Labor & Employment Law Update

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Compliance Alert: New Illinois Pregnancy Accommodation Law Goes into Effect Jan. 1, 2015

Now that Governor Pat Quinn signed into law the Pregnancy Accommodation Act (also referenced to as the "Pregnancy Fairness law"), amending the Illinois Human Rights Act, Illinois finds itself among a handful of states offering enhanced workplace rights to pregnant employees. A number of significant developments involving pregnancy-related accommodations have taken place in the past few months: the U.S. Equal Employment Opportunity Commission issued its controversial regulations on July 14, 2014 and the Supreme Court heard oral arguments in the *Young v. UPS* case. Many employers around the country anxiously await the Supreme Court's decision, hoping that it settles the question of whether light-duty programs, previously offered only to those employees injured on the job, must also be made available to pregnant employees who are unable to perform their jobs. The Pregnancy Accommodation Act dramatically shifts the analysis in Illinois, creating a series of new rights and obligations that employers need to understand and comply with beginning January 1, 2015, regardless of how the Supreme Court decides the *UPS* case.

Under the Act, it is a civil rights violation for an employer to

- not make reasonable accommodations, if so requested, to an employee for "conditions related to pregnancy, childbirth, or related medical conditions," unless the employer can demonstrate the accommodation would impose an undue hardship on the employer;
- require a job applicant or employee to accept an accommodation that the applicant or employee chooses not to accept;
- require an employee to take leave if another reasonable accommodation can be provided;
- retaliate against an applicant or employee for requesting an accommodation; or
- fail to reinstate an employee affected by pregnancy, childbirth or common related conditions to her original or an equivalent job with equivalent pay and benefits upon her signifying her intent to return or when her need for reasonable accommodation ceases, absent proof of an undue hardship on the employer's business.

Employers with one or more employees are covered by the Act. Moreover, the Act applies not only to full-time employees, but also to part-time and probationary employees "affected by pregnancy, childbirth or medical or common conditions related to pregnancy or childbirth."

Helping clarify what will be expected of employers, the Act provides a lengthy list of possible accommodations, some of which go beyond what

many employers are used to considering in the context of Americans with Disabilities Act accommodations. Possible accommodations include, but are not limited to:

- more frequent or longer bathroom breaks, or breaks for increased water intake or periodic rest;
- private non-bathroom space for expressing breast milk and breastfeeding;
- seating;
- assistance with manual labor;
- light duty, temporary transfer to a less strenuous or hazardous position, job restructuring or reassignment to a vacant position;
- the provision of an accessible work site or modification of equipment;
- a part-time or modified work schedule or time off; and
- appropriate adjustment or modifications of examinations, training materials or policies.

The fact that an employer provides a similar accommodation to other, non-pregnant employees, regardless of the reason, creates a rebuttable presumption that the accommodation does not impose an undue hardship on the employer. This means that an employer must provide accommodations to pregnant employees similar to those it gives to disabled employees or employees who were injured on the job.

Employers may request documentation from the employee's health care provider concerning the requested accommodation if the request is "job related and consistent with business necessity." The Act limits employer inquiries to 1) the medical justification for the requested accommodation, 2) a description of the reasonable accommodation that is medically advisable and 3) the probable duration of the reasonable accommodation.

Employers may refuse to provide an accommodation only when it poses an undue hardship on the company. The Act defines undue hardship as an action that is "prohibitively expensive or disruptive" when considered in light of a number of factors, including the nature and cost of the accommodation needed, the overall financial resources of the facility or facilities involved, the number of employees at the facility, and the overall size and financial resources of the employer generally. The burden of establishing that an undue hardship exists falls on the employer.

Employers must post a notice approved by the Department of Human Rights (not yet issued), or include a statement in any handbook summarizing the requirements of the Act and information pertaining to the filing of a charge.

Employers with operations in Illinois should carefully review—and, where necessary, revise—their reasonable accommodation and leave

Save the Date!
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policies to ensure that such policies reflect the new rights afforded pregnant employees, employees attempting to become pregnant and employees with medical conditions arising from pregnancy or childbirth. Managers and human resources professionals should be trained regarding the employer's obligation to engage in the interactive process and accommodate pregnancy-related conditions.

If you have any questions about this new law or accommodating pregnant employees in general, please contact **Nicholas Anaclerio** at +1 (312) 609 7538, **Emily C. Fess** at +1 (312) 609 7572 or any other Vedder Price attorney with whom you have worked.

New Year, New OSHA Reporting Requirements: Significant Changes Are Coming in 2015

In a move that will drastically increase the number of incidents employers must report, the U.S. Department of Labor's Occupational Safety and Health Administration (OSHA) recently announced a new rule that changes the requirements regarding the types of injuries and incidents that must be reported to the agency. The rule, which goes into effect on January 1, 2015, also updates the list of employers partially exempt from OSHA's record-keeping requirements.

Under the old rule, employers were required to notify OSHA of any workplace fatality or when three or more employees were hospitalized because of an illness or injury. Beginning January 1, 2015, employers must notify OSHA whenever a single employee (i) is hospitalized as a result of a workplace injury or illness, (ii) suffers an amputation or (iii) loses an eye. The obligation to report a workplace fatality remains unchanged. The three-employee threshold for hospitalizations is no more. The new rule also imposes specific timeliness requirements for incident reporting: work-related fatalities must be reported within eight hours (just as under the old rule), while hospitalizations, amputations, or the loss of an eye must be reported within 24 hours. The new reporting requirements apply to all employers, including those which are currently exempt from maintaining injury and illness logs.

OSHA is developing a web portal for employers to electronically report incidents in addition to the traditional reporting options currently available to employers—contacting the OSHA Area Office nearest in vicinity to the site of the accident or calling OSHA's toll-free number. These reports of illness or injury—regardless of the method used—will be made public on OSHA's website where they can be viewed by employees, union organizers and/or competing companies.

OSHA has also revised the list of industries that are exempt from the injury and illness record-keeping requirements. Where the regulations previously used the Standard Industrial Classification (SIC) system to categorize industries, OSHA will now look to the North American Industry Classification System (NAICS) to determine whether employers in a certain industry are covered. The new list is based on updated injury and illness data from the Bureau of Labor Statistics. Employers with ten or fewer employees remain exempt from the requirement to keep records of workplace injuries and illnesses.

Employers that are unsure whether they are required to maintain records of workplace injuries and illnesses should immediately determine if their industry is covered so that they are ready to begin tracking recordable incidents effective January 1, 2015. Employers should also ensure that the responsible operations and employee health and safety professionals are aware of and understand the new reporting obligations.

If you have any questions on this topic, please contact **Aaron R. Gelb** at +1 (312) 609 7844, **James R. Glenn** at +1 (312) 609 7652 or any Vedder Price attorney with whom you have worked.

New Advice on Sending FMLA Notices

Many employers use the U.S. Postal Service and/or e-mail to send the requisite notices to employees requesting Family and Medical Leave Act (FMLA) in an effort to save time and/or money. Two recent federal court decisions, however, will likely cause many employers to reexamine their notification practices and opt for a method of delivery that can be verified.

The FMLA requires employers to provide general notice to employees of their FMLA rights (both by posting a notice on the employer's premises and by including information regarding the employer's specific FMLA policies and procedures in an employee handbook), as well as specific notice to those employees seeking to exercise their rights under FMLA. FMLA regulations establish the specific requirements related to this individualized notice, of which most employers are well aware. If an employee has been prejudiced by the employer's failure to provide proper notice, this can result in an actionable interference claim.

In *Lupyan v. Corinthian Colleges*, the Third Circuit reversed a district court's decision granting summary judgment to an employer, where the ruling rested on a presumption that the employee had received individualized notice of FMLA rights. The employee, when presented with evidence that the employer sent the requisite individualized notice by regular U.S. mail (without any tracking or verification of receipt), denied having ever received it. Whether or not the notice was received was a key issue because the

mailing would have informed the employee that her time off would be counted against her 12 weeks of FMLA leave; if the employee were to be believed that she did not receive it, then she could offer an explanation for not knowing that she would be terminated if she failed to return after exhausting her available leave.

While many courts recognize a presumption (called the "Mailbox Rule") that a document sent by U.S. mail was received by the recipient, the Third Circuit stated that this presumption is not ironclad. Considering the evidence before it, the court held that the employee's claim that she did not receive the FMLA notice by mail was sufficient to create an issue of material fact that should be resolved by a jury, vacating the grant of summary judgment to the employer. The Third Circuit made it abundantly clear that employers wishing to avoid material disputes regarding whether an employee has received the requisite individualized notice regarding his or her FMLA rights should send such notice using a method that allows for verification of receipt. As the Third Circuit put it, "the negligible cost and inconvenience of doing so is dwarfed by the practical consequences and potential unfairness of simply relying on business practices in the sender's mailroom."

On the heels of the *Lupyan* decision, the District Court for the Eastern District of Michigan held that transmitting FMLA notices by e-mail, without any proof that the e-mail had been opened and received by the employee, could only constitute proof of "constructive" as opposed to "actual" notice of an FMLA-related communication. In *Gardner v. Detroit Entertainment*, *LLC*, the court denied the employer's bid for summary judgment on the employee's FMLA interference and retaliation claims, finding a material issue of fact existed as to whether Ms. Gardner had received notice from the employer informing her of the need to recertify her eligibility for intermittent leave. The question of whether notice had actually been received mattered because the employer terminated Ms. Gardner pursuant to its attendance policy after a number of absences were not excused as FMLA-related due to her failure to recertify by the deadline set forth in the e-mailed notice. Although the employer contended that Ms. Gardner had requested e-mail delivery of notifications, she claimed otherwise, stating that she rarely read her e-mails and thus elected to receive communications by mail after the employer retained a third-party administrator to process FMLA requests. None of this would have mattered had the employer sent Ms. Gardner a certified letter or confirmed the need to recertify orally (with an acknowledgment signed by Ms. Gardner); relying instead on an e-mail left the company unable to conclusively rebut Ms. Gardner's claims.

In light of the *Lupyan* and *Gardner* decisions, employers looking to ensure that an administrative or clerical issue does not preclude them from proving that they provided an employee with the requisite FMLA notice should consider transmitting this notice by registered or certified mail, requiring a return receipt, or by using some other physical (oral) or electronic

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transmittal method by which receipt can be verified and confirmed. At the same time, employers should also ensure that both the requisite individualized FMLA notice and evidence of its delivery are maintained in the employee's files.

If you have any questions about this article or the FMLA in general, please contact **Laura Sack** at +1 (212) 407 6960, **Sadina Montani** at +1 (202) 312 3363 or any Vedder Price attorney with whom you have worked.

Going Global: How to Tackle International Assignments – A U.K. Focus

With experts predicting that the number of individuals taking on global assignments will increase dramatically in the next decade, employers would do well to note that a significant percentage of these assignments typically end in failure. Companies preparing to move forward with such a placement should take the necessary steps to ensure not only that the employee accepting an international assignment (the "assignee") is qualified for the position, but also that senior management understands the full range of legal issues that may affect the assignment. Beyond the obvious legal considerations surrounding immigration and work visas, employers should familiarize themselves with the protections that may be afforded to the assignee within the foreign jurisdiction.

Looking towards the United Kingdom, the fact that an assignee is working in Britain may be enough to give that individual a number of British statutory protections. The various protections afforded such a person may result in the employer's facing legal proceedings in two separate jurisdictions, with the associated costs (both legal and management) that come with such proceedings. For those employers evaluating an assignment to Britain, the British laws that are most likely to apply are (i) unfair-dismissal law, (ii) discrimination law and (iii) contract law.

Unfair dismissal protection

Protection from unfair dismissal arises from the Employment Rights Act 1996 (the ERA 1996). There are a number of factors to consider when determining whether an employee may seek a remedy under this law, including the nature of the particular employment arrangement and whether the employee was "working in Britain at the time of the dismissal." Essentially, employees working within Britain for two years or more may pursue a claim in the employment tribunal if their employer fails to ensure due process in relation to their dismissal. As such, employers will need to establish a fair reason for dismissal (there are five) and must have held a

series of consultation meetings with the employee before moving forward with a decision to terminate the assignment contract.

Discrimination law

The Equality Act 2010 (EqA 2010) protects individuals who suffer some detriment because of having a "protected characteristic" such as sex, race, disability, religion or belief, sexual orientation, age, gender reassignment or marriage or civil partnership. If an employer is found liable, the damages are unlimited in value and the reputational damage can be disastrous. The EqA, however, does not address territorial jurisdiction provisions and it is thus unclear what kind of "connection" is required to confer jurisdiction over assignees. A recent decision of the Employment Appeal Tribunal suggests that the "closest connection" test will be applied, meaning that while no qualifying period of employment is necessary, the employee need establish only that he or she was working in Britain at the time of the challenged action.

Contractual rights

Consideration also needs to be given to the terms of the employee assignment contract and whether the parties agreed that the laws of a particular jurisdiction would apply. While most assignment agreements contain such a provision, they are not always determinative. In one case, the Court of Appeals decided to disregard the exclusive New York jurisdiction clause in a bonus plan agreed to before the dispute arose, concluding that a "multinational business must be expected to be subject to the employment laws applicable to those they employ in different jurisdictions." It is likely, however, the employee would need to show in any event a "close connection" to Britain to invoke the protections of its laws.

Conclusion of assignment

Many assignments fail because the assignee underestimated the impact the move would have on the individual and his/her family. When an assignment fails for personal reasons, it often results in the assignee returning to the home jurisdiction sooner than expected, making for a difficult reentry back home. To minimize such difficulties, employers should try to agree with the employee on the parameters of his or her return at the outset of the assignment and to include any agreements in this respect within the assignment documentation.

Conclusion

Businesses looking to expand their reach on the world stage must come to grips with the possibility that their employees may seek to avail themselves of both the legal protections afforded them in the country to which they are assigned as well as those in their home jurisdiction. The risks of liability in such assignments are significantly enhanced when the appropriate planning and agreements are not put in place at the outset. As a result, the traditional three- to four-year period of assignment may not be something

that organizations may consider going forward. Shorter assignments or "international commuting" may be a more preferable alternative. Either way, employers with assignees in Britain should endeavor to treat the assigned employee in very much the same way as it would an employee who was, in fact, permanently based within Britain.

For more information, please contact **Jonathan Maude** at +44 (0)20 3667 2860 or any Vedder Price attorney with whom you have worked.

California Corner: New California Law Requires Paid Sick Leave

Beginning July 1, 2015, employees who work in California for 30 days or more within a year will accrue sick pay thanks to the Healthy Workplaces, Healthy Families Act of 2014 (the Act). The Act, signed by Governor Jerry Brown on September 10, 2014, applies to employers regardless of size, with only a few enumerated categories of employees ineligible for leave. Under the law, employees accrue sick pay at no less than one hour for every 30 hours worked and may begin using accrued paid sick days on their 90th day of employment. For example, an individual hired on July 1, 2015, would begin accruing sick leave on July 31, 2015, and be entitled to use that leave as of September 29, 2015.

While the employee determines how much paid sick leave he or she needs, the law does require the employee to provide "reasonable" advance notification when leave is foreseeable and notice "as soon as practicable" when it is unforeseeable. Employers can set a reasonable minimum increment for the use of paid sick leave, but the designated increment cannot exceed two hours. Not surprisingly, the law prohibits discrimination and retaliation against employees for using accrued sick days. Further, the Labor Commissioner may award reinstatement, back pay, payment for sick days withheld and payment of an administrative penalty for violations.

Employers that already provide paid sick leave (or paid time off), subject to certain requirements, need not provide "additional" paid sick days where the existing policy (i) satisfies the new law's accrual, carryover and use requirements; or (ii) provides at least 24 hours or three days of paid sick leave for each year of employment.

As with vacation, accrued sick days carry over to the following year of employment. An employer may, however, cap paid sick leave at 24 hours or three days in each year of employment. Employers may also limit an employee's total carry over accrual to 48 hours or six days. Employers may lend paid sick days to an employee before they are accrued and, where an employer provides the full amount of sick leave at the beginning of each year, no accrual carryover is required.

Recent Accomplishments

J. Kevin Hennessy won a hotly contested labor arbitration in which the arbitrator accepted our argument that skilled trade workers were not entitled to a wage increase for the life of the labor agreement despite language providing for increases for all other hourly workers.

J. Kevin Hennessy obtained dismissal of an NLRB charge filed by a worker alleging he was fired for union organizing activities. Mr. Hennessy successfully argued he was fired for operating a forklift without first being certified. The NLRB also dismissed several collateral allegations of interference with protected activities of union supporters.

Kenneth F. Sparks successfully completed negotiations with the Teamsters Union for a first-time collective bargaining agreement for a large transportation and logistics unit.

Unlike vacation time, employers are not required to compensate employees for unused sick days upon termination. If an employer combines vacation and sick time into a paid time-off bank, however, it must pay out the accrued but unused PTO upon termination. In the event an employee is rehired within one year of his or her termination date, the employee's previously unused balance must be reinstated and available for use.

Employers should take care to comply with a series of new and/or revised requirements to provide or post information regarding employee entitlement to paid sick leave and related rights. In addition to administrative penalties for noncompliance, employers can expect plaintiffs' attorneys to pursue class action claims based on any alleged failure to provide the required information. Included among the new requirements are the following:

- The Wage Theft Prevention Act of 2011 will now require notices to include new language advising employees of their right to accrue and use paid sick-leave, be free from retaliation, and file a complaint for violations of the law. The Labor Commissioner will make available compliance notices under this section.
- Under Labor Code section 226, employers must provide employees with information detailing the amount of paid sick leave available on either the employee's itemized wage statement or in a separate writing provided on the designated pay date with the employee's payment of wages.
- Employers must display a poster notifying employees of their paid sick-leave rights. Willful violation of the posting requirements subjects the employer to a penalty of not more than $100 per offense.
- Labor Code section 247.5 will require employers to retain, for at least three years, records documenting the hours worked, paid sick days accrued and paid sick days used by each employee. These records may be inspected by an employee or the Labor Commissioner.

Given the broad scope and reach of the Healthy Workplaces, Healthy Families Act, employers should review their policies and procedures before the law takes effect, ensure those individuals responsible for administering these policies understand these new obligations and confirm they are complying with the various notice and posting requirements. If you have any questions about the new California paid sick-leave law, or any other California matter, please contact:

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Recent Accomplishments

Kenneth F. Sparks successfully completed negotiations with AFSCME for a new contract covering a large nursing home.

Representing Warner Music Group and Atlantic Records in putative class and collective actions by unpaid interns seeking to recover wages, Laura Sack, Lyle S. Zuckerman and Michael Goettig successfully opposed plaintiffs' motion to amend pleadings to belatedly add a jury demand. This decision received press attention, including in the *New York Law Journal* and *The Litigation Daily*.

A Shot with a Training Chaser: New Training Requirements for Alcohol Servers in Cook County

An amendment to the Illinois Liquor Control Act (the Act), effective July 15, 2015, imposes new training requirements for various individuals involved in the sale and serving of alcohol in Cook County. Under the new law, all alcohol servers must complete Beverage Alcohol Sellers and Servers Education and Training (BASSET) by July 1, 2015, or within 120 days after the alcohol server begins employment, whichever is later.

The Act defines an "alcohol server" as a person who sells or serves open containers of alcoholic beverages at retail locations. Any individual whose job description requires the checking of identification for the purchase of open-container alcoholic beverages at retail locations or anyone whose job description requires the same for entry into a licensed premises must also complete the required training. Once issued, the alcohol server's training certificate is valid for three years and belongs to the server. Servers may transfer the certificate to a different employer, but it may not be transferred between servers.

Most employers are expected to require their servers to obtain their certificates on their own time and at their own expense, much like requiring that an individual possess a valid CDL in order to work as a truck driver. Some employers, however, may reimburse employees for the cost of the training, provided the employee agrees to repay the employer if he or she leaves his or her job within a certain period of time. Employers should also be mindful of the fact that attendance at training programs such as this may be counted as working time under the Fair Labor Standards Act and Illinois state law if certain restrictions are placed on the training prerequisite. For example, if an employer requires a server to attend BASSET training during working hours or attend a specific program, the employer may then have to pay the employee for the time spent in training. Of course, to accomplish timely compliance with BASSET, a restaurant or bar may want to schedule an in-house training session during work hours and pay employees for the time spent in training.

Enforcement of the new certification requirement is limited to education and notification of the certification requirement—with the aim of encouraging compliance—between July 15, 2015 and December 31, 2015. It is unclear at this time what sanctions will be imposed for noncompliance after December 31, 2015.

If you have any questions on this topic, please contact **Aaron R. Gelb** at +1 (312) 609 7844, **Joseph K. Mulherin** at +1 (312) 609 7725, **Margo Wolf O'Donnell** at +1 (312) 609 7609, **James R. Glenn** at +1 (312) 609 7652 or any Vedder Price attorney with whom you have worked.

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