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Labor and Employment Law

Illinois' Medical Marijuana Law

On August 1, 2013, Illinois joined a growing list of states—now 20—allowing the use of medical marijuana when Governor Pat Quinn signed the Compassionate Use of Medical Cannabis Pilot Program Act (the Act). The stated purpose of the Act is to permit individuals who are suffering from certain debilitating medical conditions to use prescribed medical marijuana to alleviate their symptoms.

The Act is one of the strictest of its kind and includes the following noteworthy provisions:

- A person may not be prescribed more than 2.5 ounces of marijuana during a 14-day period and may not possess more than 2.5 ounces of marijuana at any time;
- The prescribing physician must have a prior and ongoing medical relationship with the patient and must find that the patient has one of approximately 35 listed debilitating medical conditions for the marijuana to be prescribed;
- Patients must buy the marijuana from one of 60 dispensing centers throughout the state and may not legally grow their own;
- Users will carry cards that indicate how much they have bought to prevent stockpiling. The Illinois Department of Public Health will issue the cards;
- Dispensing centers will be under 24-hour camera surveillance, and workers at dispensing and cultivation centers will undergo criminal background checks;
- Marijuana use will be banned in public, in vehicles and near school grounds;
- Property owners will have the opportunity to ban marijuana on their grounds.

Notably, the Act contains certain employment-related provisions in contrast to the recently enacted concealed carry law in Illinois (which provides no guidance to employers). Under the Act, Illinois employers are prohibited from discriminating against or penalizing a person based solely on his or her status as a patient qualified and registered to receive medical marijuana. This means, for example, that employers should not discipline or terminate employees solely because of their use of medical marijuana or their status as a registered user. Additionally, Illinois employers should not refuse to hire an applicant because he or she is a registered user under the Act. Doing so could not only violate the Act, but could also violate disability discrimination statutes given the fact that most registered users will likely have a disability. In light of the Act's prohibition on discrimination, employers should consider updating their antidiscrimination policies to take into account the new protection afforded to covered employees.

Despite the new requirements imposed by the Act, employers still have a significant amount of flexibility to enforce their workplace policies. For example, according to the very language of the Act, employers may still

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enforce a "policy concerning drug testing, zero-tolerance, or a drug free workplace provided the policy is applied in a nondiscriminatory manner." The Act also creates an exception to its nondiscrimination provision by permitting employers to discriminate against or penalize registered users if failing to do so would put the employer in violation of federal law or cause it to lose a monetary or licensing-related benefit under federal law. Businesses with federal contracts with the Department of Transportation, for example, must comply with drug-testing regulations under federal law that prohibit contractors' employees from using marijuana. Thus, such businesses would likely maintain and enforce a drug-free workplace policy without violating the state medical marijuana law.

There are still many unanswered questions regarding the Act. Until the law goes into effect in January of 2014 and regulations are put into place, the exact scope and impact of the Act on employers remains unclear. Employers should nonetheless familiarize themselves with the Act's employee protections and seek counsel before disciplining, terminating or refusing to hire a registered user for failing a drug test.

If you have any questions about Illinois' new medical marijuana law or how it may impact your organization, please contact **Edward C. Jepson** at +1 (312) 609 7582, **Cara J. Ottenweller** at +1 (312) 609 7735, **Andrew Oppenheimer** at +1 (312) 609 7664 or any other Vedder Price attorney with whom you work.

Department of Labor Clarifies FLSA Coverage for Domestic Service Employees

In September 2013, the U.S. Department of Labor (DOL) published revised regulations concerning application of the federal Fair Labor Standards Act (FLSA) to employees providing in-home companionship services to adults. According to the DOL, the new regulations reflect the fact that the home care industry for elderly or otherwise compromised individuals has grown significantly since 1975, the year in which the DOL last promulgated regulations concerning such domestic service employees. The new regulations, which go into effect on January 1, 2015, extend coverage to a significant number of workers in the home care industry who were previously considered exempt from the FLSA's minimum wage and overtime requirements.

For decades, the FLSA has included nursing homes and assisted living facilities in the scope of its coverage. Also covered have been nurses and other trained professionals who provide care in their patients' homes. However, the FLSA and its regulations expressly exempted from coverage those who provide "companionship services" to elderly people or others requiring assistance in daily living. Implementing regulations defined such services as "fellowship, care, and protection," including "household work…such as meal preparation, bed making, washing of clothes, and other similar services." These services may include housework not to exceed 20 percent of all hours worked in a week. The FLSA also contained an overtime exemption for live-in domestic workers; while employers were required to pay at least minimum wage to such employees and record the time that they worked, employers were not required to pay an overtime premium for hours worked over forty in a given week.

For employers in the home care industry, the most significant change in the DOL's revised regulations is the elimination of *any* exemption for third-party employers of workers providing either companionship services or live-in domestic services. In the past, staffing agencies that provided home care aides arguably could avail themselves of these exemptions under the FLSA. The DOL's new regulations make clear that the exemptions are not available to these third parties and that all employees providing domestic services through a staffing agency are entitled to minimum wage and overtime compensation.

The new regulations further clarify that the "companionship services" exemption is available only if "fellowship, care, and protection" is provided exclusively to the elderly, disabled or ill person in question. For example, if an employee hired by a family to provide care for an elderly family member spends 20 percent of his time in a week cleaning the family's common living area, the exemption is lost because the employee is providing housekeeping services to the family as a whole, rather than to the elderly family member exclusively. Conversely, the exemption is maintained if the worker spends the same amount of time cleaning only the elderly family member's living area.

Also excluded from the definition of "companionship services" is the administration of medication or provision of services that would typically be provided by trained professionals. An employer may not claim the companionship services exemption for any employee who provides such services and must pay minimum wage and overtime to all such employees.

The DOL has posted a number of fact sheets and questionnaires concerning the new regulations on its website, available at http://www.dol.gov/whd/regs/compliance/whdfsFinalRule.htm. It is advisable for employers in the home care industry to consult counsel

to ensure compliance with the DOL's new regulations prior to their January 1, 2014 effective date.

Please contact **Amy Bess** at +1 (202) 312 3361 or **Michael Goettig** at +1 (212) 407 7781 for answers to questions about the Department of Labor's regulations implementing the FLSA.

Are Unions the Newest Item on the Menu? A Look at the Restaurant Unionization Movement

In August 2013, employees at more than 1,000 fast-food restaurants in over 50 cities staged work stoppages. Employees took to the streets demanding a wage increase to at least 15 dollars an hour, twice the federal minimum wage. These protests were supported by organized labor as well as community groups such as Justice at Work, a nonprofit organization that provides legal services to support and encourage organization of low-wage immigrant workers. Even though UNITE HERE has traditionally been seen as the main union representing food service workers, it was the Service Employees International Union (SEIU), which represents more than two million workers in health care, janitorial and other industries, that provided financial support and training for local organizers across the country in preparation for the strikes.

While the protesters represented a tiny fraction of the fast-food workforce and an even smaller fraction of the overall food service industry, various forces are at work attempting to build momentum for additional concerted labor actions. The August walkouts should serve as a reminder to employers that organized labor will continue its efforts to establish a foothold in the food service industry. Indeed, these protests came on the heels of a series of strikes last year in New York City and a nationwide one-day strike staged by 2,200 fast-food workers in seven cities. Fast-food worker strikes have even taken place in the South, which has traditionally been far less welcoming to unions than the North.

Meanwhile, groups such as Restaurant Opportunities Centers United (ROC United) are attempting to focus attention on non-union restaurant establishments that they characterize as "bad actors" in an effort to advance their own brand of worker justice. Using a multipronged approach, ROC United attempts to secure paid sick days for food service workers, a higher minimum wage for tipped employees and greater opportunities to advance within the restaurant industry. Despite its relatively recent founding in January 2008, ROC United is attempting to organize employees on a national scale to advocate for workforce justice. It started as a local group in New York City, ROC-NY, founded after September 11, 2001 to provide support to displaced restaurant workers and to advocate for improved working conditions. Based on the local chapter's successes in New York, ROC United was founded to serve as an intermediary to help establish Restaurant Opportunities Centers, such as ROC-NY, in other areas, including but not limited to the following: the Bay Area, New Orleans, Miami, Detroit, Chicago, Philadelphia, Los Angeles, Houston, New York City and Washington, DC.

In each region, the respective center studies local restaurant workers' needs and creates training and placement programs to place workers in those restaurants that it views as taking the high road in terms of workplace fairness. Overall, the group boasts that it has won 13 workplace justice campaigns, obtaining over $7,000,000 in judgments for its members along with improvements in workplace policies. In Chicago, for example, ROC United has partnered with at least one legal clinic that routinely brings wage and hour lawsuits against restaurants and other small employers. ROC United has even launched a smartphone app that people can use to see how a particular restaurant rates in certain areas relating to workplace fairness, the idea being that consumers will be inclined to patronize those

New York Super Lawyers

The 2013 edition of *New York Super Lawyers* magazine includes five New York Labor & Employment shareholders from Vedder Price. Attorneys selected by *New York Super Lawyers* magazine are chosen in a selection process that is multiphased and includes independent research, peer nominations and peer evaluations.

The following Vedder Price attorneys and the practice areas in which each was recognized are:

Neal I. Korval – Employment & Labor
Stewart Reifler – Employee Benefits/ERISA
Laura Sack – Employment Litigation: Defense
Jonathan A. Wexler – Employment & Labor
Lyle S. Zuckerman – Employment & Labor

Rising Star:

Michael Goettig – Employment Litigation: Defense

establishments with higher ROC ratings. If ROC United gains traction, we would expect to see a noticeable uptick in efforts to organize all types of restaurants, from fast-casual to fine dining.

Given recent organizing efforts, the increased focus on and awareness of wage and hour compliance, and pressure on the industry, now is the time for restaurant employers to ensure that their workplace policies and procedures comply with the law, that their managers are trained, and that they understand how to effectively manage their employees to create a positive and productive work environment so their employees will not feel the need to seek union support.

If you have any questions about the restaurant unionization movement or how it may impact your organization, please contact **Aaron R. Gelb** at +1 (312) 609 7844, **Heather M. Sager** at +1 (415) 749 9510, **James R. Glenn** at +1 (312) 609 7652 or any other Vedder Price attorney with whom you work.

Labor and Employment Law: Tri-State Round-Up

It was a busy summer and fall for the state legislatures of New York, New Jersey and Connecticut, each of which passed legislation that stands to have a significant impact on area employers. Assembled here is an overview of the most important pieces of new law. If you have questions about any of the legislation discussed below and how it may impact your organization, please contact **Laura Sack** at +1 (212) 407 6960, **Jonathan S. Hershberg** at +1 (212) 407 6941, or any other Vedder Price attorney with whom you have previously worked.

New York

"Pregnant Workers Fairness Act" Becomes Law in New York City

On October 2, 2013, New York City Mayor Michael Bloomberg signed into law the "Pregnant Workers Fairness Act" (PWFA) in an attempt to plug a perceived gap in the Pregnancy Discrimination Act, which does not require accommodation for pregnant employees. Once the new law takes effect in early February 2014, it will require employers in New York City to offer reasonable accommodation for pregnancy, childbirth and related medical conditions.

The PWFA will apply to all businesses in New York City with four or more employees, including independent contractors. It requires that written notice of its provisions be presented to all new employees at the time of hire, and that a poster advising employees of their rights under the PWFA—to be produced by the City's Commission on Human Rights—be posted within the employer's facility. Employers that are able to demonstrate that compliance would pose an undue hardship are excluded from compliance. Employees who believe they have been the victims of discrimination in violation of the PWFA have the option of either filing a complaint with the New York City Commission on Human Rights or bringing a court action against their employer.

NYS Department of Labor Proposes New Wage Deduction Regulations

Employers in New York have been waiting since June 2012 for guidance regarding amendments made that month to Section 193 of the New York Labor Law restoring employers' ability to make deductions from employee wages for overpayments and advances, but only in specific, as-yet-undefined circumstances. The wait, however, appears to be nearing an end.

In May 2013, the NYSDOL issued proposed wage deduction regulations that address not only deductions for overpayments and advances, but also deductions deemed permissible because they are "for the benefit of the employee." The complete proposed regulations are available on the NYSDOL website (www.labor.ny.gov./legal/wage-deduction-regulation.shtm), but the following is a brief summary:

- **Deductions for Overpayments**
  Written authorization from the employee is not required for the employer to make deductions for unintended overpayments. The proposed regulations specify in detail, however, the timing, frequency, amount permitted and advance notice required for such deductions, along with dispute resolution procedures and the method by which improper deductions are to be repaid.
- **Deductions in Repayment of an Advance**
  The new regulations state that any provision of money to an employee by an employer that is accompanied by the accrual of interest, fees or a repayment amount of anything other than the specific amount provided to the employee is not an advance, and it may not be recouped via wage deduction. Furthermore, the parties must agree in writing to the terms of repayment before the advance is given; and once agreement is reached, no further permission or notice is required until the entire amount of the advance has been recouped.
- **Deductions for the Benefit of the Employee**
  Such deductions are expressly limited to those

listed in Section 193 of New York's Labor Law, along with benefits for health and welfare, pension and savings, charity, representation, transportation, food and lodging.

Employers are encouraged to proceed with caution if they wish to implement a program for recoupment of overpayments and wage advances, as the wage deduction regulations proposed by the NYSDOL are **not yet final** and are thus subject to change.

New Jersey

New State Law Limits Employer Access to Employees' Social Media Accounts

A new law set to take effect on December 1, 2013 will make New Jersey the latest of a growing number of states—including Arkansas, California, Colorado, Illinois, Maryland, Michigan, Nevada, New Mexico, Oregon, Utah and Washington—that prohibit employers from requesting access to the social media accounts of current or prospective employees. The law also prohibits employers from retaliating or discriminating against any such individual who either refuses to provide such access or who complains about what he or she believes to be a violation of the law.

The law applies only to those social media accounts that are the exclusive personal property of the employee or prospective employee. Employers are, however, permitted to obtain access to private accounts for the purposes of ensuring legal or regulatory compliance, investigating employment-related misconduct or investigating a potential disclosure of the employer's proprietary or confidential information. The law does not prohibit employers from accessing accounts its employees use for business-related purposes, and employer review of material that employees or prospective employees post publicly on an otherwise private social media account remains lawful.

Enforcement of New Jersey's social media law is left solely to the state's Department of Labor; the law does not provide individuals with a private right of action. Companies may be fined up to $1,000 for their first violation and $2,500 for violations thereafter.

Amendment to NJLAD Prohibits Retaliation Against Employees Who Seek Information About Their Coworkers

An amendment to New Jersey's Law Against Discrimination (NJLAD), signed into law on August 28, 2013 and given immediate effect, adds a nonretaliation pay equity measure to NJLAD. Intended to protect employees who request information about other employees' or former employees' compensation or potential membership in a protected class, the amendment prohibits employer retaliation for such a request, provided the request is made either as part of an investigation into potential discriminatory treatment or to take legal action for such discriminatory treatment with regard to compensation.

It is important to note that the amendment does not require employers to take action in response to such a request from an employee or to provide him or her with the information sought while employers are free to deny such requests; they are, however, prohibited from retaliating against the employee making the request.

Employers in New Jersey should consider examining and, if necessary, revising their policies pertaining to requests for and disclosure of protected information, and they should take steps to make sure that supervisory and managerial employees are aware of NJLAD's new provisions.

"NJ Safe Act" Requires Unpaid Leave for Employees Affected by Domestic or Sexual Violence

A new law that took effect on October 1, 2013 enables eligible employees within New Jersey to take 20 days of unpaid leave within a 12-month period in the event that the employee, his or her child, parent, spouse or domestic or civil union partner is the victim of domestic or sexual violence.

Dubbed the New Jersey Security and Financial Empowerment Act, but better known as the "NJ Safe Act," the law applies to employers within the state with 25 or more employees. Its intended purpose is to allow victims of assault, or those who are giving care to such victims of assault, to engage in a series of activities related to such victims' recovery without fear of losing their jobs.

The NJ Safe Act covers those employees who have worked for a covered employer for at least 12 months and who have worked at least 1,000 hours during the previous 12 months. Leave may be taken within one year of an occurrence of domestic violence or sexual assault, and it may be taken intermittently. If the need for leave is foreseeable, employees seeking such leave are required to provide written notice to their employer as far in advance as possible. Employers are permitted to request documentation from the employee supporting the employee's need for leave. The act also requires employers to post a notice made available by the New Jersey Commissioner of Labor and Workforce Development to inform employees of their rights.

Employees are provided with a private right of action under the NJ Safe Act and are able to seek relief in the

New Jersey Superior Court up to one year after an alleged violation. Prevailing plaintiffs may be entitled to recovery of economic and noneconomic damages, as well as attorneys' fees, a civil fine and an order of reinstatement. The law, like most of New Jersey's employment laws, contains a provision that prohibits retaliation against an employee who exercises his or her rights under it.

New Jersey employers with more than 25 employees should take steps to ensure that their leave policies comply with the new law. Such employers should also make sure that any employee training on the subject of retaliation includes information on the NJ Safe Act and that they have posted the required materials within their workplaces.

Connecticut

Significant Changes Made to Connecticut's Personnel Files Act

As a result of an amendment to Connecticut's Personnel Files Act that took effect on October 1, 2013, employers within the state now have a dramatically shorter period of time within which to respond to requests from current or former employees to inspect the contents of their personnel files. Whereas the law previously required employers to permit such inspection "within a reasonable period of time," the law now mandates that current employees be allowed to inspect their files within seven days of a written request; former employees must receive the same opportunity within ten days. Such inspections are to take place during regular business hours and at a location at, or reasonably near, the employee's place of employment.

The amendment also places a number of other new requirements on Connecticut employers. Among them are the following:

- Employees must now be provided with a copy of any documented disciplinary action not more than one business day after the action is imposed;
- Employees must "immediately" be given copies of any documented notice of the termination of their employment;
- Employers must now include a "clear and conspicuous" statement in any written termination or disciplinary notice that, should an employee disagree with any information contained in such a document, the employee may submit a written explanation of his or her position. If an employee chooses to submit such a statement, employers are required to include it within the employee's personnel file; employers must also include the employee's statement with any transmission of or disclosure from the file to any third party.

As before, Connecticut's Personnel Files Act does not contain a private right of action. The state's Department of Labor may impose a fine of up to $500 for a first violation and up to $1,000 for subsequent violations involving the same employee.

Recent Accomplishments

Patrick W. Spangler successfully obtained the Rule 12(b)(6) dismissal of an ERISA indemnification claim brought by an insurer against a national electronics company in the U.S. District Court for the Northern District of Illinois. The underlying claim involved an alleged breach of fiduciary duty for failure to adequately provide life insurance conversion notices.

Thomas M. Wilde, Scot A. Hinshaw and **Emily C. Fess** defeated conditional certification of a wage and hour collective action in the U.S. District Court for the Middle District of Florida on behalf of an international manufacturing company.

Thomas M. Wilde, Scot A. Hinshaw and **Emily C. Fess** won summary judgment on behalf of a national retailer in the U.S. District Court for the Northern District of Illinois. The plaintiff asserted numerous claims under the Equal Pay Act, Title VII, Section 1981 and the Age Discrimination in Employment Act.

Thomas M. Wilde and **Cara J. Ottenweller** achieved dismissal of a case in the Southern District of Indiana filed by over 30 former employees of an international manufacturing company who claimed they were owed vacation pay upon termination of employment.

Amy L. Bess and **Sadina Montani** recently won summary judgment on behalf of a national retailer in the U.S. District Court for the District of Maryland. The case involved claims of quid pro quo sexual harassment by a former sales associate against a former store manager-in-training. Without determining whether the manager-in-training was a "supervisor," the court granted summary judgment to the employer based on (i) the plaintiff's failure to present a causal link between her alleged sexual relationship with the manager-in-training and her ultimate termination and (ii) the plaintiff's failure to report the alleged sexual relationship to any company representative.

Charles B. Wolf recently represented a client in a federal court pension dispute. The client had amended

California Corner

California's Strict Pregnancy Disability Leave Regulations Expand Employer Obligations and Increase Potential Claims

California's Department of Fair Employment and Housing has amended the Pregnancy Disability Leave (PDL) regulations to significantly expand the leave rights of eligible employees. The new regulations significantly broaden the definition of "disabled by pregnancy," make "perceived pregnancy" a basis for discrimination, redefine length of leave, expand the accommodation and reinstatement rights, and establish new notice requirements.

Broader Definition of Disabled by Pregnancy
Employees may now take pregnancy disability leave for previously unrecognized conditions "related to pregnancy," such as postnatal care; lactation-related conditions; gestational diabetes; hypertension; postpartum depression; childbirth; loss or end of pregnancy; and recovery from childbirth.

Liability for "Perceived Pregnancy" Discrimination
The new regulations prohibit discrimination based on the employer's perception that an employee is pregnant. "Perceived pregnancy" is defined as "being regarded or treated by an employer or other covered entity as being pregnant or having a related medical condition." The employer may require medical certification at its discretion in the event accommodations are requested, but should take care in that a request for documentation could in itself be considered discriminatory.

Length of Leave Redefined
The PDL law allows employees with pregnancy-related or childbirth-related disabilities up to four months of leave. The previous regulations defined four months as 88 paid, eight-hour days for full-time employees. The new regulations interpret four months as one-third of a year, or 17 1/3 weeks of leave, which is calculated in hours, rather than days. For example, an employee who works 40 hours a week would now be entitled to 693 hours of leave (40 X 17.33), as opposed to 88 days under the old definition. Employees also are eligible for up to four months of pregnancy disability leave per pregnancy, not per year.

In addition, the right to take pregnancy disability leave is separate from the right to take a leave of absence under the California Family Rights Act (CFRA). After 17 1/3 weeks of pregnancy disability leave under the PDL, employees may take an additional 12 weeks of CFRA leave to bond with the baby.

Accommodation and Reinstatement Rights
To the extent reasonable, employers have a duty to accommodate employees suffering from disabilities "related to pregnancy," including but not limited to accommodating requests to transfer to other positions, if the request is based on a recommendation of the employee's health care provider and will not cause undue hardship. On the other hand, it is unlawful for employers to involuntarily transfer an employee who is pregnant or perceived to be pregnant without a legitimate business reason unrelated to pregnancy. In addition, employers may not require a pregnant employee to take a leave of absence when the employee has not requested leave.

Once the employee is ready to return to work, the employer must reinstate her to the same or a comparable position. If no comparable position is available, the employer must provide notice within 60 days of available positions for which the employee would qualify. Employers may no longer use hardship to business operations as a defense to a failure-to-reinstate claim. However, inability to hold a position open for legitimate business reasons unrelated to the employee's pregnancy disability leave (e.g., layoffs) is a viable defense.

New Notice Requirements
The new regulations include new certification forms and notices, which contain important changes to the information employers must provide to employees about their rights and responsibilities under the PDL and CFRA.

Not only do California's PDL regulations establish new compliance requirements for employers, they also create potential new claims against employers while limiting the defenses available to them. California employers should prepare to face these challenges by updating their notices, policies and procedures and by providing training to key personnel about the new regulations.

If you have any questions about this, or any other California matter, please contact:

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its pension plan to provide a forum selection clause and a two-year limitations period for filing a lawsuit challenging a benefit denial. This was done six months after the plaintiff's benefits were denied, but the plaintiff still knew about the amendment at least seven months before the two-year period expired. The federal court held that the plan amendment was lawful and enforceable and dismissed the case.

Margo Wolf O'Donnell was successful in obtaining dismissal of a complaint for pregnancy discrimination filed against an international distributor of natural stone products in the Circuit Court of Cook County. The grounds for that dismissal, pursuant to 735 ILCS 5/2-619 (a)(1), was a showing that the company did not have the requisite number of employees in Illinois (15 for 20 or more calendar weeks) to qualify as an employer under the Illinois Human Rights Act. The plaintiff appealed, and the Illinois Appellate Court recently affirmed the lower court's dismissal of that complaint.

Steven L. Hamann and **Cara J. Ottenweller** won a summary judgment on behalf of a global medical waste company in the U.S. District Court for the District of Minnesota. The plaintiff asserted discrimination, harassment and retaliation claims under Title VII.

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