

Labor and Employment Law

Caught Between Scylla and Charybdis: Navigating a Course Between Attendance Policy Enforcement and ADA Compliance¹

In recent years, the U.S. Equal Employment Opportunity Commission (EEOC) has been aggressively investigating and litigating claims involving the application of local and national company attendance policies. In 2011 alone, the EEOC recovered \$27.1 million for ADA claimants, \$20 million of which involved a high-profile challenge to a single employer’s no-fault attendance policy. Employers thus find themselves in a quandary, seeking to balance those operational needs associated with ensuring that their employees report for work as scheduled and running afoul of the Americans with Disabilities Act (ADA). Two recent decisions—one addressing the propriety of a no-fault attendance policy and the other considering an employer’s requirement that employees provide a detailed medical excuse for illness-related absences—provide some helpful guidance for employers looking to chart a safer course.

Newsflash! Regular and Reliable Attendance Is, in Some Cases, an Essential Job Function

Many employers have learned the hard way that “no-fault” does not mean “no-risk” when it comes to disability discrimination claims challenging the application of attendance policies. Under these types of policies, employees accumulate occurrences of absences from work regardless of the employee’s reason for the absence (excluding FMLA leave, jury duty leave and other required exceptions). Once an employee exceeds the maximum allowable number of absence occurrences, his or her employment is terminated—no questions asked. Many employers believe that these no-fault

policies are the best way to implement an evenhanded approach for rewarding employees for good attendance and disciplining employees for poor attendance.

The EEOC, however, has taken a dim view of such policies under a theory that employers have affirmative duty under the ADA to accommodate qualified individuals with disabilities who for one reason or another cannot reliably report to work. To comply with the ADA, the EEOC often contends that employers may need to grant additional absences or leave time beyond the maximum amount otherwise permitted by company policy to those employees who are unable to comply with the policy. The EEOC thus instructs employers to modify their policy language to allow for such flexibility.

This obligation presents challenges for employers whose business operations demand regular, dependable attendance from their employees. Fortunately, a recent Ninth Circuit Court of Appeals (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon and Washington) decision provides support (and guidance) to employers seeking to defend against attendance policy attacks. In *Samper v. Providence St. Vincent Medical Center* (9th Cir. 2012), the plaintiff was a neo-natal intensive care unit nurse with a disability who was entitled to as many as five unplanned absences per year (in addition to a host of other permissible absences) yet still often exceeded the policy maximum—sometimes for reasons unrelated to her condition. Providence made

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¹ Scylla and Charybdis were mythical sea monsters on opposite sides of the Strait of Messina between Sicily and the Italian mainland. They were close enough to each other that they posed an inescapable threat to passing sailors; avoiding Charybdis meant passing too close to Scylla and vice versa. The authors do not intend to suggest that the EEOC is a monster, from the sea or otherwise.

exceptions to its policy on multiple occasions and generally bent over backwards to accommodate her.

When Samper asked Providence to accommodate her disability by exempting her from the attendance policy altogether and providing her with an unlimited number of absences, Providence declined, and it eventually terminated her employment for repeatedly exceeding the number of permitted unplanned absences. Samper sued, claiming Providence failed to provide her with a reasonable accommodation, in violation of the ADA.

Addressing the issue head-on, the Ninth Circuit stated: “This case tests the limits of an employer’s attendance policy. Just how essential is showing up for work on a predictable basis? In the case of a neo-natal intensive care nurse, we conclude that attendance really is essential.” The court held that regular attendance was an essential function of Samper’s job because her physical presence was required for teamwork, face-to-face interaction with patients and their families, and working with on-site medical equipment. Focusing on the very nature of a neo-natal intensive care nurse’s work, the court further asserted that Samper’s “regular predictable presence to perform specialized life-saving work in a hospital context” was particularly essential.

Notably, in its analysis, the court examined and took into account Providence’s written job description for the nursing position. According to the job description, the position required strict adherence to the attendance policy and specifically identified “attendance” and “punctuality” as essential job functions. Given that Samper could not perform these essential functions—with or without a reasonable accommodation—she was not a “qualified” individual with a disability, and therefore she was not protected by the ADA. As to her request to simply be exempt from the attendance policy, “Providence was under no obligation to give Samper a free pass for every unplanned absence.”

Although the court took special care to limit its ruling to the essential functions of neo-natal intensive care nurses at Providence, employers in a variety of industries can glean important lessons from *Samper*:

- Employers must remember that the EEOC and the courts may still expect some level of flexibility in attendance policies. No-fault policies should be updated to allow for exceptions when appropriate under the ADA.
- If regular, dependable attendance and punctuality are truly essential to a particular position, a written job description should accurately reflect that fact.

- Even if attendance is an essential job function, employers should still engage in a good-faith interactive process to determine if they can provide a reasonable accommodation to a qualified employee with a disability without undue hardship to the employer. However, as the Ninth Circuit stated, “an accommodation that would allow the employee to simply miss work whenever she felt she needed to and apparently for as long as she felt she needed to as a matter of law is not reasonable.”

Although *Samper* provides employers with some good news amidst the EEOC’s recent crackdown on attendance policies, employers should continue to administer their policies with caution. The ADA often presents a host of complex legal issues when dealing with employee attendance and leave situations, and employers would be prudent to consult legal counsel before taking any significant actions against employees.

Attendance Policy Requiring Employees to Identify the Medical Reason for a Health-Related Absence May Violate the ADA

Another issue that perplexes some employers involves how much information an employer can request from an employee who takes a health-related absence.

The ADA permits employers to “make inquiries into the ability of an employee to perform job-related functions,” but it prohibits employers from “mak[ing] inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related or consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(B), (D).

In *EEOC v. Dillard Store Services, Inc.* (S.D. Cal. 2012), the court found that an attendance policy requiring the employee’s health care provider to identify the medical reason for an absence from work may violate the ADA. The policy at issue required employees to identify the medical condition for which they sought an excuse for a health-related absence. Dillard claimed that it simply sought a general diagnosis (e.g., migraine, high blood pressure, etc.) and not necessarily any further detail. The company argued that it required the nature of the medical condition to verify the legitimacy of the absence and to ensure that the employee could safely return to work without posing a threat to the health or safety of others.

The court disagreed, finding that a note from a medical provider verifying in writing that the employee has a medical condition which requires her to be out of work and also specifying when the employee may return to work is sufficient to verify that an employee's absence is health related. To require an employee to provide further detail about the nature of the condition is an impermissible disability-related inquiry under 42 U.S.C. § 12112(d)(4)(A).

The court's decision gives guidance to employers, clarifying that, while it is permissible to require a doctor's note for a health-related absence, the employer should not seek further detail about the nature of the medical condition when seeking to categorize the absence as excused under an attendance policy. Employers should review their attendance policies to ensure they do not require more detail about the nature of an employee's absence and should advise supervisors to avoid seeking greater details concerning the reasons for a health-related absence from work.

Keep in mind that employee requests for accommodations for disabilities or for medical leave under the Family and Medical Leave Act may allow for further inquiry and should be considered separate from a general attendance policy.

If you have any questions about either issue or other inquiries about attendance policies, the Americans with Disabilities Act or the Family and Medical Leave Act, please contact **Aaron Gelb** at +1 (312) 609 7844, **Megan Crowhurst** at +1 (312) 609 7622, **Cara Ottenweller** at +1 (312) 609 7735, or any other Vedder Price attorney with whom you have worked. ■

EEOC Update: Limiting the Use of Conviction Records and Protecting the Transgendered

The EEOC was busy this spring, issuing *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* and holding, in the context of a federal employee's claim before the agency, that the protections afforded by Title VII extend to transgendered persons. While both actions are significant, the Guidance on Conviction Records will present significant challenges to those employers who have historically used such records as part of the applicant screening process, with the extent of its impact yet to be known due to certain unresolved issues.

The New EEOC Guidelines: Expect Heightened Scrutiny of Your Application Process

By way of background, Title VII prohibits employers from treating job applicants with the same criminal records differently because of their race, color, religion, sex or national origin (disparate treatment). Even when an employer uses criminal record exclusions uniformly, its actions may nonetheless disproportionately and unjustifiably exclude people of a particular race or national origin (disparate impact). If the employer does not show that such an exclusion is "job related and consistent with business necessity" for the position in question, the exclusion is unlawful under Title VII.

According to the EEOC, the new Enforcement Guidance "consolidates and supersedes" policy statements issued by the agency in 1987 and 1990. This is quite an understatement. While prior policy statements recognized both disparate-treatment and disparate-impact claims, the new Enforcement Guidance essentially recognizes only two circumstances under which an employer can establish that its criminal background inquiry is job related and consistent with business necessity. An employer now has two choices if it wishes to consider conviction records when making employment decisions. It can validate the appropriateness of a criminal screen using the Uniform Guidelines on Employee Selection Procedures—a complex statistical endeavor that is likely to be an impractical option for the average employer. Alternatively, it can develop a "targeted screen" that considers the nature of the crime, the amount of time elapsed since the conduct or conviction at issue, and the nature of the job in question. Employers choosing the latter approach must also provide applicants or employees who may be excluded from an employment opportunity due to a disqualifying conviction record with the opportunity to present mitigating information (for example, demonstrating that the conviction record does not belong to the applicant) with an *individualized assessment*. While Title VII does not require such an assessment in all circumstances, the EEOC maintains that a screening process that does not utilize such an inquiry is more likely to violate Title VII.

The Guidance serves as a warning to all employers who disqualify candidates on the basis of a criminal conviction, whether the disqualification is automatic once a conviction is discovered or occurs only following a determination that the conviction relates to the position in question. Many employers are now asking themselves whether they should do away altogether with the familiar criminal conviction history questions on their employment

applications. Given the hodgepodge of state laws governing use of such questions, it is a step that many national employers may opt to take. Even if an employer is in compliance with the laws in those states in which it operates, the EEOC takes the position that Title VII preempts state law on the subject, so dispensing with the application inquiry is something that smaller employers might consider as well. This does not mean, however, that employers cannot ask about convictions or run criminal background checks (provided all the requirements of the Fair Credit Reporting Act and various state laws are met), but rather that they may choose to wait until later in the application process, perhaps until after the initial screen or once a final slate of candidates has been identified. And when a conviction record is revealed, employers should carefully assess the nature of each position being filled and determine whether the conviction at issue is reasonably related to the particular position, such that it should be a disqualifier.

Now is the time for employers to reassess their criminal background check policies and practices to determine the level of risk they face in light of the new Enforcement Guidance and whether revision is appropriate.

Protecting Transgendered Persons: An Expected Expansion of Title VII

Earlier this year, the EEOC confirmed, after much speculation, that Title VII protects transgendered persons from discrimination. In *Macy v. Holder (Bureau of Alcohol, Tobacco, Firearms and Explosives (the Bureau))* (Case No. 0210210821), Macy claimed that she was denied a position with the Bureau because she revealed that she was in the process of transitioning from male to female. Macy filed a discrimination charge based on sex and gender stereotyping, but the Bureau found that her sex discrimination claim was limited to her status as a female and that her gender stereotyping claim fell outside of Title VII's protections. In reversing the Bureau's findings, the EEOC held for the first time that "complaint[s] of discrimination based on gender identity, change of sex, and/or transgender status [are] cognizable under Title VII."

While significant, this ruling is unlikely to change the practices of those employers covered by the Illinois Human Rights Act, as sexual orientation has been a protected characteristic under Illinois law for some time. The decision is likely, however, to influence judicial rulings concerning these types of claims under federal law, specifically Title VII, and whether plaintiffs can proceed on them. Employers should also be prepared

for the EEOC's active acceptance, and possible unilateral investigations, of discrimination claims based on transgendered status.

If you have any questions about this article, the use of criminal conviction history with respect to employment actions, or the treatment of transgendered employees, please contact **Amy Bess**, of Vedder Price's Washington, DC office, at +1 (202) 312 3361, **Laura Sack**, of Vedder Price's New York office, at +1 (212) 407 6960 or **Elizabeth Hall**, of Vedder Price's Chicago office, at +1 (312) 609 7795. ■

Whistleblower Update: Sarbanes-Oxley Now Really Means Business

Ever since the Sarbanes-Oxley Act (SOX) became law in 2002, publicly traded companies have fared quite well when defending "whistleblower" retaliation complaints brought by employees claiming to have suffered retaliatory personnel actions for reporting or cooperating in investigations of corporate fraud or violations of Securities and Exchange Commission (SEC) rules or regulations. During this ten-year period, corporate whistleblowers have prevailed on only 21 out of 1,455 complaints (less than 2 percent), while another 996 cases have been dismissed. The rest of the cases were withdrawn or settled or remain pending. This all figures to change, however, thanks to a series of recent changes that make it easier for an aggrieved employee to plead and prevail on whistleblower retaliation claims.

When an employee files a SOX whistleblower complaint (employees have 180 days to file from the date of the alleged discrimination or when the employee learned of the alleged discrimination), the Occupational Safety and Health Administration (OSHA—yes, OSHA!) will conduct an investigation and issue findings and a preliminary order. Either party may then request a full hearing before a U.S. Department of Labor (DOL) administrative law judge. The administrative law judge's decision and order may be appealed to the DOL's Administrative Review Board (ARB).

To prevail on a SOX claim, a complainant must prove by a preponderance of the evidence that (1) he or she engaged in activity or conduct protected by Section 1514A, (2) the employer took an unfavorable personnel action against him or her, and (3) the protected activity was a contributing factor in the adverse personnel action.

In the past year and a half, however, the ARB has taken the following actions:

- Recognized a more pro-claimant pleading

standard by disavowing a complainant's obligation to prove that an employer's proffered non-retaliatory reasons for terminating the complainant were mere pretext.

- Expanded its interpretation of "protected activity," dispensing with the requirements that a complainant must (a) allege shareholder fraud to obtain SOX whistleblower protection and (b) definitively and specifically plead the company's violation; it also held that protected activity may include allegations of SOX violations that have not yet occurred.
- Broadened the definition of an unfavorable personnel action to include any "non-trivial" employer action, regardless of whether it was employment related.
- Extended SOX whistleblower protections to employees of private companies in certain circumstances. For example, the ARB has held that an employee of a privately owned accounting firm fell under SOX's whistleblower protections when he reported SOX violations of a publicly traded company for which he was performing full-time auditing services.

Given these significant changes to well-established pleading requirements, public companies—and even some private employers that have dealings with public companies—should expect to see an increase in the number of SOX whistleblower complaints and find it more difficult to secure their dismissal. As such, covered employers should consider reviewing their SOX/whistleblower policies and determining whether they have adequate internal controls in place to address and respond when someone blows the whistle.

If you have any questions about this article or SOX whistleblower protections in general, please contact **Neal Korval**, of Vedder Price's New York office, at +1 (212) 407 7780, **Bruce Alper**, of Vedder Price's Chicago office, at +1 (312) 609 7890, **Sadina Montani**, of Vedder Price's Washington, DC office, at +1 (202) 312 3363, or any other Vedder Price attorney with whom you have worked. ■

Health Care Reform Reminder

With the recent United States Supreme Court decision upholding the majority of the Patient Protection and Affordable Care Act (PPACA), employers need to ensure compliance with the provisions of PPACA that will become operative during 2012, 2013, 2014 and beyond.

This article highlights upcoming key requirements and action items.

2012

Uniform Summary of Benefits and Coverage (SBC). This mini summary plan description (no longer than four double-sided pages) for each benefit option under an employer's medical plan must be provided annually to participants as part of the plan's open-enrollment process, must be provided to newly eligible employees as part of their initial enrollment and must be provided generally to participants upon request. The first SBCs will need to be distributed to participants as part of the open enrollments that occur on or after September 23, 2012.

To Do:

- Confirm that your vendors are preparing SBCs for each benefit option.
- Incorporate the SBC into open-enrollment materials this fall.
- Develop a distribution mechanism for new hires and other newly eligible employees, and for handling requests for copies.

W-2 Reporting of Employer-Provided Coverage. Beginning with the 2012 Form W-2s issued in January 2013, each W-2 must include the applicable cost of employer-provided coverage. For 2012, this requirement does not apply to employers that filed fewer than 250 W-2s for 2011.

To Do:

- Work with internal payroll department and/or outside payroll vendor to make sure they are prepared for this new reporting requirement.
- Develop a process for accurately calculating the cost of employer-provided coverage for each plan option and level of coverage.

Patient-Centered Outcomes Research Fee. This is an annual fee per person covered under an employer-sponsored plan, and it applies to both insured and self-insured plans. The fee for 2012 is one dollar per covered person, increasing to two dollars per covered person in 2013. The first payment of the fee will be due in July 2013. The IRS has issued a new form (Form 720) to report this payment.

2013

Preventive Services. Additional preventive services for women must be covered at 100 percent with no cost sharing (i.e., copayments). (This requirement is not

applicable to grandfathered plans.) These additional services include comprehensive annual well-woman visits, HPV DNA testing, HIV screening, prescription contraceptives, RU 486 morning-after pills and sterilization procedures.

To Do:

- If your plan is not grandfathered, make sure these provisions are included in the underlying administrative documents, as well as open-enrollment materials, summary plan descriptions and summary of material modifications for 2013.

\$2,500 Annual Limit on Health FSAs. For plan years that begin in 2013, the maximum amount that an employee can contribute to a health care flexible spending account (FSA) will be \$2,500. (Plans have generally imposed their own dollar limits on contributions to health FSAs, but a statutory limit has not previously applied.)

To Do:

- Make sure this limit is communicated in your 2013 open-enrollment materials.
- Amend your cafeteria plan to reflect this limitation.
- Update election forms and procedures to prevent employees from making FSA elections exceeding the \$2,500 limit.

Additional Medicare Tax for High Earners. Beginning in 2013, an additional 0.9 percent employee Medicare tax is imposed on wages for individuals earning over \$200,000 (and couples earning over \$250,000) for amounts over those thresholds. This additional Medicare tax does not apply to the employer portion of the Medicare tax, which remains at 1.45 percent.

To Do:

- Work with your internal payroll department and/or your external payroll vendor to make sure this additional Medicare tax will be collected.

Medicare Part D Subsidies. If the employer participates in the CMS Medicare Part D subsidy program relating to retiree prescription drug coverage, those subsidies will effectively become taxable to the employer.

Notice about Exchanges. PPACA envisions that employers will notify employees by March 1, 2013 about the applicable state health insurance exchange and how that exchange will work. In addition, the notice is

expected to contain information about health insurance premium credits and cost share reductions.

2014

- Individual mandate becomes effective, along with government subsidies to purchase coverage.
- Insurance market reforms—guaranteed issue and community rating—become effective.
- Insurance exchanges become operative.
- Employer “play or pay” mandate for employers with more than 50 full-time equivalent employees becomes effective.
- Minimum essential coverage requirements for medical plans become effective.

Most of the substantive provisions that become effective in 2014 still await regulatory guidance. As a result, we expect significant regulatory activity over the next 12 to 18 months. In addition, by early 2013 employers will need to make strategic decisions regarding employer-sponsored medical plan coverage for 2014 and beyond, in order to allow adequate time for implementation.

As issues under the PPACA continue to evolve (whether through regulatory guidance, emerging best practices, etc.), employers will have to keep up to date. Vedder Price will continue to provide timely guidance through Employee Benefits Briefings and webinars to support that effort.

In the meantime, if you have any questions regarding this article, please contact any Vedder Price attorney with whom you have worked. ■

Please Join Us

Employment Law Update, DC

Practical Advice for In-House Counsel & Human Resource Professionals

**October 3, 2012
8:30 a.m. - Noon**

Please join us for this timely and engaging discussion of recent issues in employment law, including health care reform, social media, working remotely, OFCCP developments and wage and hour issues.

CLE Credit Available

For more information, or to register, please visit www.vedderprice.com and click on our events page.

Recent Vedder Price Accomplishments

- ◆ *Amy Bess and Sadina Montani won an appeal in the U.S. Court of Appeals for the Fourth Circuit recently in the matter of Goodman v. Praxair Services, Inc., when the court affirmed a defense judgment in favor of Vedder Price's clients following a jury trial in the United States District Court for Maryland. The suit involved various claims including breach of contract and alleged violations of the Maryland Wage Payment and Collection Act brought by a former independent contractor.*
- ◆ *Aaron Gelb secured the reduction of an Illinois Department of Labor citation from willful to serious for a violation of an occupational safety and health law that applies to public employees in Illinois. The DOL also agreed to withdraw the \$10,000 fine it assessed against the employer. The citation alleged that the employer's workplace violence prevention program was inadequate and that an incident of workplace violence was thus a violation of the General Duty Clause.*
- ◆ *Aaron Gelb prevailed at a final hearing before the Wisconsin Equal Rights Division, defending a national logistics employer from claims of race and sex discrimination involving the employee's terms and conditions of employment as well as her discharge.*
- ◆ *Kevin Hennessy recently assisted a major national food distributor in winning a decertification election involving over 100 Teamsters warehousepersons in New York, and defeating unfair-labor-practice charges alleging unlawful termination of four alleged union supporters.*
- ◆ *Neal Korval recently completed collective bargaining negotiations with the Teamsters on behalf of a major New York retailer which resulted in the inclusion in the CBA of a sales quota system that was much sought after by management.*
- ◆ *Laura Sack and Roy Salins won an appeal at the Second Circuit Court of Appeals on behalf of a media client. The Second Circuit affirmed the district court's dismissal on summary judgment of the plaintiff's race and gender discrimination claims (including claims of disparate pay, wrongful discharge, hostile work environment and retaliation) under federal law, New York State law and New York City law.*
- ◆ *Jim Spizzo and Margo Wolf O'Donnell teamed up to provide extensive, hands-on training services for a national client on the topic of workplace harassment and bullying. The client recently implemented a rigorous anti-bullying component within its company-wide harassment policy. The company maintains an anti-harassment training program with regularly scheduled seminars for employees and new hires.*
- ◆ *Jim Spizzo obtained EEOC dismissal of an Americans with Disabilities Act complaint on behalf of a national freight carrier. The charge was brought by a truck driver who applied for a position after the client acquired his employer. The company fired the driver after he failed a neutrally applied physical-fitness and agility test given by the client to all conditional-offer hires.*
- ◆ *Lyle Zuckerman and Roy Salins won a Second Circuit appeal affirming a decision of the Eastern District of New York, which granted summary judgment in favor of a major New York metropolitan university. The defendant was sued by a former academic service coordinator for discrimination on the basis of race, national origin and religion, and retaliation under federal law. Notably, the court affirmed summary judgment for the employer on the retaliation claim despite the fact that the protected activity (a complaint of discrimination to human resources) occurred mere days before plaintiff's discharge.*

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Labor and Employment Law Group

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