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Labor and Employment Law

No Vacation for You! What a Boastful Daughter's Facebook Antics Can Teach Employers about Settlement Agreements.

Most employers, often upon the advice of counsel, shy away from monitoring their employees' social media activity. Earlier this year, however, an employer was able to use a Facebook status update posted by a former employee's daughter to recoup a large chunk of a lawsuit settlement paid out to the employee.

In February 2014, the Florida Third District Court of Appeals threw out a settlement between a local preparatory school and its former headmaster. The court ruled that the headmaster and his daughter breached the confidentiality terms of the settlement agreement when the daughter bragged about the settlement on social media. In 2010, the 69-year-old headmaster sued his former employer for age discrimination after his contract was not renewed. The case settled in November 2011. The settlement agreement entered into by the parties included a confidentiality clause that required the headmaster and his wife to refrain from discussing the settlement's existence and its terms, including the $80,000 payment to the headmaster. Days after the settlement was finalized, however, the headmaster's daughter posted the following on Facebook: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT."

Once it learned of the post, the school informed the former headmaster that it would not pay a large portion of the settlement because the headmaster and his daughter had violated the confidentiality clause. The circuit court ordered the school to comply with the terms of the agreement; however, an appellate court reversed the enforcement ruling, finding that the former headmaster was at fault because his daughter did exactly what the agreement was designed to prevent.

Rich with irony, this case serves as a timely reminder that employers may want to review the confidentiality provisions of their settlement and termination agreements to ensure they are providing proper protection and effectively limiting what their employee and his or her family members and others to whom disclosure is made are saying about the terms or amounts of any settlements. Of course, given the recent actions by the EEOC challenging separation agreements, employers must take care to craft appropriately tailored restrictions on dissemination.

Please contact **Brendan G. Dolan** at +1 (415) 749 9530, **James R. Glenn** at +1 (312) 609 7652 or the Vedder Price attorney with whom you have worked if you have questions about this case or about the confidentiality provisions or other terms of your company's separation or settlement agreements.

In this issue...

Daily Checkup for Illinois Employers: Are You Properly Responding to Child Support Orders?

Employers must be wary of letting their guard down when responding to child support orders issued under the Illinois Income Withholding for Support Act (IIWSA) because mistakes can result in a windfall for complainants and harsh penalties for employers. Take, for example, the employer who properly withheld child support of $82 per week from its employee but failed to pay the withheld amount to the State Disbursement Unit in a timely fashion and was penalized $1,172,100 (*see In re Marriage of Miller*, 227 Ill. 2d 185 (2007)); or the employer who failed to withhold child support altogether and was penalized $369,000 (*see In re Marriage of Gulla*, 382 Ill. App. 3d 498 (2d Dist. 2008)). The importance of proper compliance with notices to withhold income cannot be understated.

The cost to employers lies in the $100-per-day penalty that will accrue if the employer knowingly fails to withhold income under the IIWSA or pays late. This penalty applies to each new infraction, and more than one late or failed payment creates the presumption that the employer knowingly failed to pay over the amounts due.

However, there is some good news for employers. Before 2012, there was no requirement that a complainant must notify the employer of late or failed payments, thereby allowing him or her to collect tens of thousands of penalty dollars for what is often a simple payroll mistake; but in 2012, the Illinois General Assembly amended the IIWSA to add a one-year statute of limitations and a notification requirement. Now, a complainant must give an employer written notice of the late or failed payment before he or she can collect the $100-per-day penalty.

What are employers supposed to do? Employers would be wise to review existing garnishment and withholding policies, and conduct annual training sessions so that staff are aware of the strict statutory requirements that must be met. It would also be prudent for employers to use checklists and make sure withholdings are properly taken from all wages, including bonuses and commissions.

Vedder Price's employment attorneys are well equipped to assist employers in this area. Please contact **Joseph K. Mulherin** at +1 (312) 609 7725, **Emily C. Fess** at +1 (312) 609 7572 or any other Vedder Price attorney with whom you have worked if you have any questions.

EEOC and FTC Jointly Issue New Guidance Regarding Background Checks

The U.S. Equal Employment Opportunity Commission (EEOC) created quite a stir among employers when it released its controversial enforcement guidelines two years ago, "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964." Now, the EEOC has partnered with the Federal Trade Commission (FTC) to issue a joint publication, "Background Checks: What Employers Need to Know" (March 10, 2014), available at http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm (Joint Publication). In the Joint Publication, the agencies each affirm their increased emphasis on enforcing the antidiscrimination and consumer protection laws as they apply to the use of background checks. The Joint Publication discusses the application of these laws to all manner of "traditional" background checks, including criminal records, financial history and medical history, as well as the review of an employee's or applicant's use of social media, in connection with an employer's personnel decisions.

Both the EEOC and the FTC enforce laws that apply to employees and job applicants. The EEOC administers laws that ensure information an employer obtains during a background check process is not used to make discriminatory decisions about an employee or a job applicant based on his or her race, color, national origin, sex, religion, disability, genetic information (including family medical history) or age. Similarly, the FTC enforces the Fair Credit Reporting Act (FCRA), which mandates the accuracy, fairness and privacy of information collected by consumer reporting agencies, including information regarding an employee's or applicant's check writing history, medical records and rental history. An employer must follow procedures required under the Fair Credit Reporting Act whenever it obtains or relies on a background report from an outside reporting agency to make an employment decision.

The new Joint Publication demonstrates that both agencies will continue to scrutinize the ways employers collect and use background information. In it, the EEOC reminds employers that it is illegal to decide to check an employee's or applicant's background when that decision is based on race, national origin, sex, religion, disability, genetic information (family medical history) or age. The EEOC further warns employers in the Joint Publication of the disparate impact problems often associated with basing employment decisions on background issues that might be more common among people within certain protected classes. Indeed, the

Joint Publication reminds employers that a policy or practice that significantly disadvantages individuals of protected classes is not an accurate predictor of who will be a "responsible, reliable or safe employee." The Joint Publication also reminds employers that they cannot ask medical questions of a candidate before a conditional job offer is made; rather, such questions can only be asked after the person has started the job and only where the employer has objective evidence that the employee is unable to do the job or poses a safety risk because of a medical condition.

The Joint Publication also advises employers that singling out people of a certain race by asking about their financial histories or criminal records is evidence of discrimination, and it points out that exploring an applicant's or employee's use of social media could place employers at risk if the information identified is used in a discriminatory manner when making an employment decision.

The Joint Publication further reminds employers that the FCRA requires that they inform an applicant or an employee that they might use the information obtained from a background reporting company for making employment decisions. The notice cannot be given orally or included within the employment application, but must be in writing and in a stand-alone format. The Joint Publication further notes that, when employers decide to take an adverse action based on background information they obtained from a reporting company, the FCRA requires employers to first give the applicant or employee a written notice that includes a copy of the consumer report relied upon in making the decision and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act." After taking the adverse action, employers must then inform the applicant or employee that:

- he or she was rejected because of the information in the report and provide the name, address and phone number of the company who provided the report;
- the company providing the report did not make the employment decision and cannot give specific reasons for it; and
- the employee or applicant has a right to dispute the accuracy or completeness of the report and can obtain an additional free report from the reporting company within 60 days.

The EEOC and the FTC also released a related publication, "Background Checks: What Job Applicants and Employees Should Know," which informs job applicants and employees of their rights and protections under the laws enforced by the two agencies. The publication offers job applicants and employees examples of illegal employer conduct and instructs them to be vigilant as to the way that their background information is used.

In light of the Joint Publication, employers should review their current practices associated with background checks to ensure compliance and avoid undue scrutiny by the EEOC and the FTC. In addition, employers should be mindful that numerous state and local jurisdictions across the United States also have adopted their own statutory restrictions on the use of background information in making employment decisions.

Please contact **Amy L. Bess** at +1 (202) 312 3361, **James R. Glenn** at +1 (312) 609 7652 or any other Vedder Price attorney with whom you have worked if you have any questions about this topic.

Accommodating Religious Beliefs & Practices: The Latest Guidance from the EEOC

The Equal Employment Opportunity Commission (EEOC) recently issued informal guidance related to religious garb and grooming in the workplace. In it, the EEOC reiterates the need for employers to accommodate employees' sincerely held religious beliefs and customs. The takeaway for employers is that a clear and effective antidiscrimination policy, coupled with managers who understand the need to explore and, in most cases, provide religious accommodations, are key to preventing religious discrimination in the workplace.

Title VII of the Civil Rights Act of 1964 requires employers to accommodate employees whose sincerely held religious beliefs, practices or observances conflict with a work requirement, unless doing so would impose an undue hardship on the employer. The Act defines "religion" broadly and protects virtually all types of traditional and nontraditional practices, provided that the employee's beliefs are sincerely held. As such, an employee's belief or practice can qualify as "religious" under Title VII even if the employee is not affiliated with a formal religious organization or others in the employee's sect do not adhere to the same belief or practice.

To prevent religious discrimination in the workplace, it is critical for employers to understand that Title VII accords broad protections to employees relative to their religious beliefs, practices and customs, often making it necessary for the employer to provide a wide range of accommodations to employees of different faiths. In a perfect world, every employee requiring an accommodation would make a formal request immediately after learning about the employer's conflicting dress or grooming policies or upon being given a schedule that conflicts with his or her holiday or

Sabbath observances. However, it is important for managers to understand that an employee need not use any "magic words" to make a request. Indeed, the EEOC's guidance states that, in some instances, it may be obvious that the employee's practice is religious and that it conflicts with a workplace policy.

Employers may not avoid their responsibilities under Title VII by refusing to hire applicants who may require a scheduling or other accommodation, or by segregating religious employees in certain positions. The EEOC's guidance makes clear that customer preferences concerning religious beliefs and practices do not provide the employer with a lawful basis for employment decisions. As such, assigning an employee to a non-customer-facing position because of expressed or anticipated customer preferences or complaints will violate Title VII. This is one instance where the customer is not always "right."

Once an employer becomes aware of the need for an accommodation, whether by a formal request or observation, it should assess each situation on a case-by-case basis and make exceptions to the employer's usual rules or preferences whenever possible. If an employee's request would cause more than *de minimis* cost or burden on the operation of the employer's business or infringe upon the rights of other employees, the employer should explore alternative accommodation options before denying the request. Oftentimes, according to the EEOC, making an exception to the dress/grooming code by, for example, allowing a Sikh man to wear a beard or a Muslim woman to wear a hijab, will not cause an undue hardship on the employer.

A proactive approach is recommended to minimize the risk of a religious discrimination claim. Consider including a statement in your employee handbook affirming your organization's commitment to accommodating employee religious beliefs, practices and customs. Training is another essential component. Managers should be taught how to recognize when an accommodation may be necessary and to involve the human resources or legal department when employees request religious accommodations. Managers should understand the extent of protection afforded by the law and be reminded that each and every situation is unique, meaning that prejudgments and assumptions (and especially knee-jerk denials) should be avoided. Inflexible adherence to dress and grooming policies, or to work schedules that do not accommodate religious observances, is a recipe for trouble, and employers should educate managers about the need to remain flexible in the face of a need or request for religious accommodation.

The EEOC's guidance on religious garb and grooming in the workplace was issued in two parts and is available here: http://www1.eeoc.gov//eeoc/publications/fs_religious_garb_grooming.cfm?renderforprint=1; http://www.eeoc.gov/eeoc/publications/qa_religious_garb_grooming.cfm.

For more information on this topic, please contact **Jonathan A. Wexler** at +1 (212) 407 7732, **Aaron R. Gelb** at +1 (312) 609 7844, **Michelle T. Olson** at +1 (312) 609 7569, or any other Vedder Price attorney with whom you have previously worked.

The NLRB Is Teaming Up with OSHA on Retaliation Allegations

On May 21, 2014, the National Labor Relations Board released operations-management memo OM 14-60, explaining that the NLRB has entered into a referral agreement with the Occupational Safety and Health Administration for the handling of whistleblower complaints. The OSH Act establishes a 30-day statute of limitations for whistleblower claims under Section 11(c). OSHA estimates that each year between three hundred and six hundred complainants seeking to assert retaliation claims are unable to do so due to the 30-day statute of limitations. Some situations, such as retaliation for group complaints concerning unsafe working conditions, may also implicate claims under the National Labor Relations Act, which carries a six-month statute of limitations. To address these situations, OSHA will now notify complainants who file an untimely whistleblower charge of their rights to file a charge with the NLRB. OSHA personnel will be provided with talking points describing the NLRB and how a complainant can contact the Agency. A separate toll-free number for use by those referred by OSHA has also been established. The cooperation between these two Agencies will likely result in an increase in whistleblower claims. Consequently, employers should be mindful of how complaints regarding workplace safety are addressed and handled, particularly when they arise from concerted employee activities, such as group complaints.

Please contact **Aaron R. Gelb** at +1 (312) 609 7844, **James R. Glenn** at +1 (312) 609 7652 or the Vedder Price attorney with whom you have worked if you have any questions about retaliation allegations or any other issues related to this article.

Contact Preferences

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California Corner

San Francisco "Bans the Box" for Private Employers

On February 14, 2014, Mayor Ed Lee signed the San Francisco Fair Chance Ordinance (the Fair Chance Ordinance), also known as "ban the box" legislation that requires employers to remove check-this-box questions pertaining to criminal history from their employment applications. The Fair Chance Ordinance, which goes into effect on August 13, 2014, applies to private employers with 20 or more employees in San Francisco as well as to city contractors and subcontractors. It is intended to give ex-offenders a chance to display their qualifications in the hiring process before being asked about their criminal records. San Francisco is the ninth jurisdiction to pass such an ordinance affecting private employers, following the states of Hawaii, Massachusetts, Minnesota and Rhode Island, and the cities of Buffalo, New York; Newark, New Jersey; Philadelphia, Pennsylvania; and Seattle, Washington.

Section 4904(a) of the Fair Chance Ordinance prohibits employers from inquiring into or considering any of the following information at any time during the hiring process or employment:

1. An arrest not leading to a conviction (except an "unresolved arrest" that is the subject of an ongoing criminal investigation or trial);
2. Participation in or completion of a diversion or deferral of judgment program;
3. A conviction that has been judicially dismissed, expunged, voided, invalidated or otherwise rendered inoperative;
4. A conviction or other determination or adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system;
5. A conviction that is more than seven years old (the date of conviction being the date of sentencing); and
6. Information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

The Fair Chance Ordinance allows employers to inquire into convictions and unresolved arrests either after the first "live" interview (whether via telephone, video or other technology, or in person), or at the employer's discretion, once a conditional offer of employment has been made. Before making any such inquiry, however, the employer must provide the applicant or employee notice of his or her rights under the Fair Chance Ordinance. In addition, prior to obtaining a copy of a background check report, the employer must comply with all state and federal requirements to provide notice to the applicant or employee that such a report is being sought, including the California Investigative Consumer Reporting Agencies Act (California Civil Code sections 1786 *et seq.*) and the Federal Consumer Reporting Act (15 United States Code sections 1681 *et seq.*). Once the employer obtains information about the applicant or employee's conviction or unresolved arrest after the initial interview, the employer must conduct an individualized assessment, considering only convictions directly related to the job at issue, the time that has elapsed since the conviction, any evidence of inaccuracy and rehabilitation, and any other mitigating factors. In short, employers should not reflexively refuse to hire an individual with a prior conviction, where the offense bears no rational relation to the individual's ability to perform the job.

If the employer intends to make an adverse employment decision based on the applicant or employee's conviction history, the employer must provide the applicant or employee with a copy of the background check report, if any, and notify the applicant or employee of the anticipated adverse action and the items forming the basis for same. The applicant or employee then has seven days to provide verbal or written notice to the employer of the evidence of inaccuracy of the criminal history items or to submit evidence of rehabilitation or other mitigating circumstances.

In addition to the Fair Chance Ordinance, San Francisco employers must also comply with the other California laws that limit their right to ask about or consider certain types of convictions, such as marijuana-related convictions and those that have been judicially dismissed or ordered sealed. Given the myriad laws governing the use of criminal background information, covered employers and contractors in San Francisco should review their hiring policies to ensure compliance and train management to consider criminal history only in a manner that is job-related and consistent with business necessity.

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

Brendan G. Dolan	**Heather M. Sager**	**Ayse Kuzucuoglu**	**Lucky Meinz**	**Brittany A. Sachs**
+1 (415) 749 9530	+1 (415) 749 9510	+1 (415) 749 9512	+1 (415) 749 9532	+1 (415) 749 9525

Recent Accomplishments

A media client was named as a defendant in two actions asserted by former interns claiming entitlement to unpaid wages. Plaintiff's counsel commenced the first of these actions in New York State court under the New York Labor Law, and the second a short time later in federal court under the Fair Labor Standards Act. **Laura Sack**, **Lyle S. Zuckerman** and **Michael Goettig** removed the first action to federal court under the Class Action Fairness Act. Plaintiff's counsel subsequently filed a motion to remand that case to state court. With the assistance from **Daniel C. Green**, we successfully opposed the plaintiff's motion and both cases will now be litigated before one judge in federal court.

J. Kevin Hennessy, with assistance from **Patrick W. Spangler** and **Andrew Oppenheimer**, successfully achieved the voluntary dismissal of a putative class action brought under the WARN Act related to a reduction in force implemented by a defense contractor client in the Northern District of Alabama. The case was voluntarily dismissed by class counsel with prejudice. No settlement funds were paid.

Aaron R. Gelb and **James R. Glenn** won summary judgment on behalf of a local school district in the U.S. District Court for the Northern District of Illinois. The plaintiff, a special education teacher, asserted multiple claims of discrimination under Title VII in a failure to transfer case.

Client Alerts, Thought Leadership Updates and Other News

For more information, please visit www.vedderprice.com

Brendan G. Dolan authored a client alert titled "California Supreme Court Imposes Significantly Increased Rigor on Class Certification," which discusses the positive impact the recent California Supreme Court opinion in *Duran v. U.S. Bank* will have for employers on pending California state court wage and hour class action cases.

Laura Sack and **Scott M. Cooper** co-authored a client alert titled, "What Employers Need to Know About the New York City Earned Sick Time Act." The Act, which took effect on April 1, 2014, has implications for particular employers located in New York City as well as specific employers without offices or facilities in New York City whose employees do certain work within the City's borders.

The firm also issued a client alert titled "Supreme Court Endorses Broad View of Sarbanes-Oxley's Whistleblower Protection" discussing the March 4 decision handed down by the United States Supreme Court in *Lawson v. FMR LLC, et al.*, which expanded the scope of the whistleblower provision within the Sarbanes-Oxley Act to extend protection beyond employees of public companies to now cover employees of private contractors and subcontractors that serve public companies.

Joseph K. Mulherin authored a client alert warning franchisors about class action lawsuits filed against a leading fast food restaurant and franchisees in several states alleging improper conduct by certain independently owned franchisees. The alert discusses what constitutes a "joint employer" relationship and various class certification issues.

Charles B. Wolf recently updated meeting materials titled, "Withdrawal Liability to Multi-Employer Pension Plans Under ERISA," which he originally provided for the American Bar Association's Joint Committee on Employee Benefits 21st Annual National Institute on ERISA Litigation in 2011.

Heather M. Sager was quoted in the April 22 *Compliance Week* article titled, "Beware of Bizarre and Far-Fetched Whistleblower Claims." The article discusses the need for companies to investigate all whistleblower claims, even those that appear to be without merit at first glance, as well as the need for employers to have firm policies and procedures in place for investigating whistleblower reports or risk playing "catch-up" to properly defend themselves later.

Ms. Sager was also quoted in the April 8 *Compliance Week* article titled, "As Whistleblower Protections Expand, Companies Must Act." The article discusses the need for companies to address the potential risk of whistleblower retaliation in light of increased whistleblower complaints, increased regulation protecting corporate whistleblowers and a recent Supreme Court decision that expands whistleblower protections to employees of private companies.

On April 7, **Joseph K. Mulherin**, a member of the Labor & Employment practice area in the Chicago office, was named a firm Shareholder. Mr. Mulherin focuses his practice on counseling and representing private- and public-sector employers nationwide in a variety of employment law contexts, including those involving discrimination lawsuits and EEOC investigations, wage and hour disputes, class action strategy and procedure, and Department of Labor audits and investigations.

On May 19, the firm welcomed **Brittany A. Sachs** as a new Associate member of the firm's Labor & Employment practice area. Ms. Sachs joined the firm from the San Francisco office of an AmLaw 100 firm, where she focused on the representation of employers in civil litigation, in both state and federal court, including wage and hour class actions and single-plaintiff cases.

On March 20, we announced the expansion of our California presence with the opening of a new office located in **Los Angeles**. It is the sixth location for Vedder Price across the United States and in London, England.

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 L. 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
John J. Jacobsen, Jr. ..... +1 (312) 609 7680
Edward C. Jepson, Jr. ..... +1 (312) 609 7582
Philip L. Mowery ..... +1 (312) 609 7642
Joseph K. Mulherin ..... +1 (312) 609 7725
Margo Wolf O'Donnell ..... +1 (312) 609 7609
Michelle T. Olson ..... +1 (312) 609 7569
Andrew Oppenheimer ..... +1 (312) 609 7664
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
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

Scott M. Cooper ..... +1 (212) 407 7770
Michael Goettig ..... +1 (212) 407 7781
Daniel C. Green ..... +1 (212) 407 7735
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
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
Brittany A. Sachs ..... +1 (415) 749 9525

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, San Francisco and Los Angeles.

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VEDDER PRICE®

Chicago

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

Washington, DC

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

San Francisco

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

New York

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

London

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

Los Angeles

10250 Constellation Boulevard, Suite 2300
Los Angeles, CA 90067
T: +1 (424) 204 7700
F: +1 (424) 204 7702