from one to three years.

Commission Agreements Must Be in Writing

This amendment to California's Labor Code requires that by January 1, 2013, when an employer enters into a contract of employment with an employee for services to be rendered within California and the "contemplated method of payment" involves commissions, the contract must be in writing and must set forth the method by which the commissions are to be computed and paid. The meaning of the term commissions is the same as that set forth in Labor Code Section 204.1, which generally excludes short-term productivity bonuses and profit-sharing plans.

Use of Consumer Credit Reports

Employers' use of consumer credit reports has been limited. California law now prohibits employers and prospective employers, except certain financial institutions, from obtaining or relying on consumer credit reports of employees or applicants, with limited exceptions. With regard to private employers, those exceptions are whether the position a) is managerial, qualifying for the executive exemption from overtime; b) requires credit information by law; c) involves regular access to specified personal information, including bank or credit card account information, Social Security numbers and dates of birth (except for routine processing of credit card applications in a retail business); d) involves the employee or applicant being a named signatory on the employer's bank or credit card accounts, or given authority to transfer money or enter into financial contracts on behalf of the employer; e) involves access to confidential or proprietary information defined as a trade secret under California law; or f) involves regular access to cash totaling $10,000 or more that belongs to the employer, a customer or a client.

If an employer only conducts a background check (e.g., criminal convictions, lawsuits filed, DMV records), then the new requirements do not apply. However, in addition to the existing requirement to provide the name, address and telephone number of the reporting agency conducting the background check, employers now must also provide the reporting agency's website address.

Pregnancy Disability Leave

The California Family Rights Act (CFRA) has been amended to clarify that it is an unlawful employment practice for an employer to interfere with, restrain or deny the exercise of any right provided under the CFRA, or due to disability by pregnancy, childbirth or related medical conditions.

A new law in California also requires employers with five or more employees to maintain and pay for health insurance coverage under a group health plan for any eligible female employee who takes up to four months of leave due to pregnancy, childbirth or a related medical condition in a 12-month period. The benefits must be maintained at the same level and under the same conditions as if the employee had not taken the leave.

Gender Identity and Expression Protection

California's Fair Employment and Housing Act has been amended to define gender as including both gender identity and gender expression. Thus, the law now prohibits workplace discrimination on the basis of gender identity (i.e., how the person sees himself or herself) and gender expression (i.e., how other people view the person). Gender expression is a person's "gender-related appearance and behavior," "whether or not stereotypically associated" with the sex assigned at birth. An employee must be allowed to dress consistent with

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the employee's gender identity and expression.

With regard to each of these new laws, employers need to review their existing policies and practices and update all forms necessary to avoid incurring stiff penalties.

If you have any questions about these laws, please contact **Thomas G. Hancuch, Scot A. Hinshaw** or any other Vedder Price attorney with whom you have worked.

Riding the Escalator (Principle) Safely: Recent Appellate Court Decision Underscores Challenges Facing Employers Reinstating Returning Servicemembers

With large numbers of soldiers returning home and, presumably, to the jobs they held before being called to active duty, employers would do well to brush up on the re-employment obligations imposed by the Uniformed Services Employment and Re-employment Rights Act (USERRA). Not only must an employer reinstate a returning servicemember (assuming reinstatement was requested in a timely manner), but that employer must place the servicemember in a position equivalent to the position the employee would have held but for the fact of the employee's military leave.

Complying with this obligation—which is commonly referred to as the Escalator Principle—can present some challenges for employers struggling to determine how far an employee would have advanced (up the escalator) in terms of position, pay and benefits, had the employee worked the entire period of time spent in the military. This analysis is even more difficult when the returning employee held a position that does not entail lockstep increases or seniority-based promotions or benefits.

In late 2011, the US Court of Appeals for the Second Circuit (Connecticut, New York and Vermont) issued an opinion in *Serricchio v. Wachovia Securities LLC* that underscores the sort of complex analysis in which employers must engage when reinstating employees and determining their post-service compensation rate.

Background of the Case

Michael Serricchio worked as a financial advisor for Prudential Securities (whose retail brokerage business was subsequently subsumed by Wachovia Securities) from late 2000 through September 2001, when he was called to active duty in the United States Air Force Reserve. Serricchio earned approximately $75,000 in commissions during his predeployment employment. While serving his country abroad, however, most of Serricchio's accounts were reassigned and several were taken by the partner to his new firm.

When Serricchio returned from active duty in October 2003, he requested reinstatement, but had to wait five months before Wachovia re-employed him. When he was finally reinstated in late March 2004, Wachovia offered Serricchio an advisor position with his preservice commission rate. Serricchio, however, objected to this, citing the fact that the account list provided to him by Wachovia was not nearly as lucrative as the one he managed before deployment. Indeed, the court noted in its opinion that the book of business provided by Wachovia would "generate virtually no commissions." Wachovia made matters worse, since it provided no assistance to Serricchio in re-establishing either his book of business or his higher, preservice commissions. Serricchio thus filed a lawsuit in US district court, accusing the company of violating USERRA by failing to re-employ him in a position that would provide him with the same earnings opportunities that he had prior to his deployment.

The Serricchio *Decision*

Following trial, a jury determined that Wachovia had not satisfied its obligation to provide Serricchio

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with the position that he would have held had his employment not been interrupted by military service or, in the alternative, to a position of "like seniority, state and pay" upon return from active duty. As such, the jury found that Wachovia had a) failed to offer Serricchio re-employment within two weeks of his request; b) failed to reinstate him to a position with pay comparable to his pre-service earnings; and c) constructively discharged him by failing to offer a suitable and appropriate position.

After a bench trial on the issue of damages, the district court awarded Serricchio $778,906 in back pay and liquidated damages, $830,107 in attorneys' fees and costs, plus $36,567 in prejudgment interest, and reinstated him as a Wachovia financial advisor with a three-month fixed salary and a nine-month draw. Wachovia appealed both the jury's decision and the district court's apportionment of damages, arguing that it had complied with its USERRA obligations by offering Serricchio his preservice commission rate. The Second Circuit disagreed.

Noting that *Serricchio* presented a USERRA issue that was a matter of first impression, the Second Circuit held that Wachovia's provision of a position with the "same preservice commission rate" did not comply with USERRA because it disregarded the "amount of actual commissions" that Serricchio had earned from his preservice book of business. The court held that offering a commission-based employee the same commission rate "without regard to volume or size of the accounts in the servicemember's pre-activation book of business" does not satisfy USERRA. Where an employee has received commission-based pay, the appropriate USERRA analysis must therefore include the amount of prior earnings. Thus, Wachovia violated USERRA because the position that it offered to Serricchio upon his return from active duty would have resulted in much lower actual earnings—despite the same commission rate—and "did not provide the same opportunities for advancement, working conditions and responsibility that [Serricchio] would have had but for his period of military service."

Lessons Learned

With thousands upon thousands of soldiers returning to the workforce, employers should ensure that the individuals responsible for making decisions relating to the employee's position, pay and benefits understand what USERRA generally requires with respect to re-employment, how to properly apply the Escalator Principle and what the *Serricchio* decision means for employees who are compensated in ways other than straight salary. If at all possible, employers should provide USERRA training to these decision makers so that they understand the broad requirements of the law with respect to re-employment, as well as to other employment rights accorded to the men and women in our military. Finally, all re-employment-related decisions affecting a returning service-member should be reviewed by human resources, and employment counsel should be consulted if any questions arise.

If you have any general questions about USERRA, or this article in particular, please contact **Aaron R. Gelb**, who tried a USERRA case in federal court, **Mark S. Goldstein** or any other Vedder Price attorney with whom you have worked.

Lawsuit by Tennis Umpires Underscores Growing Trend of Individuals Challenging Their Status as Independent Contractors

US Open umpires are not giving the United States Tennis Association (USTA) any love. Four umpires filed a class action in the Southern District of New York, alleging that the USTA misclassified them as independent contractors and denied them overtime. The umpires state that their workday often started as early as 7:30 a.m., and that they were required to officiate matches through the night. Additionally, they claim that they were paid a daily rate instead of

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hourly, based on their certification levels and type of match worked. The umpires argue that they are employees: They cannot negotiate their own salary, cannot work for another company while working at the tournament and do not set their own schedules.

The likelihood that this case will succeed is minimal at best. The umpires work for the USTA three weeks out of the year, meaning that they are outside of the USTA's control the other 49 weeks. However, this lawsuit is another, very public, example that employee misclassification lawsuits are here to stay.

The US Department of Labor (DOL) and the Internal Revenue Service (IRS) are making this point loud and clear. The two agencies signed a memorandum of understanding on September 19, 2011 to coordinate efforts to stop employers from misclassifying employees. Eleven state agencies—including those in Connecticut, Maryland, Massachusetts, Minnesota, Missouri, Utah and Washington—also signed on. The DOL has agreements from state labor agencies in Hawaii, Illinois, New York and Montana to enter into similar memorandums of understanding. These agreements allow the DOL to share information and coordinate law enforcement with the IRS and participating states.

Depending on the scope of the alleged misclassification, the damages can be large. Spearmint Rhino, a national adult night club, recently settled an employee misclassification lawsuit for $10 million. A class of 11,000 exotic dancers alleged that Spearmint Rhino failed to pay them minimum wage; divided their tips among doormen, DJs and managers; and charged them penalties if they did not sell a minimum amount of drinks during their dancing shifts. California's penalties can add up to millions of dollars in damages.

The US Open umpires will not be the last group of independent contractors to call "fault." Employers, especially those in California, must carefully review their policies to ensure that any independent contractors are not improperly classified.

Looking to Change Your Ways? IRS Offers "Reduced" Tax Liability Programs for Employers Who Voluntarily Change Contractors to Employees

Last September, the IRS launched the Voluntary Classification Settlement Program (VCSP), a program through which employers can resolve issues surrounding the classification of workers as contractors when, in fact, those workers should have been categorized as employees. The VCSP allows eligible employers to reclassify workers currently categorized as contractors to "employees" for future tax periods. Under the program, employers who previously misclassified employees as contractors will face limited tax liability for the past tax treatment of these workers, and will be able to utilize low-cost and streamlined administrative procedures to solve potential classification issues.

In order to be eligible for the VCSP, employers must have treated the worker or workers in question consistently as contractors, and filed Forms 1099 for those workers for at least three years prior to applying to the VCSP. The employer must also not be the focus of a current IRS audit or a DOL or other administrative audit related to its worker classification practices.

An employer need not reclassify all its contractors as part of the VCSP, but all contractors working in the same or largely similar capacity must be reclassified together.

The tax liability under the VCSP for past misclassification is limited to 10 percent of the potential tax liability that would have been due as a result of the misclassification, and the employer will not be required to pay any interest on the penalties. Additionally, the IRS will not subject the employer to an audit of its past employment treatment of the workers in question.

In order to participate in the VCSP, the employer must submit an application to the IRS using Form 8952, which is available at www.irs.gov/pub/irs-pdf/f8952.pdf. Eligibility for the program is not guaranteed to all employers.

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If you have any questions about this article or the use of independent contractors in general, please call **Jonathan A. Wexler, Sadina Montani, Emily T. Collins** or any other Vedder Price attorney with whom you have worked.

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Recent Vedder Price Accomplishments

- ***Michael G. Cleveland won summary judgment in the Northern District of Illinois on race, national origin and age discrimination, and harassment claims brought by a registered nurse against a Chicago-area hospital.***

- ***Michael G. Cleveland and Megan J. Crowhurst won summary judgment in the Southern District of Indiana on claims that the company failed to rehire, promote, train and provide schedule adjustments and overtime to the plaintiff because of her race, and in retaliation for filing discrimination complaints with the company's internal disputes office.***

- ***Aaron R. Gelb and Andrea Lewis obtained the dismissal, before discovery started, of a Title VII retaliation and state whistleblower lawsuit filed in the Northern District of Illinois by an assistant store manager against a national retail chain.***

- ***Aaron R. Gelb secured a 30 percent reduction of the fines assessed against an Illinois manufacturer cited by OSHA following a serious workplace injury.***

- ***Laura Sack and Michael Goettig won summary judgment in the Eastern District of New York on age, gender and disability discrimination claims filed by two plaintiffs against a family-owned bookstore. Among other things, the plaintiffs claimed that the defendant "regarded them" as disabled because they were obese; the court found in the defendant's favor on this claim and the myriad other claims in the complaint.***

- ***Laura Sack and Michael Goettig successfully moved in two different cases to enforce a predispute arbitration agreement that included a provision shortening the applicable statute of limitations to six months. These victories resulted in the dismissal with prejudice of two discrimination/wrongful discharge lawsuits filed against our client (a large financial services institution) in New Jersey state court.***

- ***Richard H. Schnadig and Megan J. Crowhurst won summary judgment in the Northern District of Illinois on FMLA retaliation and interference, Illinois Whistleblower Act and common law retaliation claims. The plaintiff, a factory worker, alleged that he was denied promotions and was terminated for taking time off to care for his wife, who suffered from severe depression, and in retaliation for reporting an alleged workplace injury.***

- ***Thomas M. Wilde and Patrick W. Spangler won a two-week jury trial in the Circuit Court of Cook County on behalf of a national retailer. The plaintiff claimed he was terminated in retaliation for exercising his workers' compensation rights.***

- ***Thomas M. Wilde won two labor arbitrations on behalf of a national manufacturing company. In one case, the union challenged the manner in which the company assigned work at their Ohio location. In the other case, the union challenged the wage rate of employees when they performed certain work at the company's Chicago location.***

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Labor and Employment Law Group

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