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June 2013

Labor and Employment Law

New York City Employers Beware: Discrimination Against the Unemployed is Now Illegal

Effective June 11, 2013, New York City employers with at least four employees (as well as employment agencies) are prohibited by law from discriminating against individuals based on their employment status. Thus, covered employers may not make employment decisions (including those regarding hiring and compensation, or the terms, conditions or privileges of employment) on the basis of an applicant's employment status. Nor may covered employers state in job advertisements that only those who are currently employed may apply, or that unemployed applicants will not be considered.

This latest expansion of the New York City Human Rights Law (NYCHRL) adds "unemployment" to the growing list of personal characteristics that are protected by the law (the list already includes personal characteristics such as race, sex, age, disability and sexual orientation). "Unemployment" is defined by the NYCHRL as "not having a job, being available for work, and seeking employment."

Several other jurisdictions have enacted similar laws. New Jersey started the trend, passing a law in 2011 that bars employers from stating in advertisements that they will only hire currently employed individuals. Oregon and the District of Columbia have followed suit, and other states (including California, Maryland and Arizona) have considered such laws but have not yet passed them. Similar federal legislation was introduced in 2011 but has not yet been voted on.

The NYCHRL's prohibition on discrimination against the unemployed has been described as the toughest such law in the nation, in large part because it is the first such law to allow individuals to sue for discrimination based on their employment status. Successful plaintiffs may recover damages, including punitive damages, attorneys' fees and injunctive relief. In addition, plaintiffs may establish a violation of the law under either a disparate-treatment or a disparate-impact theory.

The NYCHRL does permit employers to consider an applicant's employment status "where there is a substantially job-related reason for doing so." Employers are also expressly permitted to inquire "into the circumstances surrounding an applicant's separation from prior employment." Additionally, employers are allowed to accept applications only from those whom they already employ and to give hiring preference to those whom they already employ.

To comply with this latest amendment to the NYCHRL, employers should ensure that their job advertisements and postings do not exclude the unemployed from applying, and employers should also ensure that hiring managers and human resources staff do not screen out applicants because they are unemployed, or otherwise discriminate against the unemployed in the hiring process.

If you have any questions about the new law, or about its implications for your organization's hiring practices, please contact **Laura Sack** at +1 (212) 407 6960, **Michael Goettig** at +1 (212) 407 7781 or any other Vedder Price attorney with whom you have worked. ■

In this issue...

Court Overrules NLRB Notice Posting Ruling

On May 7, the U.S. Court of Appeals for the D.C. Circuit issued a long-awaited ruling regarding the National Labor Relations Board's "notice posting" rule. That rule, originally issued in August 2011, would have required almost all private-sector employers to post a notice in the workplace informing employees of their right to form and join unions, and otherwise engage in protected, concerted activity such as discussing terms and conditions of employment with other employees. Many employers and the U.S. Chamber of Commerce objected to making any such posting and also felt that the posting ordered by the NLRB was not balanced and could encourage unionization. Under the NLRB's promulgated rule, failing to post the notice was itself an unfair labor practice and also would toll the statute of limitations indefinitely for any other unfair labor practices committed by employers who failed to post.

The D.C. Circuit stuck down the NLRB's rule in its entirety. It first found that the notice rule violated section 8(c) of the National Labor Relations Act, which is widely known as the "employer free speech" provision and was designed to mimic the First Amendment. The D.C. Circuit held that it is well established under other court decisions that "free speech" includes both the right to speak as well as the right to refrain from speaking. By requiring an employer to post a notice informing employees of their right to unionize, and creating a new unfair labor practice for refusing to post the notice, the court concluded that the rule violated employers' free speech rights to remain silent about unions. The D.C. Circuit also found that provisions of the rule preventing the statute of limitations from running until the notice was posted was an attempt by the NLRB to change the National Labor Relations Act in a way that Congress did not intend.

For now, the requirement that employers post the NLRB's notice is of no effect. But it remains to be seen how the U.S. Court of Appeals for the Fourth Circuit will rule on a case involving the same issue. If the Circuits split on the issue, and even if they do not, the issue could well be taken up by the U.S. Supreme Court.

The D.C. Circuit's ruling has no impact on the requirement under Executive Order 13496 that most federal contractors with contracts having a value of $10,000 or more post a similar Department of Labor notice. That order was issued in January 2009 and remains in effect.

If you have any questions about the NLRB's rule or Executive Order 13496 or other labor matters, please contact **Kenneth F. Sparks** at +1 (312) 609 7877 in Chicago, **Mark Stolzenburg** at +1 (312) 609 7512 in Chicago, **Lyle Zuckerman** at +1 (212) 407 6964 in New York, **Heather Sager** at +1 (415) 749 9510 in San Francisco or any other Vedder Price attorney with whom you work. ■

OSHA Update: April Showers Bring May Headaches

The Occupational Safety and Health Administration (OSHA) was particularly active in April 2013. It kicked off the month by issuing a surprising interpretation letter granting unions and community organizers access to nonunion worksites during OSHA inspections and allowing employees to designate such organizations to act as their representatives during the course of an OSHA proceeding. That interpretation flies in the face of the prevailing interpretation for decades that permitted unions to participate in OSHA inspections only in settings where the union was the lawfully recognized representative of employees there. OSHA ended the month by launching an initiative intended to protect temporary or contract workers.

OSHA Recognizes Employees' Right to Request Representation by Outside Union Officials During Inspections of Nonunion Workplaces

Creating the sort of "open door" policy no employer wants, OSHA released a letter on April 5, 2013, from Deputy Assistant Secretary Richard E. Fairfax interpreting the Agency's regulations as the following: (1) allowing employees at a worksite without a collective bargaining agreement to designate a union or community organization to act on their behalf during the walkaround portion of an OSHA inspection; and (2) allowing one or more employees not represented by a union to designate a person, affiliated with a union or working for a community organization, to act as their "personal representative" for OSHA purposes. This development is yet another example of the current administration's efforts to expand the opportunities for unions to flex their muscle and access nonunion worksites.

Employers with represented workforces have long understood that the union must be given a seat at the table, literally, at the opening conference and allowed to accompany the OSHA Compliance Safety and Health Officer (CSHO) as he or she conducts a walkaround

inspection of the employer's facility, whether as part of a programmed inspection or in response to a complaint.

Although OSHA maintains in the April 5 letter that employees have always possessed the right to have someone who is neither an employee of their company nor a member of their union serve as their representative, this interpretation breaks from past practice and will pose difficult challenges for employers. As many employers have experienced, labor unions can file, and frequently have filed, OSHA complaints against unrepresented employers as a tactic to assist in organizing. Effectively, the new OSHA interpretation could encourage unions to make greater use of that tactic to gain access to unrepresented workplaces. This appears in part to be what is intended. As Deputy Assistant Secretary Fairfax opines, outside representatives may add value because workers in some situations may feel uncomfortable talking to the CSHO without the trusted presence of a "representative" of their choosing.

This development underscores the need for employers to have a plan in place for responding to unannounced OSHA inspections. Until now, most employers have allowed OSHA access to their facility without requiring a warrant. While cooperation has its benefits, that may not always be the case going forward if there is reason to believe the "chosen representative" has an agenda that extends beyond the inspection at hand. It becomes even more important to ensure that the employer representative(s) tasked with managing the inspection understand where these outsiders should (and should not) be allowed in the facility, that the outsiders should be expected to adhere to the applicable safety rules, and that conversations with these outsiders should be avoided whenever possible and limited when necessary to a single individual, preferably counsel. Finally, employers should be careful to guard their confidential information and trade secrets if there is any concern that

Vedder Price Expands Labor & Employment Practice into California

With expanded labor and employment capabilities, Vedder Price is proud to announce the opening of our San Francisco office led by new labor and employment shareholders Heather M. Sager and Brendan G. Dolan. Heather and Brendan are joined by labor and employment associates Ayse Kuzucuoglu and Lucky Meinz. As a result, Vedder Price is poised to further assist you with labor and employment matters throughout California.

What can we do for you?

For more information on our new attorneys and this exciting endeavor, visit us at **www.vedderprice.com/sanfrancisco**.

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the outsider may be exposed to such information in the course of a walkaround inspection.

Employers should consider in advance how they may want to respond in the event a CSHO appears at a nonunion facility. At a minimum, an employer may and should ask that every member of OSHA's inspection team present identification showing their affiliation. If the team includes a union representative, employers should keep a record of that person's name and union affiliation and ask the CSHO to clarify the individual's role on the team.

Then comes the harder choice, whether to permit an OSHA inspection that includes a union representative demanding access to a workplace where employees are not represented. Some nonunion employers may decide to allow the inspection even though it includes union representatives. If you make this choice, you have the right to accompany the inspectors other than during witness interviews, and may and should object to the CSHO if a union representative engages in conduct that appears to be inappropriate for an OSHA inspection. Do not simply allow the union representative to wander without escort.

Employers who have particular concerns about union organizing always have the option to request that OSHA either exclude the inspector or return with an inspection warrant. As noted above, most employers have declined to exercise that right so as not to unnecessarily antagonize the Agency. Nonunion employers who want to appear cooperative but not allow a union representative onto the property may want to try the intermediate path of offering the CSHO an opportunity to complete the inspection as long as the union representative remains outside. It remains to be seen whether OSHA will agree or will tie up its resources and delay inspections by refusing such an offer and then seeking a warrant. Remember, there are no citations or penalties associated with refusing an inspection without a warrant, and OSHA is prohibited from retaliating based on the exercise of those rights.

In the event a warrant is presented, an employer still has options. It may and should still accompany OSHA's team. If there are particular concerns with the presence of union representatives that outweigh the costs, an employer also may decline to allow an inspection that includes a union representative and then challenge the warrant in court. It is likely that such challenges to OSHA's new interpretation of its inspection power will be brought in the weeks ahead. We will keep you up to date on any developments in this area.

OSHA Launches Initiative to Protect Temporary/Contract Workers

On April 29, 2013, OSHA announced a new initiative to ensure that employers are properly training temporary and contract employees before exposing them to workplace hazards. Citing a number of recent workplace fatalities where contract workers were killed soon after starting work—in several cases on their first day—OSHA makes clear that employers must ensure that they are providing the required training to contract/temporary workers in a language and vocabulary they understand. According to OSHA, recent inspections have found a number of instances in which contract workers started work without the appropriate personal protective equipment or training on lockout/tagout protections.

As part of this enhanced effort to protect temporary/contract workers, OSHA is instructing its CSHOs to gather and track information relating to the temporary/contract workers they encounter in the course of an inspection or investigation. In addition to creating a new internal tracking code to identify temporary/contract workers who may be exposed to a violative condition, OSHA will require CSHOs to document the name of the workers' staffing agency, the agency's location and the supervising structure under which the workers are reporting.

Going forward, employers should anticipate that CSHOs will question the temporary/contract workers they encounter during inspections about the training they have received and the hazards they face. The CSHOs will also likely request training records for these workers and review them to determine if the workers have been placed in their positions without the required and appropriate training. As such, any employer who utilizes temporary/contract employees in positions that require safety training should make sure that those workers receive the same training that is provided to regular employees before they begin working.

If you have any questions about these OSHA initiatives or other workplace safety matters, please contact **Aaron R. Gelb** at +1 (312) 609 7844 in Chicago or **Ayse Kuzucuoglu** at +1 (415) 749 9512 in San Francisco. If you have any questions about union organizing, please contact **Kenneth F. Sparks** at +1 (312) 609 7877 in Chicago. You may also contact any other Vedder Price attorney with whom you work. ■

Immigration Update: All U.S. Employers Required to Use New Employment Eligibility Verification Form I-9 as of May 7, 2013

U.S. Citizenship and Immigration Services (USCIS) now requires all U.S. employers to use its revised Employment Eligibility Verification Form I-9 as of May 7, 2013. All employers are required to complete an Employment Eligibility Verification Form I-9 (Form I-9) for each new employee hired in the United States. The updated form (revision date 03/08/13) includes new information fields and has been expanded to two pages. USCIS says the new formatting will reduce errors and provide clearer instructions for both employees and employers. The List of Acceptable Documents has not changed.

A few things to note:

- Employers should NOT require current employees to complete the new Form I-9 unless required by federal contract.
- The new form will be used only for new employees or when re-verifying the work authorization of current employees.
- New employees may complete the form after acceptance of the job offer, but no later than the first date of hire.
- The new instructions confirm that an employer has three business days to complete the form; in the case of reverification (e.g., for expired Employment Authorization Documents, etc.), the employer must reverify the document(s) on or before the employee's work authorization expires.

The new Form I-9 does NOT change any requirements relating to remote hires. USCIS's position is that the employer representative who signs the attestation must be the same person who physically examines each original document to determine if it reasonably appears to be genuine and relates to the employee. An employer with remote hires may delegate the verification to a person who serves as an agent of the employer, but that agent must examine the documents and complete Section 2 or Section 3 of the Form I-9. The employer remains liable for the actions of the agent.

A Spanish-language version of the new form is also available on the USCIS website for use in Puerto Rico only. Spanish-speaking employers and employees in the 50 states, Washington, DC, and other U.S. territories may refer to the Spanish-language version but must complete the English-language version of the Form.

Employers may be fined for all substantive and uncorrected technical violations of Form I-9. Penalties for failing to use the new Form I-9 range from $110 to $1,100 per violation.

Business Immigration Seminar & Architectural Boat Tour

June 18, 2013

Join us for a complimentary overview of immigration options and issues for employers, followed by a reception and architectural tour on the Chicago River. Seminar will include a discussion of visa categories, update on recent trends, ensuring I-9 compliance and a legislative update.

For more information and to register, visit www.vedderprice.com/The-Architecture-of-Immigration.

Visitors to the United States May Need to Print Form I-94 Arrival/Departure Records

U.S. Customs & Border Protection (CBP) began a new program on April 30, 2013 that ended the issuance of paper Form I-94 Arrival/Departure Records for many visitors. Foreign visitors arriving in the United States via air or sea who need to prove their lawful immigration status are now required to access their arrival information online and print their own Form I-94 Arrival/Departure Records (Form I-94). A hard copy of Form I-94 is required to begin employment, apply for a Social Security number, and obtain a driver's license or identification document.

CBP has indicated that it expects this automation to save the government an estimated $15.5 million per year. Because advance information is transmitted only for air and sea travelers, CBP will continue to issue paper Forms I-94 at land border ports of entry.

If a visitor does not receive a paper Form I-94 record to verify his or her immigration status or employment authorization, the record number and other admission information will be available on the U.S. Customs and Border Protection website. A CBP officer will stamp the travel document (passport) of each arriving nonimmigrant traveler showing the date of admission, the class of admission and the date until which the traveler is admitted. The visitor will not need to print Form I-94

merely to provide it to the government upon departure. A CBP Fact Sheet may be found here.

Immigration Legislation

A number of pieces of legislation have been introduced into both the House and the Senate dealing with comprehensive immigration reform. The Senate has held hearings on its bill (S.744, Border Security, Economic Opportunity, and Immigration Modernization Act) and is in the process of "marking up" the legislation and considering 300 proposed amendments. We do not yet know when or if this legislation will become law, but we will keep you apprised of developments affecting employers.

If you have any questions, please contact **Gabrielle M. Buckley** at +1 (312) 609 7626, **Bradley A. Richards** at +1 (312) 609 7711 or any Vedder Price attorney with whom you have worked. ■

Recent Accomplishments

Laura Sack obtained dismissal of a complaint of race, sex and disability discrimination that was filed with the New York State Division of Human Rights (NYSDHR) by an employee of a well-known sporting goods retailer. The employee contended that she was unfairly disciplined and was otherwise treated in a hostile and harassing manner by her supervisor. In dismissing the complaint, the NYSDHR relied heavily on evidence we submitted to show that the store's employees have all been held to higher performance standards since the Barclays Center opened right across the street, dramatically increasing customer traffic in the store.

On behalf of a private university, **Lyle S. Zuckerman** and **Michael Goettig** obtained dismissal of one verified complaint and one petition filed under Article 78 of New York's Civil Practice Law and Rules. A student commenced both actions following a determination by the university that the student had engaged in misconduct, which resulted in a one-semester suspension. The presiding judge in the plenary action dismissed the complaint on the grounds that courts may hear student grievances against a university only pursuant to Article 78; the presiding judge in the Article 78 action dismissed the petition on the grounds that the student failed to show that the university had acted arbitrarily or capriciously in reaching its determination. Both actions were dismissed with prejudice.

J. Kevin Hennessy won a hotly contested labor arbitration case on behalf of an Iowa manufacturer involving the unilateral subcontracting of mobile equipment. This resulted in annual savings for the company of $300,000 to $400,000 a year. ■

On the Lighter Side...

Truth Is Not Always a Defense

A federal district court judge in California recently denied a supervisor's motion for summary judgment on a sexual harassment claim brought against him by a female subordinate who claimed that the supervisor unzipped his pants and exposed his testicles during an argument in which the female employee told him that he "didn't have any balls."

In a decision that should not surprise anyone, the judge concluded that a single incident of this nature was sufficiently severe under the California Fair Employment and Housing Act to support a hostile-environment claim based on sex.

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
James R. Glenn ..... +1 (312) 609 7652
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
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
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

San Francisco

Brendan G. Dolan ..... +1 (415) 749 9530
Ayse Kuzucuoglu ..... +1 (415) 749 9512
Lucky Meinz ..... +1 (415) 749 9532
Heather M. Sager ..... +1 (415) 749 9510

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 thriving general-practice law firm with a proud tradition of maintaining long-term relationships with our clients, many of whom have been with us since our founding in 1952. With approximately 300 attorneys and growing, we serve clients of all sizes and in virtually all industries from our offices in Chicago, New York, Washington, DC, London and San Francisco.

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VEDDER PRICE®

Chicago
222 North LaSalle Street
Chicago, IL 60601
T: +1 (312) 609 7500
F: +1 (312) 609 5005

New York
1633 Broadway, 47th Floor
New York, NY 10019
T: +1 (212) 407 7700
F: +1 (212) 407 7799

Washington, DC
1401 I Street NW, Suite 1100
Washington, DC 20005
T: +1 (202) 312 3320
F: +1 (202) 312 3322

London
4 Coleman Street
London EC2R 5AR
T: +44 (0)20 3667 2900
F: +44 (0)20 3667 2901

San Francisco
275 Battery Street, Suite 2464
San Francisco, CA 94111
T: +1 (415) 749 9500
F: +1 (415) 749 9502

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