Labor & Employment Law Update

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Proposed Regulations Implementing the Fair Pay and Safe Workplaces Order Signal Broad Disclosure Obligations of Labor Law Violations for Federal Contractors

As reported in our September 2014 newsletter, President Obama's Fair Pay and Safe Workplaces Executive Order (the "Order") will create significant obligations for federal contractors once effective. On May 28, 2015, the Federal Acquisition Regulatory Council (the "FAR Council") issued a proposed rule, accompanied by proposed implementing guidance from the Department of Labor (the "DOL"), to implement the Order's key requirements, which include the disclosure of labor law violations for contractors performing or bidding on covered federal contracts and new paycheck transparency requirements.

The proposed rule has generated significant commentary from the contractor community as well as from several congressional leaders. Below are some of the key provisions of the proposed rule:

- Consistent with the Order, contractors bidding on federal contracts worth more than $500,000 must disclose all administrative merits determinations, arbitral awards or decisions, and civil judgments during the previous three years for violations of a wide variety of federal and state labor and employment laws.
- During the bidding stage, for procurements exceeding $500,000, a contractor is required to disclose whether it has any covered violations within the preceding three-year period. Subcontractors are subject to similar disclosure requirements for subcontracts that exceed $500,000 and the subcontract is not for commercially available off-the-shelf items. During contractual performance, on a semi-annual basis, a contractor must update the information provided about any disclosed covered violations and also obtain the required information for covered subcontracts.
- In the case of disclosed violations, the contracting officer must coordinate with an agency labor compliance advisor (an "ALCA"), a position added by the Order, to consider the disclosed violations as part of the contracting process to determine whether the contractor has a satisfactory record of integrity and business ethics as required by FAR subpart 9.104.
- Disclosures will be made publicly available through the Federal Awardee Performance and Integrity Information System.

Under the proposed DOL rule, the scope of the types of violations that must be disclosed is broad and based on, among other things, 14 federal labor laws and executive orders identified in the Order. For example, a WH-56 "Summary of Unpaid Wages" form from the Wage and Hour Division, a letter of determination from the EEOC, a show cause notice from the OFCCP, a citation from OSHA and a complaint from any regional director of the NLRB are all examples of "administrative merits determinations." Labor violations adjudicated at a merits hearing, court or private arbitration, rendered within the previous three years, are also required to be disclosed.

The proposed rule also defines which violations would be considered "serious," "repeated," "willful" and "pervasive" for purposes of assessing whether a contractor's violation record will impact the award of a contract. The standard for "serious violations" is notably low and would cover most retaliation claims, a violation which affects more than 25 percent of the employees at a worksite, and violations resulting in fines or penalties over $5,000 or back wages of $10,000. A "repeated violation" includes violations involving overlapping protected status, even if under different laws or based on different employment practices, policies or employment actions. A "willful" violation generally incorporates those violations that result in punitive or liquidated damages under federal or state law. The proposed rule provides that there must be more than one violation to be considered "pervasive." Multiple violations of the same labor law, regardless of their similarity, or violations of more than one of the labor laws may be considered "pervasive."

In addition, the proposed rule outlines factors that an agency or prime contractor may take into account when assessing violations as well as mitigating factors. Factors to consider when assessing violations include whether the violations are pervasive such that they demonstrate a basic disregard for the labor laws; whether the violations meet two or more of the "serious," "repeated" or "willful" categories; and whether the violations are reflected in final order or determination. The proposed rule also addresses what types of information are required to be disclosed by subcontractors to prime contractors, but the specific process—whether prime contractors will be required to obtain and disclose subcontractor violations or subcontractors will report their labor violations to the contracting agency directly—has not been finalized.

The proposed rule also implements two "paycheck transparency" mandates contained in the Order. First, it requires contractors to provide employees with a wage statement including the employee's hours worked, overtime hours and pay, and any deductions made from his or her pay. Subcontractors are subject to the same obligations by virtue of flow-down language. Second, contractors and subcontractors are required to provide a statement to independent contractors advising them of their status as such.

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The proposed rule also implements the Order's prohibition on the arbitration of Title VII claims and tort claims related to sexual assault or harassment for contracts worth over $1 million (although a contractor may agree to arbitration after the fact if such a dispute arises). The proposed rule exempts collective bargaining agreements, preexisting arbitration agreements, and contractors providing commercial items or commercially available off-the-shelf items.

After several extensions to the comment period, the DOL recently extended the comment period for the proposed regulations through August 26, 2015. The regulations will take effect after publication in the FAR Council's final rule, which will likely occur sometime in 2016. We will be monitoring the progress of the regulations and will provide further detailed coverage when the FAR Council publishes the final rule. If you have any questions, please contact **Patrick W. Spangler**, **J. Kevin Hennessy** or **Marques O. Peterson**.

A View from Across the Pond

To Tweet or Not to Tweet?

Facebook, LinkedIn, Twitter, YouTube, Instagram, Tumblr…. Employers are increasingly having to grapple with posts on social media by their employees which they find unacceptable, perhaps because they cast them in a bad light and damage their reputation, insult or harass fellow colleagues, clients or customers or breach confidentiality.

In the UK, employees are protected from being unfairly dismissed (usually provided they have two years' service). Employers must have a fair reason for dismissal, and they also must act reasonably in treating that reason as sufficient to justify dismissal. This generally means only deciding to dismiss after an investigation and weighing up all the alternatives.

Getting it wrong could mean claims in the Employment Tribunal, with all the associated costs. Cases involving email and social media often grab headlines and can also go viral—like the email a lawyer sent to his secretary asking for £4 to cover a dry-cleaning bill after she spilled tomato ketchup on his trousers.

Decisions in this area can leave employers baffled. The Employment Tribunal considers all the individual circumstances of each case, which makes it hard to predict who will win. Many of the cases in which employees have won unfair-dismissal claims might surprise employers, for example:

- Mr. Mazur,[1] who was dismissed after posting a "selfie" of himself on Facebook wearing an Osama bin Laden mask in his employer's

laboratory, where a fragment of the employer's logo could be seen in the photo; and

- Ms. Walters,[2] the manager of a supermarket, who posted on Facebook about her customers that "*hitting them in the back of the head with a pic axe would make me feel far more happier hehe.*"

There are also cases on the other side of the line, where dismissal was justified. For example, Crisp v. Apple Retail,[3] where Mr. Crisp put disparaging comments online not only about his employer, Apple, but also about its products; and another case, Teggart v. TeleTech UK Limited,[4] where Mr. Teggart posted vulgar and coarse comments about the promiscuity of a female colleague on Facebook.

These decisions show that an offensive or inappropriate post may entitle the employer to dismiss, but it will not automatically do so. The Employment Tribunal will consider the whole picture and ask questions like the following:

- How bad were the comments, and what were they about?
- Was the offending post put up during working time?
- Could the employer be identified?
- Was there a real risk to reputation?
- How many "hits" or "likes" did the post receive?
- Was the profile public or private?
- Did the employer tell the employee that such conduct could lead to dismissal, and how?

There is often a push internally that someone who has been bad-mouthing the employer online should lose their job. Employers will need to realize that a knee-jerk reaction may expose them to claims and negative publicity, and that they will have to look into the situation and consider all options, however much it sticks in the throat to do so.

The good news is that there are steps proactive employers can take. First and foremost—manage expectations. While the decisions in this area may not be consistent, one issue which comes up time and time again is the need for employers to tell employees what they can and can't do, if they want to be able to take action.

As a first step, this means having a Social Media Policy. This must be communicated to the workforce, and training on it should engage the workforce in protecting the corporate image and reputation. Such a policy should:

- Be tailored to the business;
- Cover work and personal use of social media;

[1] 2015, Employment Tribunal, unreported

[2] Walters v Asda Stores Ltd. ET/2312748/08

[3] Crisp v Apple Retail (UK) Ltd. ET/1500258/11

[4] Teggart v TeleTech UK Limited NIIT 007904/11

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- Give meaningful examples of what is and isn't acceptable;
- Give guidelines for responsible use;
- Explain that breaches may result in dismissal.

A clear policy, with a message that is regularly communicated and enforced, has the aims both of preventing issues from arising, and of putting the employer in the best position to defend itself against claims, if it has to.

If you have any questions about this article or any matters in relation to employment law in the UK or EU, please contact **Jonathan Maude** or **Esther Langdon** of the London office.

California Corner

New Amendments Cure Some of the Heartburn Caused by California's Sick Leave Law

California's Healthy Workplaces, Healthy Families Act went into effect January 1, 2015, with accrual rights beginning July 1, 2015. Most California employers have spent the first half of 2015 trying to reconcile various apparent contradictions in the law. On July 13, 2015, Governor Jerry Brown approved Assembly Bill No. 304, which amended various aspects of California's paid sick leave law. The amendments are effective immediately and clarify some of the ambiguities pertaining to implementation.

Below are some of the changes made by the amendments.

Eligibility

Originally, the statute provided that employees who worked in California for 30 or more days within a year were entitled to accrue paid sick leave. The amendments now clarify that an employee must work in California for the *same* employer for 30 or more days within a year from commencement of employment to qualify under the law.

Exclusions

The law initially enumerated four categories of employees ineligible for leave under the statute. The amendments make a small change to one of the excluded categories, changing the definition of "employee in the construction industry" by eliminating the requirement that the employee perform "on-site" work.

Additionally, the amendments create a fifth category of employees who are excluded from the statute's coverage: retired annuitants of a public entity, as defined in the amendments.

Accrual

Originally, employees were to accrue one hour of paid sick leave for every 30 hours worked. The amendments now make clear that employers can use an alternative method of accrual so long as the time accrues on a "regular basis." This requirement can be fulfilled by employees having accrued at least 24 hours (or three days) of sick leave (or paid time off) (i) by the 120th calendar day of employment; (ii) within each calendar year; or (iii) within a 12-month period.

Finally, if an employer does not wish to implement a policy involving accrual or carryover, the amendments still permit an employer to satisfy the statute if 24 hours or three days is given at the beginning of each year of employment, calendar year or 12-month period.

Use

The law initially provided that employers could limit the use of paid sick leave to 24 hours or three days "per year." The amendments now clarify that an employer can limit the use of accrued paid sick time to 24 hours or three days in each year of employment, calendar year, or 12-month period.

Existing Paid Sick Leave or Paid Time Off Policies

The statute's original language stated that employers who already provided paid sick leave or paid time off, subject to certain requirements, were not required to provide "additional" paid sick days where the existing policy: (i) satisfied the new law's accrual, carryover and use requirements; or (ii) provided at least 24 hours or three days of paid sick leave for each year of employment.

The amendments make some modifications. Subject to certain requirements, as before, an employer does not need to provide additional paid sick days when the policy satisfies the amendments' accrual, carryover and use requirements.

However, the amendments also create a new option, which applies to employers who provided paid sick leave or paid time off to a class of employees prior to January 1, 2015. Under the amendments, and subject to certain requirements, an employer can use its prior policy if it provided paid sick leave or paid time off to a class of employees before January 1, 2015 even if it used an accrual method other than one hour per 30 hours worked, if:

- the accrual is on a regular basis, so that an employee, including one that is hired into that class after January 1, 2015, has no less than one day or eight hours of accrued sick leave or paid time off three months

of employment of each calendar year or each 12-month period; and

- the employee was eligible to earn at least three days or 24 hours of sick leave or paid time off within nine months of employment.

Under the amendments, if an employer modifies the accrual method used in a policy it had in place before January 1, 2015, the employer must comply with an accrual method described in the amendments or provide 24 hours or three days at the beginning of each year of employment, calendar year or 12-month period. The amendments do not prohibit an employer from increasing the accrual rate or number of days accrued for a class of employees covered by the subdivision.

Finally, the amendments also clarify that, notwithstanding any other law, sick leave benefits provided pursuant to specific sections of the Government Code, or annual leave benefits provided pursuant to specific sections of the Government Code, or by provisions of a memorandum of understanding reached pursuant to specific sections of the Government Code, meet the sections' requirements.

Reinstatement of Accrued Sick Leave

The law originally provided that if an employee separates from an employer and is rehired within one year from that date, any previously accrued and unused paid sick days must be reinstated. Under the amendments, if an employer pays an employee for accrued but unused paid time off at separation of employment, such as pursuant to a paid time off policy that combines vacation and sick leave, the employer is not required to reinstate accrued paid time off upon rehire.

Notice

The law requires that 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 along with the employee's payment of wages. The amendment now confirms that if an employer has an unlimited paid sick leave or paid time off policy, the employer satisfies this notice requirement by indicating "unlimited" on the required notice.

The amendments further indicate that the subdivision pertaining to employee notice applies to employers covered by Wage Order 11 (Broadcasting Industry) or Wage Order 12 (Motion Picture Industry) on and after January 21, 2016.

Calculating Leave

The amendments set forth a number of clarifications regarding how employers should calculate paid sick leave for their employees. The amendments provide three options:

1. an employer shall calculate paid sick leave for nonexempt employees in the same manner as the regular rate of pay for the workweek in which an employee uses paid sick time, regardless of whether the employee works overtime during the week;
2. an employer shall calculate paid sick leave for nonexempt employees by dividing the employee's total wages (not including overtime premium pay), by the total hours worked in the full pay periods of the employee's prior 90 days of employment; or
3. an employer shall calculate paid sick leave for exempt employees in the same way that it calculates wages for other forms of paid leave time.

Record-Keeping

The statute imposes a three-year record-keeping requirement on employers; however, under the amendments, notwithstanding any other provision of the paid sick leave law, employers have no obligation to inquire into or record the reasons an employee uses paid time off or paid leave.

What Does This Mean for Employers?

Given the scope of the Healthy Workplaces, Healthy Families Act and the newly effective amendments, employers should continue to review their policies and procedures currently in effect. While the amendments clarify many implementation questions, employers may still struggle with the statutory language and how to apply it.

If you have any questions about how the amendments impact your policies or whether your policies comply with the law, please contact please contact a member of our California Labor & Employment practice.

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**.

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Recent Accomplishments

A team of Vedder Price lawyers, including **Amy L. Bess**, **Brendan G. Dolan**, **Joseph K. Mulherin**, **Emily C. Fess** and **Zachary Scott**, recently defeated, on behalf of a global retailer client, a motion for conditional certification of a nationwide Fair Labor Standards Act collective action relating to the usage of handheld devices by nonexempt sales employees outside the workplace and normal operating hours. Despite the relatively low bar for the plaintiff to certify a collective action at the conditional certification stage, Vedder Price was able to convince the court that the plaintiffs' allegations and evidence did not even satisfy the modest level of proof required for certification.

Neal I. Korval, **Jonathan A. Wexler** and **Daniel J. LaRose** secured the voluntary dismissal of a federally filed FLSA and NYSLL wage-and-hour class and collective action, claiming the nonpayment of overtime and minimum wages for all pharmacists working in New York for a large national drugstore chain. Vedder Price quickly determined, however, that three different exemptions applicable to those laws (professional, administrative and highly compensated employee) precluded all of the class's statutory claims. Accordingly, Vedder Price wrote a Rule 11 letter to plaintiff's counsel threatening to seek the imposition of judicial sanctions on both the named plaintiff and his counsel unless the class action suit was voluntarily dismissed—which it was shortly after our letter was delivered.

Thomas M. Wilde and Cara J. Ottenweller obtained summary judgment in the U.S. District Court for the Southern District of Indiana on behalf of a national manufacturing client. Twenty-seven plaintiffs, who were terminated for unemployment fraud, sued claiming they were terminated due to race and national origin and in violation of a collective bargaining agreement. The court granted summary judgment to the company on all claims.

J. Kevin Hennessy and **Cheryl A. Luce** obtained dismissal of an age discrimination charge filed by a junior high social studies teacher in a Catholic church with the Illinois Department of Human Rights. The IDHR agreed with our argument that the church was not an "employer" under the Illinois Human Rights Act.

J. Kevin Hennessy assisted a large nationwide food distributor in defeating a union organizing drive involving hundreds of employees in Texas. Successful strategy included the winning argument that employees at a remote domicile site belonged in the voting unit, thus defeating the "micro unit" and ensuring the favorable election results.

Thomas G. Hancuch and **Paul F. Russell** advised a major medical center on defined benefit pension plan de-risking, including the design and successful implementation of a lump-sum window program for terminated vested participants.

Thomas G. Hancuch advised a health care industry client on the design and implementation of an employee severance benefits program in connection with the merger of three unrelated organizations.

Thomas M. Wilde and **Emily C. Fess** obtained summary judgment on behalf of a national association in the U.S. District Court for the Northern District of Illinois. A former employee claimed she was harassed and denied a promotion due to her race, and then retaliated against for complaining about the harassment and discrimination.

Thomas H. Petrides recently joined the firm's Los Angeles office as a Shareholder in the Labor & Employment group. Tom has practiced exclusively in the area of labor and employment law on behalf of management for nearly 30 years. He represents management in all aspects of labor and employment law, including employment-related litigation and traditional labor law proceedings. Tom regularly counsels a broad spectrum of clients on issues such as terminations, employment discrimination, wage and hour, FMLA, ADA, OSHA, employment policies, trade secrets and union avoidance.

Ethan E. Rii also recently joined the firm as a Shareholder in the Corporate practice area in the firm's Chicago office. Ethan focuses his practice on health care regulatory and transactional matters for various types of health care providers, including hospitals, physician practices, imaging centers, cancer treatment centers, home health companies, ambulatory surgery centers and dialysis centers. Ethan also has extensive experience assisting health care clients with health care regulatory issues associated with physician compensation, structuring regulatory compliance programs and policies (many of which overlap with HR policies and requirements) and conducting internal audit and review processes related to regulatory compliance.

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Vedder Price aligns workforces for better performance. We've been a leader in the field since our founding in 1952. Today, 60+ professionals are dedicated solely to workplace law and are consistently ranked as top-performing lawyers.

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