Labor & Employment Law Update

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Employer Policies Still in the Crosshairs

NLRB General Counsel Issues Report on Employee Handbooks

On March 18, 2015, the General Counsel of the National Labor Relations Board (NLRB or the Board) issued a report summarizing recent Board decisions involving rules contained in employee handbooks. Serving as yet another reminder of the Board's ongoing, and some might say overzealous, efforts to protect employees from any infringement upon the rights afforded them by Section 7 of the National Labor Relations Act (namely, the right to engage in protected concerted activity with respect to the terms and conditions of their employment), this 30-page report addresses a number of topics such as confidentiality, employee conduct, third-party communications, rules restricting the use of Company logos, copyrights and trademarks, and rules restricting photography and recording.

The report contains a number of instructive and, in some cases, alarming examples of handbook rules the Board has found to be both legal and illegal. Some key takeaways for employers, both unionized and non-union alike include:

- The Board continues to maintain that rules generally restricting the disclosure of employee information are unlawfully overbroad. Also, blanket bans on discussing employee contact information, without reference for how employees obtain that information, are also facially unlawful.
- The General Counsel reaffirmed that confidentiality rules that do not explicitly exempt employee reference to terms and conditions of employment can be unlawful. Specifically, rules that contain broad restrictions and do not clarify, in express language or contextually, that they do not restrict lawful Section 7 communications, violate the Act. According to the Report, any rule that directly bans discussion of "all nonpublic information" is considered unlawful because it would be reasonably understood to encompass discussions of nonpublic information protected under the Act such as discussions regarding wages, benefits, and other terms and conditions of employment. By contrast, employer rules can ban the unauthorized disclosure of business secrets of other confidential information.
- Employee conduct rules continue to face strict scrutiny by the Board. For example, rules that could be construed to ban protected criticism or protests regarding supervisors, managers, or the employer, in general, are unlawfully overbroad and, thus, viewed as

unlawful by the Board. Moreover, broad and ambiguous language that would reasonably be construed to encompass protected spirited or heated discussions among employees regarding Union activity, the employer's labor policies, or the employer's treatment of employees, are unlawful. Rules banning communications with the media, government agencies or other third parties about protected topics as well as restrictions that employees would reasonably read to ban fair use of the employer's intellectual property in the course of protected activity, are viewed by the Board as unlawful.

- The use of social media and personal devices in the workplace remains a key target for NLRB enforcement. The Board is well aware of the prevalence of technology in today's workplace and certainly appears to be looking to remain relevant in the digital age. The NLRB deems rules that could be reasonably interpreted to prohibit the use of personal equipment—cameras, recording devices, personal electronic devices—as illegally overbroad because they could be seen as prohibiting legally protected uses such as documenting health and safety violations, or unfair labor practices.

The latest report from the NLRB General Counsel is yet another reminder that employer policies will continue to be viewed closely by the Board whenever the opportunity presents itself. The Board has issued a number of decisions that have left employers scratching their heads, struggling to find a way to address key operational concerns without committing an unfair labor practice. Vedder Price will continue to monitor Board decisions and provide updates when necessary. In the meantime, if you have any questions regarding the General Counsel's report or wish to discuss whether a specific policy will pass muster, please contact Neal I. Korval, James R. Glenn or any other Vedder Price attorney with whom you have worked.

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OSHA's New Enforcement Procedures

What To Expect When You're Reporting

Anticipating a surge of injury and illness reports as a result of its new reporting rules, OSHA's Directorate of Enforcement Programs issued a 20+ page memorandum late last year outlining its Interim Enforcement Procedures for New Reporting Requirements under 29 CFR 1904.39. While many employers can expect to have their hands full dealing with a host of new requests for information from OSHA, as well as an almost certain increase in the number of inspections, the memorandum provides valuable insight into the questions employers will likely be asked and the criteria

the agency will consider when deciding whether to visit your facility after an accident.

Some readers—hopefully not many—may be wondering what the new reporting requirements are that are set forth in 29 CFR 1904.39? In case you missed it, effective January 1, 2015 OSHA requires employers to report the hospitalization of one or more employees (it used to be three), as well as amputations and/or the loss of an eye. The obligation to report a fatality within eight hours remains the same. For the most part, the new reporting requirements are self-explanatory, but there are some gray areas with respect to what constitutes an amputation, particularly when the injury involves a small portion of an employee's fingertip. If faced with such a question, an employer would be well-served to work with counsel and/or a workplace safety consultant before deciding not to report such an injury.

When making an initial report of an injury or illness to OSHA, an employer will be expected to provide the following information: the establishment name, the location of the incident, the time of the incident, the type of incident (fatality, hospitalization, amputation, or loss of an eye), the number of employees who were so injured or hospitalized, their names, a contact person for the employer and a description of the incident. Employers can report matters in person, over the phone or online. Employers should consider the fact that their own (written) words may be used against them if they opt for the online reporting mechanism; as such, many employers prefer to make an oral report.

Found at the end of the memorandum are a number of appendices, including a scripted questionnaire that OSHA personnel can use when speaking with employers who make oral reports. Among the questions such employers will likely be asked are the age of the injured individual and whether he or she was an employee or a contract worker. Employers who have been paying attention to recent developments involving OSHA know that the agency launched an initiative intended to protect temporary workers in 2013, it being the agency's experience that such individuals are often injured (seriously) shortly after being assigned to a new worksite, sometimes due to a lack of training. Employers will likely be asked the age of the affected employee because an injury to an employee a certain age or younger will result in a mandatory inspection; which brings us to the three categories into which all reports will be placed.

Category 1 reports are incidents that must be inspected. They include all fatalities and reports of two or more inpatient hospitalizations; any injury involving an employee younger than 18; an employer with a known history of multiple injuries; repeat offenders; employers on the Severe Violator list;

and any report of imminent danger. Frankly, none of these should come as a great surprise to an employer who is familiar with how OSHA operates. Still, it is helpful to know that an employer should absolutely, positively expect a knock on the door if it falls into one of these categories.

Category 2 reports are incidents that may be inspected depending on how the employer responds to certain questions asked during the intake discussion. Although the list of questions set forth in the memorandum is not intended to be exhaustive, multiple "yes" responses will most likely result in an inspection. Among the factors to be considered are whether: (1) the incident resulted from the failure of a safety program; (2) the employee was exposed to a serious hazard; (3) temporary workers were injured or made ill; (4) another governmental agency made the referral; (5) the employer has a prior OSHA inspection history; (6) there is a whistleblower complaint pending; or (7) the employer is a participant in a cooperative program such as VPP or SHARP.

Finally, Category 3 reports will likely involve situations where the majority of responses to the above questions were negative. The applicable Area Office, however, may still launch what OSHA refers to as a Rapid Response Investigation (RRI). Just like the initial intake call, OSHA has prepared a script to be followed during the conversation with an employer when initiating an RRI. As part of the RRI process, OSHA will require a written response and has created what it refers to as a "Non-Mandatory Investigative Tool" which the employer can fill out and return in lieu of sending a letter. Notably, this Tool includes a request for a Root Cause Analysis. Although the sample size at this time is small, many employers prefer to draft their own letter rather than use OSHA's Tool, for obvious reasons.

Proactive employers would be well-served to ensure that their EHS leaders are fully aware of this development and consider training individuals who routinely handle incident reporting and/or interface with OSHA. If you have any questions about this article or workplace safety matters in general, please contact Aaron R. Gelb, Sadina Montani or any other Vedder Price attorney with whom you have worked.

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Changes in the Legal Landscape regarding Interns

To pay or not to pay? For several years now, that question has vexed employers large and small, for profit and not for profit, when deciding how and whether to compensate the individuals participating in their internship

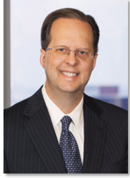
programs. What had once been a source of inexpensive and, in many cases, free labor turned into an arrangement more risky than rewarding, as a spate of wage-and-hour class actions were filed on behalf of interns across the country. Now, another issue is coming to the forefront as a number of jurisdictions, including both New York State and New York City, are extending equal employment opportunity protections to interns as well.

Until recently, unpaid interns could not avail themselves of the protections or remedies afforded regular employees by fair employment harassment laws. This gap in the law came to light two years ago when a New York federal court held that Lihuan Wang, an unpaid intern, could not proceed with a sexual harassment claim against Phoenix Satellite Television (PSTV), a company that produces television news geared towards Chinese-language audiences. Wang, a 22-year-old master's degree student in the Broadcast and Digital Journalism program at Syracuse University, claimed that the male New York bureau chief made a number of inappropriate and offensive comments to her, propositioned her and ultimately attempted to sexually assault her in his hotel room. After she rejected the bureau chief's advances, Wang claims that PSTV ceased offering future employment opportunities to her. Although the court in *Wang v. Phoenix Satellite Television US Inc.*, 976 F. Supp. 2d 527 (S.D.N.Y. 2013), allowed Wang to proceed with her failure-to-hire claim, it dismissed her hostile work environment claim, concluding that the New York City Human Rights Law's protection of employees does not extend to unpaid interns.

In response to the *Wang* case and the increased attention on the lack of legal protections afforded unpaid interns, Mayor Bill de Blasio signed an amendment to the New York City Human Rights Law on April 15, 2015, adding protections for both paid and unpaid interns. Under this amendment, "intern" shall mean "an individual who performs work for an employer for the purpose of training if: (a) the individual works for a fixed period of time at the end of which there is no expectation of employment; (b) the individual performing the work is not entitled to wages for the work performed; and (c) the work performed: (i) supplements training given in an educational environment that may enhance the employability of the intern; (ii) provides experience for the benefit of the individual performing the work; (iii) does not displace regular employees; and (iv) is performed under the close supervision of existing staff." As a result of the amendment, interns may now assert statutory claims of sexual harassment, as well as unlawful discrimination.

The New York State Legislature similarly expanded the coverage of the New York State Human Rights Law to encompass unpaid interns, in an amendment that went into effect on July 22, 2014. Under the State Human

Rights Law, employers are prohibited from engaging in sexually harassing conduct, and the law further protects unpaid interns against discrimination based on age, race, creed, color, national origin, sexual orientation, military status, sex, disability, genetic predisposition or carrier status, marital status, and domestic violence victim status.



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Given the expansion of the laws in New York City and in the state, employers are encouraged to review and amend their internship policies to ensure that they are in compliance with all aspects of the law. Vedder Price has extensive experience in helping employers with issues that arise as a result of internship programs. If you have any questions about these amendments or internship program compliance in general, please contact Jonathan A. Wexler, Kaitlyn E. Fallon or any other Vedder Price attorney with whom you have worked.

California Corner

Misclassification – What Do Managers Do? They Manage, Unless They're in California.

Store managers are typically classified as exempt from overtime based on what is known as the "executive" exemption. The California Wage Orders set out a six-part test for this exemption, but in basic form, the test asks whether the employee: manages a department or unit; directs the work of other employees; has authority over personnel decisions; exercises discretion or independence in making decisions; spends a majority (more than 50 percent) of his time engaged in managerial duties; and makes a salary above a certain level. Pretty clear that a senior management person in a retail environment would fit the bill, right? Not necessarily.

In *Smith v. Equinox Holdings, Inc.*, 2015 U.S. Dist. LEXIS 48754 (N.D. Cal. Apr. 10, 2015), the Northern District of California denied Equinox Holdings, Inc. summary judgment in a misclassification, whistleblower and wrongful termination lawsuit brought by a former manager who had been classified as overtime exempt.

The Plaintiff, Joseph Smith, worked for Equinox as a District Shop Manager and later National Shop Training Manager, selling workout clothes in Equinox fitness centers. In November 2013, Equinox started investigating low profit margins at its stores, which led them to review Smith's stores. Equinox fired Smith after concluding he had improperly discounted items for his own personal gain. Smith then sued, claiming Equinox misclassified him as exempt and fired him in retaliation for his complaints about Equinox

policies. Equinox moved for summary judgment, maintaining that Smith was an exempt executive and that his termination was legitimate.

The court found that issues of fact existed regarding: (1) whether Smith regularly exercised discretion and independent judgment; and (2) whether he was in fact primarily engaged in managerial duties. On the first issue, Smith argued that, even though he was a District Manager, he actually had only "minimal authority and discretion over his work." He claimed that the corporate office directed his actions, from managing to merchandising to the cleanliness and maintenance of his stores. He also claimed to have no input into budgets or decisions regarding how labor hours were allocated in his stores. The court agreed that questions of fact remained, noting that while "a regulated workplace does not rule out independent judgment," an employee who simply applies his knowledge in following prescribed procedures may not be exercising discretion and independent judgment.

On the second issue, Smith alleged that he was not primarily engaged in managerial duties — he claimed he spent most of his time doing the same work as nonexempt staff members (stocking shelves, folding merchandise, cashiering) because the stores were minimally staffed. Equinox countered with register data (accountings of time spent logged into the register) showing that Smith had spent only 3 percent of his time working on the register. The court agreed that this register history, if true, "would indeed be a striking fact," but Smith's testimony to the contrary was enough to avoid summary judgment by creating a triable issue.

In response, Equinox argued that if Smith engaged in mostly nonexempt activities, as he claimed, he was not performing the work Equinox hired him to do. The court, however, credited Smith's testimony that the stores were "small and lightly staffed," which he said made it unavoidable for him to perform nonexempt tasks. Ultimately, the court found that it should be left up to a jury to decide whether Equinox had "realistic expectations" and whether Smith's practices diverged from those expectations.

This case serves as a reminder that it is very challenging to get misclassification claims decided via pre-trial motions, due to the factual disputes that impact the exemption analysis. Further, when the employer is a company with multiple business locations and a necessary focus on consistency in consumer experience, the employee is likely to make the same sorts of arguments as did Smith—standardized processes deprive "managers" of the independent discretion necessary to support an exempt classification.

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In California and elsewhere, misclassification suits remain popular. Particularly for employers with corporate headquarters elsewhere and multiple business locations with “standardized” corporate processes, businesses should review their job descriptions and daily operations to ensure expectations are reasonable and performance for exempt employees is tracked and reinforced in a way that supports their classification. Calling someone a “manager” does not make them exempt from overtime—acting as a “manager” does.

If you have any questions or any other California matter, please contact Brendan G. Dolan, Heather M. Sager, Ayse Kuzucuoglu, Lucky Meinz, Brittany A. Sachs or Zachary Scott.

Recent Accomplishments

Thomas M. Wilde and **Andrew Oppenheimer** achieved summary judgment on behalf of a manufacturing client in a retaliatory discharge case in Will County. The plaintiff claimed she was terminated in retaliation for exercising rights under the Workers’ Compensation Act.

Patrick W. Spangler obtained the dismissal of an NLRB charge filed against a manufacturing client that alleging that the company violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act by terminating an employee for engaging in protected concerted activity and proposing a last chance agreement that infringed on the employee’s Section 7 rights.

Aaron R. Gelb and **James R. Glenn** obtained the dismissal of an NLRB charge filed against a retailer claiming that the company violated the National Labor Relations Act by terminating the employee after he advocated on behalf of unionization.

On March 30, **Patrick W. Spangler**, a member of the Labor & Employment practice area in the Chicago office, was named a firm Shareholder. Mr. Spangler partners with corporate legal departments and management to provide solutions for litigation, compliance and workforce change issues. His litigation practice focuses on high stakes disputes and complex claims arising from the employment relationship. He has significant experience defending ERISA and executive compensation litigation, and provides labor and benefits advice to strategic buyers and private equity firms in corporate transactions.

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