VEDDERPRICE®

Chicago • New York • Washington, DC • London • San Francisco • Los Angeles

September 2014

Labor and Employment Law

Important New Considerations in Managing Pregnant Employees

The following three articles have an overarching theme of how employers should actively become familiar with the legal ramifications surrounding the Pregnancy Discrimination Act and other laws that are in effect to protect pregnant employees in the workplace. Employers should be wary of denying pregnant workers light duty, terminating a pregnant employee and restricting protected unpaid leave as discussed below.

EEOC Guidance on Pregnancy Discrimination Act Stirs Controversy in Form and Content

On June 14, 2014, the Equal Employment Opportunity Commission (EEOC) issued controversial new guidance on the interpretation and application of the Pregnancy Discrimination Act (PDA), a 1978 amendment to Title VII of the Civil Rights Act that prohibits discrimination based on pregnancy, childbirth or related medical conditions. Among other provisions, the guidance sets forth the EEOC's position that employers may be required to provide reasonable accommodations to pregnant employees, employees who are planning to become pregnant and employees who have medical conditions related to pregnancy. The EEOC issued the interpretive guidance just two weeks after the Supreme Court agreed to hear *Young v. UPS*—an important case that will clarify an employer's accommodation obligations under the PDA. In light of this timing, commentators have criticized the EEOC for issuing the guidance before the Court has an opportunity to weigh in on the issue. Indeed, depending on how the Court rules in *Young*, many of the standards set forth in the guidance could ultimately become moot. In addition to the questionable timing of the guidance, the EEOC is also being criticized for voting to publish its own interpretations without first requesting or allowing public review and commentary.

Despite the controversy underlying the issuance of the guidance, nothing is getting more attention than the obligations set forth in the guidance itself. Here are a few of the highlights:

- The EEOC's guidance prohibits discrimination on the basis of past pregnancy, current pregnancy and intended pregnancy. As to intended or future pregnancy, an employer could be liable for adverse actions taken on the basis of the following: perceived or actual reproductive risks; an intention to become pregnant; infertility treatments; and/or the use of contraceptives. Notably, the guidance further states that employers can violate Title VII by providing health insurance that excludes

In this issue...

Important New Considerations in Managing Pregnant Employees

- **EEOC Guidance on Pregnancy Discrimination Act Stirs Controversy in Form and Content** 1
- **7th Circuit Allows "Anticipatory Termination" of Pregnant Employee in Limited Circumstances** 3
- **Maryland Update: New Parental Leave Act Will Soon Take Effect** 4

What the "Fair Pay and Safe Workplaces" Executive Order Means for Government Contractors and Arbitration Programs 5

The Younger Face of Workplace Safety and What OSHA Is Doing About It 6

Illinois and New Jersey Become Latest States to "Ban the Box": Changes Required in Job Application Inquiries about Criminal Records 6

Amendments to New York State Wage Theft Prevention Act Await Governor Cuomo's Signature 7

California Employers Have More Ammunition in Fighting Class Certification 8

Recent Accomplishments 8

coverage of prescription contraceptives. This seems to directly contradict the Supreme Court's recent decision in *Burwell v. Hobby Lobby*, which exempted a closely held corporation from providing certain contraceptives on religious freedom grounds. However, in a footnote, the EEOC explains that the guidance only addresses Title VII's prohibition against pregnancy discrimination and not whether certain employers may be exempt from Title VII under the Religious Freedom Restoration Act (which was at issue in *Hobby Lobby*).

- According to the EEOC, employers may not discriminate against employees based on medical conditions related to pregnancy or childbirth, including lactation, breastfeeding and abortion.
- Under the guidance, employers must treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other employees similar in their ability or inability to work, whether by providing modified tasks, alternative assignments, or fringe benefits such as disability leave and leave without pay. This includes providing pregnant workers or those with pregnancy-related conditions with light-duty work or a leave of absence if the employer does so for other employees with similar limitations.
- The guidance also sets forth the EEOC's position on parental leave. Such leave, which is generally offered so that new parents may bond with or care for a new child (as opposed to medical leave under a short-term disability policy), must be provided to men and women on equal terms. Thus, a policy that gives female employees three weeks of parental leave (on top of any disability or medical leave) but gives male employees only one week of parental leave would violate Title VII.

One of the most discussed and debated provisions in the guidance, however, involves the EEOC's position that employers must provide reasonable accommodations to pregnant employees or those with pregnancy-related conditions. Although pregnancy does not automatically qualify as a disability under the Americans with Disabilities Act (ADA), the new guidance certainly tends to import the ADA's accommodation obligations into the PDA—regardless of whether the employee has an ADA-qualifying disability. Under the new guidance, an employer is obligated to treat a pregnant employee who is temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, including those with disabilities.

The guidance further provides, "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations." For example, the EEOC says that pregnant women with work restrictions must be given light duty if the employer offers light duty, regardless of whether the employer's light-duty program is otherwise limited to employees who are recovering from on-the-job injuries. While employers may have denied light duty to pregnant workers in the past on this basis, the EEOC is taking the position that they may do so no longer—the very issue that is to be decided by the Supreme Court in *Young*.

In *Young*, UPS had a policy pursuant to a collective bargaining agreement that provided temporary alternate work (i.e., temporary light duty) to employees "unable to perform their normal work assignments due to an on-the-job injury." Although UPS allowed employees with ADA-qualifying disabilities and those who lost DOT certification to participate in the program, pregnant employees were ineligible if their limitations arose solely as a result of pregnancy. Young, a long-term delivery driver for UPS, became pregnant and had a 20-pound lifting restriction. She could not perform the essential functions of her job and was denied the light-duty program because her restrictions were not caused by an on-the-job injury or illness. Ultimately, Young exhausted her FMLA leave and was left with no choice but to go on an extended leave of absence, receiving no pay and eventually losing her medical coverage. She sued UPS under the ADA, the PDA and other discrimination laws.

The Fourth Circuit ruled in favor of UPS, holding that it did not discriminate against Young on the basis of pregnancy when it was simply applying a "pregnancy-blind" policy. According to the court, by demanding access to the light-duty program, Young was essentially requesting preferential treatment on account of her pregnancy. For example, other employees who had similar lifting restrictions as Young but who were not disabled under the ADA would also be ineligible for the program. Young essentially argued that the PDA requires that a pregnant worker receive whatever accommodations or benefits are accorded to individuals accommodated under the ADA. The EEOC has adopted this very position in its guidance, but the Fourth Circuit and other courts have held that Congress did not intend

to advocate such preferential treatment when enacting the PDA.

Until *Young* is decided by the Court in its next term, employers are cautioned to think twice before denying pregnant workers light duty or other accommodations based on stated policy limitations or based on the conclusion that the employee is not disabled within the meaning of the ADA.

While the status of pregnancy and pregnancy-related accommodation issues may still be up for debate at the federal level, several laws have been passed at the state level that impose obligations similar to what the EEOC's guidance reflects. For example, Illinois House Bill 8 passed both houses in May and was sent to the Governor on June 26, 2014. By all accounts, Governor Quinn will sign the bill. Once the bill becomes law, the Illinois Human Rights Act would be amended effective January 1, 2015, to prohibit pregnancy discrimination and to require employers to provide reasonable accommodations for conditions related to pregnancy, childbirth or related medical conditions. Such reasonable accommodations will likely include providing an accessible worksite, acquisition or modification of assistive equipment, job restructuring and modified work schedules. Similarly, as we reported in our December 2013 newsletter, New York City's Pregnant Workers Fairness Act requires employers in New York City to offer reasonable accommodation for pregnancy, childbirth and related medical conditions.

For the time being, employers should be aware of the EEOC's guidance and applicable state and local laws addressing accommodations for pregnant workers. Employers may want to follow the ADA framework when analyzing requests for accommodations by pregnant employees, by employees attempting to become pregnant, and by employees with medical conditions arising from pregnancy or childbirth. Such employers should engage in the interactive process, gather relevant medical documentation, determine what has been done for employees with similar limitations in the past, and ensure that the requested accommodation does not cause an undue burden. Although pregnancy does not always amount to a disability, the trend at the state level and now at the federal agency level is to apply the ADA's reasonable accommodation obligations to pregnant employees.

If you have questions regarding this article or accommodating pregnant employees in general, please contact **Laura Sack** at +1 (212) 407 6960, **Cara J. Ottenweller** at +1 (312) 609 7735, **Brittany A. Sachs** at +1 (415) 749 9525 or any other Vedder Price attorney with whom you have worked.

Save the Date

2014 Employment Law Update

Wednesday, November 5

8:30a.m. – Noon

The Hay-Adams Hotel

Washington, DC

www.vedderprice.com/employmentlawupdate-dc

7th Circuit Allows "Anticipatory Termination" of Pregnant Employee in Limited Circumstances

Most employers, upon learning that an employee is pregnant, offer a hearty congratulations and then begin planning how to handle the period of time that the employee is on an approved leave of absence. Sometimes, however, an employer may find itself facing a particularly challenging set of circumstances created by the pregnant employee's anticipated absence and/or inability to perform her job duties while pregnant. Although it is not necessarily the desired outcome, there are instances where the employer may anticipatorily terminate the pregnant employee. Doing so is fraught with risk and may have negative consequences for how a company is viewed both by employees and the public, but, if necessary, it can be done.

The Pregnancy Discrimination Act (PDA) prohibits employers from discriminating against pregnant employees simply because they believe the pregnancy might prevent the employees from

doing their jobs. The PDA's protections, however, are not absolute as noted recently by a federal district court in Chicago. Employers may, according to the court, terminate a pregnant employee as a result of her inability to perform the essential functions of her job in certain limited situations. This, of course, assumes that the employee is not eligible for leave under the Family and Medical Leave Act and that the employer does not offer leave to nonpregnant employees who similarly are unable to work for limited periods of time.

In *Cadenas v. Butterfield Health Care II, Inc.* (N.D. Ill. July 15, 2014), the employer—a residential health care facility—terminated a certified nursing assistant after she notified her supervisor of the physical limitations she would eventually experience during the course of her pregnancy. The employee, who needed to be able to push, pull and lift more than 20 pounds in order to perform the essential functions of her job—including repositioning patients—informed the facility that she would be unable to lift, pull or push that amount once her pregnancy reached 20 weeks. Plaintiff, who was 15 weeks pregnant when she turned in her doctor's note, was not yet eligible for any type of leave and was terminated immediately. Although the facility informed the employee that she could be rehired after she had her baby and no longer had any physical restrictions, she filed suit, claiming pregnancy discrimination.

Recognizing that an employer is not required to accommodate a pregnant employee's physical restrictions if it would not have accommodated a nonpregnant employee's similar restrictions, the *Cadenas* court explained that an employer—absent a duty to accommodate—may generally terminate an employee because she cannot perform the basic functions of her job, even if the restriction is due to the pregnancy. In short, employers are not required to give a pregnant employee special treatment if it would not have afforded the special treatment to a non-pregnant employee.

Significantly, the court explained that only in limited circumstances would an employer have sufficient concrete evidence of future limitations to justify an anticipatory termination on the basis of legitimate, nondiscriminatory staffing needs. As an example, the court referenced a Seventh Circuit case, *Marshall v. American Hosp. Ass'n*, 157 F.3d 520 (7th Cir. 1998), where the circuit court of appeals upheld summary judgment for an association that terminated a pregnant employee who planned an eight-week leave during the run-up to the employer's annual conference, the organization of which was one of the employee's primary job duties. Since Butterfield failed to provide evidence that there was a sufficient business justification for not allowing the employee to work during the five weeks before her restrictions went into effect, the district court denied the employer's motion for summary judgment. Had the facility simply waited until the employee could no longer do her job, it could have terminated the employee without liability, according to the court.

Terminating a pregnant employee is rarely a good idea. However, that does not mean that it may not be done. There are circumstances where it may be unavoidable, such as a reduction in force or as a result of serious misconduct. Whatever the reason, it should be well documented and easy to explain to an investigator, judge or jury. Although less common, there may also be times when exceptional business necessities arise, enabling employers to take anticipatory action in planning for future staffing needs. Such decisions should never be taken lightly and should be made after consultation with legal counsel.

If you have any questions about this article or the risks posed by taking adverse action against a pregnant employee, please contact **Aaron R. Gelb** at +1 (312) 609 7844, **Benjamin A. Hartsock** at +1 (312) 609 7922 or any other Vedder Price attorney with whom you have worked.

Maryland Update: New Parental Leave Act Will Soon Take Effect

Maryland's Parental Leave Act (PLA) goes into effect on October 1, 2014, requiring small employers in Maryland to provide protected unpaid leave to employees related to the birth of an employee's child or the placement of a child with the employee for adoption or foster care. Specifically, the PLA applies to employers with between 15 and 49 employees in Maryland. Employers who have more than 50 employees in the region, but between 15 and 49 employees in Maryland, will be required to offer protected leave under the PLA, despite the fact that such employers would likely also be required to provide protected unpaid leave under the Family and Medical Leave Act (FMLA).

The amount of protected unpaid leave to which employees are entitled under the PLA, however, is only six weeks during any twelve-month period, whereas the FMLA guarantees up to twelve weeks of leave during any twelve-month period. Employee eligibility requirements under the PLA largely mirror FMLA eligibility requirements.

As under the FMLA, when an employee returns to work after utilizing PLA leave, the employee must be restored to the position he or she held prior to PLA leave, or to a position equivalent in terms of pay, benefits and

"other terms and conditions of employment." Some narrow exceptions apply to the reinstatement requirement.

The PLA also allows employees to bring a civil cause of action against an employer for violating the statute. Potential damages include lost wages and other benefits, as well as reasonable attorneys' fees and related costs. Additionally, the PLA includes an anti-retaliation provision, which protects employees from retaliation related to their request for or use of PLA leave, filing formal or informal complaints related to PLA leave, and/or participating in an investigation or proceeding related thereto.

If you have questions regarding this article, please contact **Amy L. Bess** at +1 (202) 312 3361, **Sadina Montani** at +1 (202) 312 3363 or any other Vedder Price attorney with whom you have worked.

What the "Fair Pay and Safe Workplaces" Executive Order Means for Government Contractors and Arbitration Programs

On July 31, 2014, President Obama signed an executive order (the Order) with sweeping implications for employers that do business with the federal government. The Order requires new disclosures, imposes significant resource burdens, and bans arbitration of certain claims.

Disclosure of Labor Law Violations and Related Subcontractor Reporting

Citing the need to identify businesses with consistent track records of compliance, the Order requires contractors for the first time to report violations of labor, discrimination, wage and hour, and safety laws to the contracting agency at the pre-award stage. The disclosure must include administrative merits determinations, arbitral awards or decisions, and any civil judgments during the three-year period preceding the bid. These disclosures will be reviewed by newly appointed "Labor Compliance Advisors" at the pre-award stage at each agency.

The contractor's reporting obligations do not stop there. Contractors must also require subcontractors with contracts exceeding $500,000 to make the same disclosures to the contractor. As a result, contractors will now have to include reporting language in their subcontracts and create an internal process for soliciting and reviewing disclosures and even determining whether the subcontractor is a "responsible source that has a satisfactory record of integrity and business ethics." Once a contract is awarded, contractors must submit updates regarding their own violations and those of their subcontractors every six months.

Paycheck Transparency and "Right to Know"

The Order also requires contractors and their subcontractors to give employees accurate information about hours worked, overtime paid, and other relevant paycheck details. Significantly, the Order also contains a "right to know" provision requiring contractors to give independent contractors written notice of their independent contractor status.

Restrictions on Mandatory Arbitration of Certain Disputes

Finally, the Order bars contractors and their subcontractors with contracts of $1 million or more from forcing workers to sign agreements with pre-dispute arbitration clauses (not including collective bargaining agreements) that require the employee to arbitrate Title VII claims or any tort related to or arising out of an incident of sexual harassment or a sexual assault. This restriction tracks a similar exclusion contained in the Department of Defense Appropriations Act for Fiscal Year 2010, which previously applied only to Defense contractors and subcontractors. The good news for contractors is that the prohibition applies only to Title VII claims and tort claims related to sexual harassment and sexual assault. It does not impact the enforceability of agreements requiring the arbitration of wage and hour and other employment-related disputes.

The Rough Road Ahead for Government Contractors

The Order is the latest attempt by the Obama Administration to impose its policy agenda on businesses that contract with the federal government. Contractors should look for forthcoming regulations and should start planning for the increased resource burdens associated with the Order's disclosure obligations. Considering the growing significance of mandatory arbitration programs, employers with a government contract or subcontract that exceeds $1 million should consider the impact of the Order's restrictions on any agreement to arbitrate employment disputes.

If you have any questions on this topic, please contact **J. Kevin Hennessy** at +1 (312) 609 7868, **Patrick W. Spangler** at +1 (312) 609 7797, **James R. Glenn** at +1 (312) 609 7652 or any Vedder Price attorney with whom you have worked.

The Younger Face of Workplace Safety and What OSHA Is Doing About It

While teenagers may not think about workplace safety when starting a summer job, the Occupational Safety & Health Administration (OSHA) believes they should and wants their employers to focus on it as well. In the United States, a teenage worker is injured on the job every nine minutes. In 2012, more than 170,000 young workers were injured at the workplace and 361 were killed. As part of its efforts to curb workplace injuries, OSHA is attempting to educate young workers on their rights, in part, by creating a special webpage for young workers with access to blogs, real-life stories of workplace accidents, a list of known workplace hazards in industries and jobs typically filled by young workers, and various other resources including reporting mechanisms.

As part of this campaign, OSHA has several recommendations for employers. Consistent with other recent initiatives, including the temporary worker program, OSHA is encouraging employers to train young workers to recognize workplace hazards and to engage in safe workplace practices. OSHA also suggests developing a mentoring program or buddy system as a way to help young workers learn the ropes of the job and related safety concerns. OSHA is helping support further efforts at the local level through grants designed to provide training and education regarding the recognition, avoidance and prevention of health and safety workplace hazards.

Employers would be well served to pay attention to this and other OSHA initiatives. Even though there are no new standards or regulations in play, campaigns such as this one are a likely harbinger of things to come, namely during the next work site inspection. Employers with significant numbers of younger workers, particularly during the summer or holiday seasons, would do well to consider implementing OSHA's suggested training programs if similar programs do not already exist and take steps to ensure that the policies and procedures in place adequately take into account the risks facing younger workers less accustomed to the potential safety hazards of a particular workplace or industry.

If you have any questions on this topic, please contact **Jonathan A. Wexler** at +1 (212) 407 7732, **Aaron R. Gelb** at +1 (312) 609 7844, **James R. Glenn** at +1 (312) 609 7652, **Sadina Montani** at +1 (202) 312 3363 or any Vedder Price attorney with whom you have worked.

Illinois and New Jersey Become Latest States to "Ban-the-Box":

Changes Required in Job Application Inquiries about Criminal Records

In the last several weeks both Illinois and New Jersey enacted "ban-the-box" laws prohibiting the use of check-this-box questions on employment applications inquiring about an applicant's criminal history. In doing so, Illinois and New Jersey joined four other states with similar laws applicable to private sector employers: Hawaii, Massachusetts, Minnesota and Rhode Island.

The new Illinois Job Opportunities for Qualified Applicants Act, which was the subject of our recent bulletin, "Illinois Bans Employment Application Questions About Criminal Convictions" (July 24, 2014), becomes effective January 1, 2015. The New Jersey Opportunity to Compete Act becomes effective on March 1, 2015.

A number of cities, including Philadelphia, San Francisco and Seattle, have also passed ban-the-box laws applicable to private sector employers. Other states and municipalities are considering similar measures.

The primary focus of these laws is on *when* in the hiring process applicants are asked about criminal convictions. All of the laws ban the common practice of including questions about convictions on initial employment applications, although various exceptions exist for certain types of jobs. Some laws, like those in Illinois and Minnesota, generally prohibit employers from asking about criminal convictions until after the applicant has been selected for an interview. New Jersey law typically requires an employer to wait until after the first interview has been completed. The most restrictive state, Hawaii, requires an employer to wait until after a conditional offer of employment has been made before asking.

Employers with operations in jurisdictions with a ban-the-box law need to reconsider the stage in the hiring process at which these questions are asked. For most jobs, questions about criminal convictions need to be removed from the initial employment application and asked later in the hiring process. How much later depends on the applicable law or laws.

For a more detailed discussion, see the article available at www.vedderprice.com/ban-the-box. Please contact **Brandon L. Dixon** at +1 (312) 609 7852, **Thomas G. Hancuch** at +1 (312) 609 7824, **Lyle S. Zuckerman** at +1 (212) 407 6964 or any Vedder Price attorney with whom you have worked if you have any questions about this topic.

Amendments to New York State Wage Theft Prevention Act Await Governor Cuomo's Signature

On June 19, 2014, both the New York State Assembly and Senate passed a bill to amend the New York State Wage Theft Prevention Act (the WTPA), eliminating the need for employers to provide annual wage notices to their existing employees. The bill also imposes harsher penalties for wage law violations and imposes new liability on certain groups. The bill, which is presently awaiting Governor Cuomo's signature, will take effect 60 days after it is signed by the Governor.

As we reported in our January 19, 2011 Labor and Employment Law Bulletin, the WTPA was enacted in response to perceived employer abuse of wage and hour laws, including misclassification of employees. Since 2011, employers in New York State have been required by the WTPA to provide existing employees with annual written notices containing certain wage-related information, including the basis for the wage payment (i.e., hourly, daily, weekly, by commission, per piece, etc.), and whether the employer intends to claim any wage deductions (e.g., meal or lodging allowances). In what is sure to be welcome news for employers, such annual notices will no longer be required once the amendments to the WTPA are effective. However, employers will still be required to provide all newly hired employees with a wage notice, and the WTPA's requirements regarding earnings statements will also remain intact.

The amendments to the WTPA will also increase the penalties for employers that fail to provide new employees with the required wage notice within 10 days of hire, from $50 per worker, *per workweek*, to $50 per worker, *per workday*, up to a maximum penalty of $5,000. Employers will also face increased penalties for failing to provide employees with wage statements along with each wage payment. Under the amended WTPA, the employee and the New York State Department of Labor (NYSDOL) may each recover up to $250 from an employer for each work day it does not comply with the wage statement requirement, up to a maximum of $5,000. An employer may avoid liability for these penalties by proving that it still made all payments to employees in a timely manner, or that it reasonably believed in good faith that it did not have to provide the notice.

The new bill also creates new potential successor liability and individual liability for certain LLC members. Successor entities engaged in substantially the same operation and ownership, and with the same employees, products and customers will be liable for the acts of the predecessor entity. This provision makes it more difficult for employers to avoid liability for wage law violations by simply restructuring or renaming the business. The bill also amends the New York State LLC law in such a way that the 10 individuals with the largest ownership shares of an LLC may be held personally liable for unpaid wages owed to that LLC's employees. To recover, the employee must first provide notice to the LLC members and pursue the claim in a timely manner.

Other changes reflected in the amendments to the WTPA include enhanced penalties for repeat offenders. The bill would double the penalty to $20,000 for employers with a Labor Law violation in the preceding six-year period. Additionally, contractors or subcontractors must disclose any wage violations to employees through an attachment to paychecks that summarizes the nature of the violation. Finally, the bill clarifies that, unless otherwise specified, the Department of Labor's investigation of a wage and hour complaint will automatically cover a six-year period (because the applicable statute of limitations for claims brought under the state's wage and hour law is six years).

In short, the anticipated amendments to the WTPA will bring some welcome administrative relief for employers, while raising the stakes for employers that violate the WTPA and/or New York's wage and hour laws more generally.

Please contact **Laura Sack** at +1 (212) 407 6960, **Scott Cooper** at +1 (212) 407 7770 or any other Vedder Price attorney with whom you have worked if you have questions regarding the anticipated amendments to the New York State Wage Theft Prevention Act or for assistance meeting your obligations under the WTPA.

Contact Preferences

In an effort to conserve resources, please let us know if you would prefer to only receive this publication electronically. To do so, please e-mail info@vedderprice.com and include your contact information.

Recent Accomplishments

Lyle S. Zuckerman and **Scott M. Cooper** obtained pre-answer dismissal of an $8 million action filed by the former president of our client, a luxury goods retailer. The president had claimed breach of his employment contract, as well as violations of the New York Labor Law.

Thomas M. Wilde and **Emily C. Fess** obtained summary judgment in a retaliation case in the Northern District of Illinois on behalf of a national association.

Thomas M. Wilde and **Emily C. Fess** also obtained summary judgment in a false imprisonment and malicious prosecution case in the Circuit Court of Cook County on behalf of a national retailer.

California Corner

California Employers Have More Ammunition in Fighting Class Certification

In December 2001, there was a class action lawsuit filed against U.S. Bank National Association alleging certain California loan officers had been misclassified as exempt from overtime. The case proceeded to trial, with the judge allowing use of "representative testimony" from slightly less than 10 percent of the putative class for the purpose of determining liability. Thereafter, the court used statistical expert testimony to extrapolate classwide damages, resulting in a $15 million verdict against U.S. Bank.

The Bank appealed, arguing that it was not appropriate to determine liability or damages based on a sampling, particularly where the court did not allow the Bank to submit contrary evidence from any putative class members not selected as part of the sample. The appellate court reversed and ordered decertification. The California Supreme Court granted review and, in May 2014, affirmed the appellate court's decision, remanding the case for a new trial on both liability and damages, and encouraging the trial court to "entertain" a new class certification motion.

So what does this mean for California employers? When facing a class action, one of the things employers focus on is how to defeat certification. In order to do so, one area of focus is the manageability of the class, meaning, how feasible is it for a court to devise a way to consider classwide evidence that would not compromise the employer's right of due process by limiting submissions or testimony? Tangential to the manageability argument is the assertion that there are so many individualized issues within the class, that the *only* feasible way to determine liability would be to accept testimony from all putative class members. With a sizeable group, such an individualized inquiry would, of necessity, demonstrate that trial would not be "manageable" and, accordingly, proceeding on a classwide basis would not serve judicial economy.

The *Duran v. U.S. Bank Nat'l Assn'n*, No. S200923 (Cal. May 29, 2014) decision, and particularly the testimony of the defense expert regarding the errors caused by the plaintiffs' statistical sampling assumptions, provides new ammunition for the employers' manageability arguments in this context. Regarding presentation of defenses, the *Duran* ruling explained: "If trial proceeds with a statistical model of proof, a defendant accused of misclassification must be given a chance to impeach that model or otherwise show that its liability is reduced because some plaintiffs were properly classified as exempt." As for the trial court's sampling plan, the California Supreme Court highlighted a number of errors, including the small sampling size, lack of randomness, and an "intolerably high" margin of error, resulting in a sample that was neither representative nor fundamentally fair. While *Duran* does not go so far as to say that *all* sampling or representative testimony is facially invalid, it puts greater focus on the mechanics of trial processes, and greater pressure on class counsel to demonstrate the legitimacy of their proposed trial plans. And anytime the plaintiffs' burden of proof is heightened at certification, it is a good thing for employers.

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

Brendan G. Dolan
+1 (415) 749 9530

Heather M. Sager
+1 (415) 749 9510

Lucky Meinz
+1 (415) 749 9532

Brittany A. Sachs
+1 (415) 749 9525

Zachary Scott
+1 (415) 749 9535

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
Lucky Meinz.................................+1 (415) 749 9532
Heather M. Sager ....+1 (415) 749 9510
Brittany A. Sachs ....+1 (415) 749 9525
Zachary Scott ....+1 (415) 749 9535

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.

This communication is published periodically by the law firm of Vedder Price. It is intended to keep our clients and other interested parties generally informed about developments in this area of law. 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 P.C. is affiliated with Vedder Price LLP, which operates in England and Wales, and with Vedder Price (CA), LLP, which operates in California.

© 2014 Vedder Price. Reproduction of this content is permitted only with credit to Vedder Price. For additional copies or an electronic copy, please contact us at info@vedderprice.com.

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

1925 Century Park East, Suite 1900
Los Angeles, CA 90067
T: +1 (424) 204 7700
F: +1 (424) 204 7702