VEDDERPRICE®

Chicago ■ New York ■ Washington, DC ■ London

March 2013

Labor and Employment Law

DC Circuit Court Finds President Obama's Appointments Unconstitutional

On Friday, January 25, 2013, a three-judge panel of the U.S. Court of Appeals for the DC Circuit issued an opinion that will invalidate every NLRB decision issued during 2012 if the opinion is followed by other courts or affirmed by the Supreme Court. In *Noel Canning v. NLRB*, the DC Circuit determined that President Obama's January 2012 recess appointments to the NLRB were improper. Without those appointments, the Board lacked enough members to take effective action under the law.

The case stems from the January 4, 2012 "recess" appointments made to the Board by President Obama. The court invalidated the appointments because they did not comply with the court's interpretation of when recess appointments are permitted. The President made those appointments even though Congress was not in full recess because the Senate failed to take action on approval of the President's nominees to the NLRB, which would have left the agency without a quorum.

As a practical matter, until new nominees to the NLRB are approved, all future NLRB case decisions may be invalidated if they are appealed to the DC Circuit. That puts a cloud over most NLRB actions and significantly hamstrings the agency. Because of that, the administration and the NLRB have pledged to stay the course and appeal *Noel Canning* to the Supreme Court. A decision on whether the Supreme Court will hear the case is likely to occur this year, but it is unclear whether the case would be added to the court's docket before the fall.

For employers and unions not awaiting decision on cases before the NLRB, the primary impact of the decision is that it may delay determinations from the NLRB on controversial issues that most observers believe were likely to favor labor unions and disadvantage employers.

While controversial decisions issued by the NLRB in the last year may ultimately be overturned as a result of the ruling, long-term relief for employers is unlikely, since the NLRB will likely reaffirm its rulings once new nominees are approved. Some of the more significant changes pursued by the NLRB in the last year included decisions (i) requiring employers to provide a union with notice and an opportunity to bargain over suspensions and discharges when there is no collectively bargained grievance and arbitration process in place, (ii) extending contractual dues check-off obligations beyond the expiration of a collective bargaining agreement and (iii) compelling employers to provide unions with witness statements obtained during investigations of workplace misconduct for grievance or arbitration purposes.

In the interim, employers who ignore these and other rulings that are subject to challenge as a result of this decision will act at their own peril. The NLRB's General Counsel and Regional Directors will continue to treat those rulings as good law and will prosecute accordingly.

We will keep you informed of any future developments.

If you have any questions about this decision and its implications, or how it impacts a particular case, please contact **Kenneth F. Sparks** at +1 (312) 609 7877, **Mark L. Stolzenburg** at +1 (312) 609 7512 or any other Vedder Price attorney with whom you have worked. ■

In this issue...

Has the DOL's "Right To Know" Rule Resurfaced?

On January 11, 2013, the Department of Labor (DOL) published a notice in the Federal Register requesting public comments on its "proposal to collect information about employment experiences and workers' knowledge of basic employment laws so as to better understand employees' experience with worker misclassification." 78 Fed. Reg. 2447 (Jan. 11, 2013). This survey may signal the DOL's intention to move forward with "Right to Know" rules originally contemplated in 2010 but never formally proposed, or with other similar regulations that would affect the way employers classify workers.

In 2010, the DOL announced its intention to update the recordkeeping regulations under the federal Fair Labor Standards Act (FLSA) to require, in part, that employers who classify a worker as an exempt employee or independent contractor prepare a written explanation as to why that individual is classified as such. The explanation would then be provided to both the worker and the DOL. Additionally, for workers classified as employees, the employer would need to provide information on how it computes the pay of those employees.

As employers are not currently required to notify workers or the DOL of the workers' status, and they are not required to provide information to all employees on how their pay is calculated, these regulations would place an added burden on employers. Further, considering the increasing amount of wage and hour litigation, this type of rule may lead to even more lawsuits filed on behalf of workers alleging they were misclassified.

After indicating in late 2010 and early 2011 that it would issue proposed rules on the "Right to Know under the Fair Labor Standards Act," the DOL failed to do so. Instead, in the fall of 2011, the DOL changed the "Right to Know" rule from its previous Proposed Rule Stage to the status of Long-Term Action. "Long-Term Actions" are items that are under development but for which the agency does not expect to have a regulatory action within the 12 months after the date on which the regulatory agenda is published. Despite the suggestion that it would take no immediate action, however, the DOL maintained that the "Right to Know" regulation remained on its to-do list. Acting Wage and Hour Administrator Nancy Leppink stated in early 2012, "We're continuing to work on that regulation...We're learning about what the issues are." Gayle Cinquergrani, *Wage and Hour Division Forges Ahead with Misclassification Enforcement*, BNA Daily Labor Report (Jan. 24, 2012).

The DOL's proposed survey, intended to obtain information about the precise issues that prompted it to propose "Right to Know" rules in the first place, could mark the revival of this regulation and emphasizes the DOL's focus on worker misclassification issues. The survey is scheduled to last until May 2014. Though this evaluation may result in burdensome regulations down the line, the DOL's notice suggests it will hold off on placing additional requirements on employers regarding employee classifications in the near future. For now, employers should continue to exercise caution in classifying workers, and remain mindful of the current and developing wage and hour law.

If you have any questions about this article, please contact **Thomas M. Wilde** at +1 (312) 609 7821, **Andrea L. Lewis** at +1 (312) 609 7739 or any other Vedder Price attorney with whom you have worked. ■

GCs Name Vedder Price Among 13 Top Value Firms

330+ U.S. Law Firms Evaluated

240+ Corporate Counsel Interviewed

13 Firms Ranked Best for Client Value

Only 1 VEDDER PRICE.

In its 2013 Client Service A-Team Report, BTI Consulting Group named Vedder Price one of the top 13 firms that "provide value for the dollar."

BTI is an independent and unbiased legal industry research group. Nominations for the Client Service A-Team are submitted only by clients, unprompted and unsolicited by any law firm.

More of the Same: What to Expect from OSHA in 2013 (and Beyond)

Continuing the trend observed during President Obama's first term, the Occupational Safety and Health Administration (OSHA) will likely continue its aggressive approach toward enforcement, conducting more inspections, finding more violations, handing down stiffer fines and issuing more press releases critical of employers believed to have violated the applicable regulations. There is no reason to believe that OSHA will

ease up in any area; rather, employers should expect a renewed commitment from the agency to expand its reach and impact. Indeed, as part of its site-specific targeting program, OSHA has indicated that in the coming year it plans to inspect at least 1,260 high-hazard, nonconstruction establishments that employ 20 or more workers.

The agency's latest regulatory agenda contains over 20 new OSHA rules in varying stages of formulation, some of which will be finalized in 2013.

OSHA anticipates publishing a final rule with respect to injury and illness reporting and recording in May 2013. The final rule, for which OSHA first requested comments back in September 2011, will likely require employers to report any work-related in-patient hospitalization, as opposed to only those work-related in-patient hospitalizations of three or more employees. Additionally, the new rule may require that all work-related amputations be reported within 24 hours.

The rule would also update the list of industries that are partially exempt from the requirement of maintaining a log of occupational injuries and illnesses, usually due to their relatively low rates of occupational injury and illness.

Other rules that may be forthcoming this year include a new rule for confined spaces in construction, a rule amending the electric power transmission and distribution standard, and an updated walking-surfaces standard.

OSHA's agenda for the coming year also highlights the agency's desire to create rules related to combustible dust standards, standards for employees who are exposed to infectious diseases, and standards for employees who are exposed to crystalline silica or beryllium.

OSHA will also be busy developing an injury and illness prevention program rule that will require employers to implement a program that includes planning, implementing, evaluating and improving processes and activities to protect employee safety and health. OSHA also intends to review permissible exposure limits of regulated chemicals

Some of these rules have lingered on the regulatory agenda for over a decade. However, with four years to work without a looming bid for reelection, the Obama administration could take this opportunity to bolster OSHA rules.

While not all of the upcoming rules may apply to you, it is important to ensure that your workplace complies with the ever-expanding rules promulgated by OSHA.

Vedder Price attorneys regularly assist in-house counsel and human resources professionals with occupational safety and health compliance, and in occupational safety and health proceedings, including citation actions, inspections and related discrimination matters. If you have any questions about any upcoming OSHA rules or OSHA issues generally, please feel free to contact **Aaron R. Gelb** at +1 (312) 609 7844 or **Benjamin A. Hartsock** at +1 (312) 609 7922 in Chicago, **Jonathan A. Wexler** at +1 (212) 407 7732 in New York, **Sadina Montani** at +1 (202) 312 3363 in Washington, DC or any other Vedder Price attorney with whom you have worked. ■

Please Join Us

Employment Law Update

Practical Advice for In-House Counsel & Human Resource Professionals

Chicago
April 25, 12:30 - 4:00 p.m.
Reception to follow

Palmer House
17 East Monroe Street

Rosemont
May 2, 8:30 a.m. - 12:00 p.m.
Lunch to follow

Hyatt Regency O'Hare
9300 Bryn Mawr Avenue

New York
May 16, 12:30 - 4:00 p.m.
Reception to follow

Sentry Centers
730 Third Avenue

CLE Credit Available

For more information, or to register, please visit
www.vedderprice.com/employmentlawupdate

Supreme Court to Hear a Case Affecting a Fundamental Element of Discrimination and Retaliation Actions

The Supreme Court recently agreed to hear a case that should, at long last, determine whether the retaliation provision of Title VII requires an employee to prove but-for causation (that the employer would not have taken the challenged action but for an improper motive) or whether the employee should prevail if he or she is able to establish merely that an improper motive was one of several reasons for the challenged action. The latter method of proof, often referred to as the mixed-motive analysis, tends to pose a more difficult challenge to employers defending against such claims, particularly in front of a jury.

In *Nassar v. University of Texas Southwestern Medical Center*, the plaintiff alleged that he was constructively discharged—that is, the conditions at his place of employment were so distressing that he had no choice but to resign. He also claimed that his employer "retaliated against [him] by preventing him from obtaining a position" at another work site.

Nassar, a doctor of Middle Eastern descent who was working at the University of Texas Southwestern Medical Center (UTSW), complained that his immediate supervisor made several insensitive remarks about his ancestry and unfairly scrutinized his performance. His supervisor, he claimed, also attempted to block his efforts to secure a promotion. In the end, Nassar received the promotion, but he still sought employment elsewhere as a result of the harassment he claimed to be experiencing at UTSW. Nassar eventually expressed interest in working at a clinic affiliated with UTSW. UTSW initially approved his request to work at the clinic, but it later reversed course after Nassar explained that he was resigning because he felt he had been harassed.

The question before the Supreme Court is whether an employee, in this case Nassar, must show only that illegal bias was one of several reasons (mixed-motives) for the adverse employment action he experienced, or whether the illegal bias was the primary reason for the action. If the Court endorses the mixed-motive approach, employers defending Title VII claims will find it more difficult to defend against such claims, as it is easier for employees to establish that mixed motives led to an adverse employment action than it is to show that an illegal bias was the reason for an employment decision. Similarly, it is more difficult for employers to prove that a multifactor employment decision did not also include illegal discriminatory or retaliatory motives when it was made.

The Supreme Court is likely to hear the case in April, with a decision to follow in June. We are actively monitoring the case and will release an update when there is a decision. Stay tuned or contact your Vedder Price attorney, **J. Kevin Hennessy** at +1 (312) 609 7868, **Amy L. Bess** at +1 (202) 312 3361, or **Neal I. Korval** at +1 (212) 407 7780. ■

Employer Alert: It's Time to File H-1B (Specialty Occupation) Petitions

On April 1, 2013, the United States Citizenship and Immigration Services (USCIS) will begin accepting new H-1B visa petitions for employment that will begin on October 1, 2013. The H-1B visa is a popular choice for companies that plan to hire a foreign worker to fill a "professional" or "specialty occupation" position requiring a minimum of a bachelor's degree in a specific field. Possible candidates for H-1B status include current employees in student status (F-1 or J-1) or potential new hires.

There are 65,000 new H-1B visas available each year, in addition to 20,000 H-1B visas reserved for holders of U.S. master's or higher degrees. The USCIS reached the quota on June 11 of last year. We anticipate that the H-1B visa numbers will be used more quickly this year because of the continued economic recovery and recent increases in the evidentiary burden of other closely related visa categories. Consequently, filing your H-1B petitions on the first day permitted (April 1) will increase your chances of obtaining one of the highly coveted H-1B visa numbers.

To meet a target filing date of April 1, we recommend that you start the application process now. Before we can file an H-1B petition with USCIS, the U.S. Department of Labor (USDOL) must certify a Labor Condition Application for the position. The USDOL is generally taking at least seven days to process Labor Condition Applications, and we expect this processing time to increase in March as employers prepare to file H-1B petitions. Please note that there are some exemptions from this cap for colleges and universities and those who have held H-1B status in the past six years, but these exemptions are quite limited.

Therefore, it is critical that your organization begin the H-1B process as soon as possible to ensure that an H-1B number will be available for this fiscal year. Once the H-1B numbers are exhausted, employers will not be able to obtain new H-1B status for employees until October 1, 2014!

Please contact your Vedder Price attorney, **Gabrielle M. Buckley** at +1 (312) 609 7626 or **Bradley A. Richards** at +1 (312) 609 7711 to discuss these matters further. ■

Recent Accomplishments

Thomas M. Wilde and **Mark L. Stolzenburg** obtained summary judgment in the U.S. District Court for the District of New Jersey on behalf of an international manufacturing company. A terminated employee sued the company and his labor union, claiming breach of a settlement agreement and seeking enforcement of an arbitration award.

Neal I. Korval, **Jonathan A. Wexler**, **Thomas G. Abram**, **Patrick W. Spangler** and **Michelle D. Velásquez** recently obtained dismissal from the EEOC of its nationwide investigation into the use of an isokinetic strength and agility test as a hiring screen for all warehouse jobs at a large national drugstore chain. The EEOC was examining whether the drugstore chain's use of the test had an impermissible adverse impact on women. Vedder Price argued to the EEOC both that the use of the test did not have a statistical adverse impact on women and, in any event, that the company had a business necessity to utilize it. After a three-and-a-half-year investigation, the agency concluded that it could find no violation of law, and dismissed the charge that gave rise to the investigation.

Edward C. Jepson, Jr. and **Scot A. Hinshaw** recently obtained summary judgment on a workers' compensation retaliation case in Alabama state court for a dry goods transport company.

Mark L. Stolzenburg, after being retained to handle a discharge arbitration less than 24 hours before the hearing, secured a complete victory for a Chicago-area hotel, convincing the arbitrator to uphold the dismissal of an employee who fell asleep on the job after taking an over-the-counter cold medicine. ■

Labor & Employment Law Group

Chicago

Thomas G. Abram ..... +1 (312) 609 7760
Bruce R. Alper ..... +1 (312) 609 7890
Nicholas Anaclerio ..... +1 (312) 609 7538
Mark I. Bogart ..... +1 (312) 609 7878
Lawrence J. Casazza ..... +1 (312) 609 7770
Michael G. Cleveland ..... +1 (312) 609 7860
Steven P. Cohn ..... +1 (312) 609 4596
Christopher T. Collins ..... +1 (312) 609 7706
Thomas P. Desmond ..... +1 (312) 609 7647
Brandon Dixon ..... +1 (312) 609 7852
Emily C. Fess ..... +1 (312) 609 7572
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, *Chair* ..... +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
Andrea L. Lewis ..... +1 (312) 609 7739
Philip L. Mowery ..... +1 (312) 609 7642
Joseph K. Mulherin ..... +1 (312) 609 7725
Margo Wolf O'Donnell ..... +1 (312) 609 7609
Cara J. Ottenweller ..... +1 (312) 609 7735
Paul F. Russell ..... +1 (312) 609 7740
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
Thomas M. Wilde ..... +1 (312) 609 7821
Jessica L. Winski ..... +1 (312) 609 7678
Charles B. Wolf ..... +1 (312) 609 7888

New York

Michael Goettig ..... +1 (212) 407 7781
Mark S. Goldstein ..... +1 (212) 407 6941
Daniel C. Green ..... +1 (212) 407 7735
Alan M. Koral ..... +1 (212) 407 7750
Neal I. Korval ..... +1 (212) 407 7780
Laura Sack ..... +1 (212) 407 6960
Roy P. Salins ..... +1 (212) 407 6965
Marc B. Schlesinger ..... +1 (212) 407 6935
Michelle D. Velásquez ..... +1 (212) 407 7792
Jonathan A. Wexler ..... +1 (212) 407 7732
Lyle S. Zuckerman ..... +1 (212) 407 6964

Washington, DC

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

VEDDER PRICE®

222 NORTH LASALLE STREET
CHICAGO, ILLINOIS 60601
+1 (312) 609 7500 | +1 (312) 609 5005 • FAX

1633 BROADWAY, 47TH FLOOR
NEW YORK, NEW YORK 10019
+1 (212) 407 7700 | +1 (212) 407 7799 • FAX

1401 I STREET NW, SUITE 1100
WASHINGTON, DC 20005
+1 (202) 312 3320 | +1 (202) 312 3322 • FAX

4 COLEMAN STREET
LONDON EC2R 5AR
+ 44 (0)20 3667 2900 | + 44 (0)20 3667 2901 • FAX

www.vedderprice.com

Labor & Employment Law Group

Vedder Price is known as one of the premier employment law firms in the nation, representing private- and public-sector management clients of all sizes in all areas of employment law. The fact that over 50 of the firm's attorneys concentrate in employment law assures ready availability of experienced labor counsel on short notice; constant backup for all ongoing client projects; continual training and review of newer attorneys' work by seasoned employment law practitioners; and intra-area knowledge that small labor sections or boutique labor firms cannot provide.

About Vedder Price

Vedder Price is a business-oriented law firm composed of more than 265 attorneys in Chicago, New York, Washington, DC and London. The firm combines broad, diversified legal experience with particular strengths in commercial finance, corporate and business law, financial institutions, labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, health care, trade and professional associations and not-for-profit organizations.

This publication is intended to keep our clients and interested parties generally informed on labor law issues and developments. It is not a substitute for professional advice. For purposes of the New York State Bar Rules, this communication may be considered ATTORNEY ADVERTISING. Prior results do not guarantee a similar outcome.

Vedder Price is an international law firm operating through various separate and distinct entities. One of those entities is Vedder Price LLP, which operates in England and Wales and is regulated by the Solicitors Regulation Authority. For further information, please refer to www.vedderprice.com.

© 2013 Vedder Price P.C. Reproduction of this newsletter is permitted only with credit to Vedder Price P.C. For additional copies or an electronic copy of this newsletter, please contact us at info@vedderprice.com.

VEDDER PRICE®

Chicago

New York

Washington, DC

London

www.vedderprice.com