Labor & Employment Law Update

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In This Issue

VedderPrice

NLRB Launches an Attack to Narrow Management Rights Clauses in Collective Bargaining Agreements

Although much of the recent activity at the National Labor Relations Board (NLRB) has been directed toward making it easier for employees to organize unions, a recent decision has a profound effect on unionized employers. In this recent case, management rights clauses were in the NLRB's crosshairs. The practical effect is to make it harder for employers to act unilaterally, such as implementing new work rules, without first bargaining with a union that represents its employees. This is the case even if the management rights clause contains language that appears to give the employer the right to take the action it wants. The NLRB's decision also burdens employers to respond quickly to union information requests even if no responsive information exists, and continued its recent streak of refusing to defer issues to collectively bargained grievance and arbitration procedures.

"…the Board reversed a long line of cases and found that an employer violates the Act by refusing to respond or delaying its response to an information request even *if it has no responsive information*."

On June 29, 2016, the full NLRB, by a 3-1 vote, issued its decision in *Graymont PA, Inc.*, 364 N.L.R.B. No. 37. The employer was charged with violating Section 8(a)(5) of the National Labor Relations Act (the Act) by issuing new disciplinary policies, including a new attendance policy, during the term of its collective bargaining agreement (CBA) and allegedly refusing to provide information requested by the union. The Board (1) found no clear and unmistakable waiver in the management rights clause of the union's right to bargain over the new attendance policy and other new rules; (2) concluded the employer violated the National Labor Relations Act by refusing to respond to an information request, even though it did not have any responsive information; and (3) refused to defer the case to arbitration. This case was a change from prior decisions on the same issues and demonstrates the NLRB's doctrinal shift on these issues.

As to the management right to issue a new attendance policy, the CBA gave the employer the following rights, but the NLRB found that this clause was *not* a clear and unmistakable waiver of the right to bargain over new disciplinary policies:

"[The employer has] the sole and exclusive rights to manage; to direct its employees; … to evaluate performance,… to discipline and discharge for just cause, to *adopt and enforce rules and regulations and policies and procedures;* [and] to set and establish standards of performance for employees…" (Emphasis added.)

In concluding that this language was not sufficient to permit the employer to implement an attendance policy and other rules without bargaining, the NLRB reasoned that the parties never expressly discussed that the management rights clause would apply to attendance policies. The NLRB further claimed that the rights to "adopt and enforce rules and regulations and policies and procedures" and "set and establish standards of performance" were not sufficiently clear on their face because they did not expressly include the right to "discipline."

The NLRB further held that the employer waived the right to even argue that the "standards of performance" language was relevant. That is because the employer did not expressly refer to that language, only to the right to adopt and enforce rules and regulations, in a letter to the union defending its right to issue the attendance policy.

As to the information request, the Board reversed a long line of cases and found that an employer violates the Act by refusing to respond or delaying its response to an information request even *if it has no responsive information*.

Finally, the Board declined to defer the case to arbitration as the employer requested. It did so because the employer violated the Act by refusing to respond to the information request, even though the employer had no responsive information.

One member of the NLRB penned a vociferous dissent. He remarked that the language in the management rights clause was similar to several past cases where the NLRB found that a union waived its right to bargain over the implementation of work rules, including attendance policies. Based on that finding, he then concluded that the alleged refusal to provide information did not constitute a violation of the National Labor Relations Act.

There are several lessons from the NLRB's decision in *Graymont:* (1) with the current NLRB, no management rights clause is so strong that it can safely be relied on without investigating bargaining history; (2) do not fail or refuse to respond to an information request, even if there is no responsive information or you otherwise believe there is no obligation to respond; (3) be very careful in drafting grievance responses and other correspondence to the union to include every possible argument that you have under the contract; and (4) work with counsel to ensure that you have taken every step to defer the charge allegations to arbitration, to take the issue out of the NLRB's hands and put it in the hands of an arbitrator.

If you would like to discuss or have questions regarding the issues raised in this article, please contact **Kenneth F. Sparks**, **Mark L. Stolzenburg** or the Vedder Price attorney with whom you have worked.

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New ACA Marketplace Notices to Employers Require Action

Many employers are receiving Health Insurance Marketplace notices stating:

- an employee has been determined to be eligible for premium tax credits or cost-sharing reductions to help pay for Marketplace coverage and has enrolled in Marketplace coverage;
- the employer is receiving the notice because the employer may have to pay an employer shared responsibility payment (i.e., a penalty) to the Internal Revenue Service (IRS); and
- the employer has the right to appeal the determination.

These notices have created significant confusion and concern for employers, and for good reason. The employer shared responsibility penalties that may be imposed under the Affordable Care Act (ACA) are substantial, and no one wants to be responsible for failing to take action that may preclude an assessment of penalties.

This article provides an overview of this new chapter in the ACA's implementation, the nature of the new Marketplace notices being sent to employers, why an employer may want to appeal a determination, how to file an appeal, the relationship between this process and the IRS process for the assessment of employer shared responsibility penalties, and how to reduce the risk of liability for retaliation claims by employees purchasing Marketplace coverage.

The notice typically is addressed to the attention of the "Benefits Manager" and is sent to the employer address that the employee provides when applying for Marketplace coverage.

The New Notice

During the past several weeks, the federally facilitated Health Insurance Marketplaces have begun mailing to employers a new notice informing the employer that an individual has submitted an application for coverage through the Health Insurance Marketplace in a particular state, indicated that he or she is an employee of the employer, and reported certain information about the health insurance coverage the employee was, or was not, offered by the employer. For example, the notice might state that the employee reported that he or she:

- didn't have an offer of health insurance coverage from the employer; or
- did have an offer of coverage, but it wasn't affordable or didn't provide minimum value; or
- was in a waiting period and therefore unable to enroll in health insurance coverage.

RECENTLY ANNOUNCED NOTABLE RECOGNITION

Vedder Price Labor and Employment attorneys again received consistently high marks from significant legal services ranking directories in 2016.

Ranked by *Chambers USA* for the following categories:

- **Labor & Employment**
  – Edward C. Jepson, Jr.
  – Kenneth F. Sparks
- **Labor & Employment–Employee Benefits & Compensation**
  – Thomas P. Desmond
  – Kelly A. Starr
  – Robert J. Stucker
  – Charles B. Wolf

Recommended by *Legal 500 United States* for three Labor & Employment categories, including:

- **Employee Benefits and Executive Compensation**
  – Thomas P. Desmond
  – Thomas G. Hancuch
- **Immigration**
  – Gabrielle M. Buckley
- **Labor and Employment Disputes–Defense**
  – Nicholas Anaclerio
  – Thomas H. Petrides
  – Heather M. Sager
  – Patrick W. Spangler
  – Thomas M. Wilde

Abroad, *Chambers UK* recognizes Esther Langdon as an "Associate to Watch" for their Employment: Senior Executive—London category, and *Legal 500 United Kingdom* recommends Vedder Price Partner Jonathan Maude for Human Resources – Employment – Employers and Senior Executives category.

The notice typically is addressed to the attention of the "Benefits Manager" and is sent to the employer address that the employee provides when applying for Marketplace coverage.

Although the federally facilitated Health Insurance Marketplaces have just begun issuing these notices, certain state-based Marketplaces have been doing so for some time. Those responsible for handling the notices should recognize that the notices from the eight state-based Marketplaces will contain a different heading and may appear somewhat different than those generated by the federally facilitated Marketplaces.

The notice will explain that, with respect to a certain year or period, the employee has been determined to be eligible for advance payments of premium tax credit or cost-sharing reductions (collectively, APTC) to help the employee pay for Marketplace coverage, and that the employee has enrolled in coverage through the Marketplace.

Considering an Appeal

An employer may file an appeal to the Marketplace if the employer believes a mistake has been made about an employee's eligibility for APTC. An employer generally should consider appealing the determination if the employer is an applicable large employer (ALE) subject to the ACA's employer shared responsibility penalties and either:

- believes that the employee was or may have been incorrectly determined to be eligible for APTC because, for example, the employer offered the employee coverage that satisfied the ACA's affordability and minimum-value standards; or
- did not employ the individual on its payroll (because, for example, the individual was an employee of a staffing company or classified as an independent contractor).

For 2016, an employer of 50 or more full-time equivalent employees determined on a controlled-group basis is considered an ALE subject to the ACA's employer shared responsibility penalties (also sometimes referred to as the "play or pay mandate"). See our February 19, 2014 bulletin, *IRS Final Rule on ACA Play or Pay Mandate Allows Employers to Finalize Compliance Plans*, for additional information, including the transition rule in effect for 2015 for employers with between 50 and 99 full-time equivalent employees.

How to Appeal

An employer may appeal by completing and submitting the Employer Appeal Request Form available at https://www.healthcare.gov/downloads/marketplace-employer-appeal-form.pdf or by sending a letter that includes the information requested on the form. The form allows the employer to designate a secondary contact, such as the employer's attorney, to act on the employer's behalf with respect to the appeal, talk with the Marketplace Appeals Center, view the case file and receive all correspondence concerning the appeal.

A Marketplace determination of an employee's eligibility for APTC, or the outcome of any appeal of that determination, will not determine whether the employer must pay an employer shared responsibility penalty.

The appeal request must be submitted within 90 days of the date of the Marketplace notice being appealed. The appeal request may be sent by mail or facsimile to the address or fax number specified on the Employer Appeal Request Form. The appeal should include a copy of the Marketplace notice being appealed, the completed appeal request form (or letter) and any supporting documentation upon which the employer is relying.

Employers are encouraged to consult with legal counsel or another professional who is familiar with the applicable legal standards and can help ensure that the appeal request contains the relevant facts and supporting documentation needed to support the employer's position.

Relationship to IRS Assessment Process

Each Marketplace is responsible for determining whether an individual is eligible for APTC. If at least one full-time employee receives APTC for a calendar month, an ALE may be subject to an ACA employer shared responsibility penalty under Internal Revenue Code Section 4980H.

Specifically, the employer will be subject to a penalty under Code Section 4980H(a) if the employer fails to offer minimum essential coverage to at least 95 percent (70 percent for 2015) of its full-time employees (and their dependents) for that month. This penalty, for 2016, is equal to $180 per month ($2,160 per year) for each full-time employee, minus the first 30. It is calculated based upon all of the employer's full-time employees, including any that may have been offered coverage.

Even if the employer satisfies the 95 percent standard (70 percent for 2015), it may be subject to a penalty under Code Section 4980H(b) if the particular employee receiving the APTC is a full-time employee and the employee either was not offered coverage or was offered coverage that did not satisfy the ACA's affordability or minimum value standards. This per-applicable employee penalty for 2016 is equal to $270 per month ($3,240 per year).

A Marketplace determination of an employee's eligibility for APTC, or the outcome of any appeal of that determination, will not determine whether the employer must pay an employer shared responsibility penalty. Only the IRS, and not the Marketplaces, can determine if an employer owes an employer shared responsibility penalty under Code Section 4980H. However, if a Marketplace appeal is decided in the employer's favor, it may cause the Marketplace either (a) not to report to the IRS that the employee received APTC or (b) reduce the period for which the employee is reported as being eligible for APTC. Thus, in this sense, the Marketplace appeal process provides a potential first line of defense against the wrongful assessment of employer shared responsibility penalties.

The IRS is developing a separate process for determining if an employer shared responsibility penalty will be assessed and for the appeal of such assessment. The IRS has not yet announced the details of the certification process it will use. Once established, that process will generate notices from the IRS that employers will need to watch for and respond to appropriately.

Additional Considerations

The ACA contains a non-retaliation provision. ACA Section 1558 prohibits employers from discriminating or retaliating against an individual because he or she received APTC. This provision recognizes that an employee's receipt of APTC may result in his or her employer becoming subject to penalties under Code Section 4980H which, in turn, might prompt some employers to want to end their association with the employee.

To help reduce the risk of liability for retaliation claims, employers should consider (a) providing training to managers and human resources professionals about the ACA's non-retaliation rule and (b) treating Marketplace APTC determinations as confidential, routing them directly to responsible employee benefits personnel and keeping the notices and related correspondence separate from the employee's personnel file.

Questions

If you have any questions about Marketplace notices or other aspects of ACA compliance, contact **Thomas G. Hancuch**, **Jessica L. Winski** or any Vedder Price attorney with whom you have worked.

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OSHA: Summer Fun, Employers Feel the Burn

If asked to write an essay about what they did over the summer, the good folks at OSHA would have quite a lot to cover this fall. In fact, it would be difficult to know where to begin with so many rules announced and enforcement actions taken; so, let's start with one of the things that makes the world go 'round—money.

Dispelling any notion that big fines are reserved for heavy industry, OSHA continues to levy eye-popping fines on retailers who routinely fail to maintain good housekeeping practices.

New Penalties on Tap OSHA's new penalty levels took effect August 1, with the maximum penalty for serious violations increasing from $7,000 to $12,471. The maximum penalty for willful or repeated violations, meanwhile, rose from $70,000 to $124,709. Citations issued by OSHA after August 1 will be subject to the new penalties if the related violations occurred after November 2, 2015. With OSHA likely to regularly impose $12,471 penalties for serious violations, employers may decide to settle less and contest more. While many employers may have unwittingly set themselves up for hefty, reputation-damaging repeat citations by settling low-dollar citations because they figured litigation was not worth the cost and disruption, the new penalty structure is likely to lead employers to re-think how they respond to citations. In the past, an employer could pay $42,000 (or less if OSHA is open to discounting) to resolve six citations; now, that same employer would be looking at having to cough up nearly $75,000. OSHA, meanwhile, will presumably use its newfound ability to assess "statement-making" fines on those companies perceived as taking the "low road" with respect to their commitment to employee health and safety. While $210,000 for three repeat (or willful) citations is without question a big deal, a fine coming in at just under $375,000 hits a good deal harder; indeed, OSHA will not have to try very hard to impose fines in excess of $1 million upon those companies it considers recalcitrant or serial violators.

Taking Aim at Incentive Programs While OSHA's dislike of safety bonus and incentive programs that tie compensation and/or benefits to injury reports is well-known (see the "Fairfax Memo" issued in 2011), the agency had few options other than opening a separate recordkeeping investigation when it came across a policy or procedure it did not like. Now, however, employers can expect to receive citations pursuant to §1910.35 if and when OSHA determines that a safety bonus or incentive program will discourage or deter a reasonable employee from reporting a work-related injury or illness. Unfortunately, OSHA has yet to issue any sort of guidance as to what sorts of practices it considers problematic or those that would pass muster. Instead, agency leadership has said only that inspectors will look at rules and programs on a case-by-case basis. It also remains to be seen whether citations issued under the new rule will typically be classified as serious or other-than-serious. Either way, employers would be well-advised to take a close look at their safety incentive programs now, given that the new mandate took effect in August.

Immediate Injury Reporting Rules Incentive programs are not the only way OSHA contends that employers deter employees from reporting injuries. The agency similarly takes a dim view of rules that penalize employees who fail to immediately report work-related injuries or illnesses. While employers can point to a variety of reasons why such rules make good sense—promptly abating the hazard that may have caused an injury, investigating while evidence is fresh, etc.—OSHA is not persuaded. Indeed, the agency recently filed a lawsuit in federal court against U.S. Steel challenging the company's seemingly reasonable requirement that employees report injuries and/or illnesses within seven days (*Perez v. US Steel*, No. 16-00092, D. Del. 2016). Any employers who regularly disciplines employees who fail to immediately report an injury or illness should expect to find themselves in OSHA's crosshairs sooner rather than later.

Temporary Workers Need Training, Too OSHA continues to emphasize the obligation of the host employer to protect and adequately train contract workers. If OSHA's Temporary Worker Initiative did not catch your attention, perhaps the fact that the agency fined an Ohio auto parts manufacturer $3.42 million for willfully exposing workers to machine hazards after two workers suffered severe injuries in separate incidents in Hebron, Ohio, will. During the ensuing inspection, OSHA issued 57 violations to the host employer in addition to proposing penalties of $7,000 to three staffing agencies for failing to provide required safety training.

Crowded Aisles, Hefty Fines Dispelling any notion that big fines are reserved for heavy industry, OSHA continues to levy eye-popping fines on retailers who routinely fail to maintain good housekeeping practices. Like clockwork of late, OSHA has issued fines in excess of $100,000 (and in some cases $1 million) to discount retailers like Dollar Tree, finding blocked exits, improperly stored merchandise and other easily avoidable violations at store after store. Most recently, OSHA issued a $101,420 citation to popular home goods retailer Pier 1 for problematic merchandise storage practices. Good housekeeping is more than a magazine title—it's something that should be a standard operating procedure for retailers and manufacturers alike, especially if OSHA has already cited the employer for failing to comply with the applicable standards.

New Rx for Preventing Workplace Violence OSHA has made the prevention of workplace violence in healthcare facilities a focal point for some time, using the

General Duty Clause to cite employers that the agency found to have failed to adequately abate hazards in emergency rooms, psychiatric wards and other settings where employees were known to be at risk due to the nature of their work. Without a specific standard, however, healthcare employers have struggled at times to determine what, exactly, OSHA expects of them. That should change when OSHA issues a new rule this fall (or winter) expected to set forth specific requirements for healthcare employers regarding violence prevention. Until then, healthcare employers should continue to conduct hazard assessments for those areas of their operations where violence is a recognized problem and take steps to protect those employees exposed to potential harm.

Have You No Shame? And finally, if accessible, electronically submitted injury and illness records were not enough, OSHA has announced it will begin making public the hospitalization and amputation (as well as enucleation, presumably) information that employers are required to submit following a workplace incident. The information, made available in spreadsheet format, will include the names and addresses of the businesses that filed reports, as well as information about the event, including the cause of the event and the injured body part(s). OSHA is not expected, significantly, to state in the spreadsheet whether the agency contends the employer violated a standard or the outcome of any appeal—leaving readers free to draw whatever conclusion about the employer they may wish.

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California Corner: Achoo! New Local Paid Sick Leave Ordinances Are an Epidemic in California

San Diego and Los Angeles recently joined San Francisco, Oakland, Emeryville and Santa Monica in approving their own paid sick leave ordinances, adding a layer of complexity for employers in those jurisdictions. Employers should be aware that these two new ordinances differ in key respects from California's statewide paid sick time law, the Healthy Workplaces, Healthy Families Act of 2014 (the HWHFA), and that they must now comply with both the state and local laws.

Generally, the HWHFA requires employers to provide paid sick leave to employees who, on or after July 1, 2016, work in California for 30 or more days within a year from the beginning of employment. Among other things, it provides various methods for employees to accrue sick leave, and authorizes employers to limit the use of paid sick leave to three days (24 hours) per year, and cap sick leave accrual at six days (48 hours) per year.

Los Angeles Paid Sick Leave Ordinance

The Los Angeles ordinance is also broader than state law with respect to the persons who take paid sick leave, allowing employees to take leave not only for themselves or a family member (as defined under state law), but also for any individual related by blood or affinity whose close association with the employee is equivalent to a family relationship.

Effective July 1, 2016, employees who work at least two hours per week in Los Angeles, and for the same employer for 30 days or more within a year of hire, are entitled to paid sick leave. Due to ambiguities in the language of the ordinance, the effective date is arguably deferred by one year for employers with 25 or fewer employees.

Paid sick leave accrues from the first day of employment or the effective date of the ordinance, whichever is later. Employers that already have a paid leave or paid time-off policy that is at least equal to 48 hours are not required to provide additional time under the ordinance. Employees may use paid sick leave beginning on the 90th day of employment. Unlike the state law, however, which provides multiple methods of accruing sick leave, the Los Angeles ordinance provides for only two methods of accrual: (1) a lump sum of 48 hours to an employee at the beginning of each year of employment, calendar year or 12-month period or (2) one hour of sick leave for every 30 hours worked.

Further, the Los Angeles ordinance is more generous with respect to how many hours of sick leave employees may use each year and the cap on accrued sick leave. Employers can limit annual use to 48 hours (as opposed to 24 hours under state law) and can cap accruals at 72 hours (as opposed to 48 hours under state law).

The Los Angeles ordinance is also broader than state law with respect to the persons who take paid sick leave, allowing employees to take leave not only for themselves or a family member (as defined under state law), but also for any individual related by blood or affinity whose close association with the employee is equivalent to a family relationship.

The Los Angeles ordinance is, however, narrower than state law in one respect: state law does not expressly address whether employers can require a doctor's note to validate the need for the leave, but under the Los Angeles ordinance, employers may require employees to provide reasonable documentation of an absence from work for which paid sick leave will be used.

Like the HWHFA, employers need not pay out unused, accrued sick leave when an employee separates from the company, but they must reinstate the accrued, unused leave if the employee is rehired within a year. Employers are required to display the city's minimum wage and sick leave posters, and, at the time of hire, provide employees written notice of the employer's name, address and telephone number.

San Diego Earned Sick Leave Ordinance

Effective July 11, 2016, employees who work at least two hours in at least one calendar week for an employer in San Diego are entitled to accrue paid sick leave. Paid sick leave accrues from the first day of employment or July 11, 2016, whichever is later. As with state law, employers can require that employees wait until the 90th day of employment before using accrued sick leave.

Unlike state law, the San Diego ordinance provides for only one method of accrual: one hour of sick leave for every 30 hours worked. The San Diego ordinance is more generous than state law in that it does not allow for a cap for accrual of paid sick leave. All unused, accrued sick leave must be carried over to the next year. The ordinance does, however, permit an employer to limit the use of sick leave to 40 hours per year, as compared with the state law's 24 hours per year limit.

As under state law, if an employee elects to use paid sick leave, the employer may require the leave to be used in increments of at least two hours. Unlike state law, however, the San Diego ordinance is broader in terms of permissible uses for paid sick leave. Employees may use earned sick leave for their own medical care and for the medical care of certain covered family members. Employees also may use earned sick leave for themselves and covered family members for reasons associated with domestic violence, sexual assault or stalking, including medical care, counseling, relocation or legal services. In addition, employees may use leave time when their place of business, or their child's school or child care provider, is closed due to a public health emergency.

Under the San Diego ordinance, employers may require documentation for absences of more than three consecutive workdays.

Employers need not pay out unused, accrued sick time upon termination, but for employees who are rehired within six months from the date of separation, any previously accrued and unused sick leave must be reinstated. Under the San Diego ordinance, employers are required to display the city's official poster, and, at the time of hire, provide employees written notice of the employer's name, address and telephone number, and the employer's duties under the ordinance.


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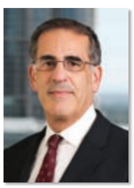
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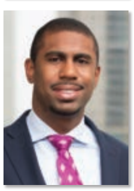
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Employers with workers in San Diego, Los Angeles and other cities with local paid sick leave ordinances should review their paid time off and paid sick leave policies to ensure compliance with the respective ordinances and the state law. In general, where state law and the applicable local ordinance differ, the more favorable and generous requirements should be implemented. Employers with workers in multiple cities in California with local paid sick leave ordinances should consider implementing a "one-size-fits-all" policy for all California employees consistent with business needs to help reduce administrative burden. Employers that incorporate paid sick leave into their paid time off policy may want to consider creating a separate paid sick leave policy if the paid sick leave requirements are more generous than their paid time off policy and to avoid having to pay out the accrued sick leave at termination.

If you have any questions regarding the topics discussed in this article, contact **Heather M. Sager, Lucky Meinz,** or any of our California Labor & Employment attorneys.

Medical Marijuana—A New Challenge Facing New York Employers

Terminating an employee who tested positive for marijuana was once a fairly risk-free decision. With nearly half the states having now adopted some form of legal protection for medical marijuana users, the stakes surrounding such a decision have gotten higher. Employers in such states—including New York—must consider a number of factors now before taking adverse action against employees who use marijuana for medical reasons. How, you ask, should New York employers address such matters?

The Compassionate Care Act (Act), signed into law in July 2014 and implemented in January 2016, allows New York residents to legally purchase and use (but not smoke) medical marijuana. New York State was the twenty-third state to allow legal access to medical marijuana. According to the New York State government official website, as of July 26, 2016, 639 physicians have registered for the New York State Medical Marijuana Program, and 5,966 patients have been certified by their doctors. Based on these numbers, the time has come for employers in New York to understand their obligations and ensure that their policies are in compliance.

Pursuant to the Act, "Certified Patients" prescribed medical marijuana are deemed to have a disability under the New York State Human Rights Law (NYSHRL). This means that New York employers with four or more employees are prohibited from terminating or refusing to employ an individual on the basis of his/her status as a certified medical marijuana patient. Further, employers must reasonably accommodate an employee who is a "Certified Patient" as a result of his/her deemed disability. The Act specifically provides that Certified Patients shall not be subject to "disciplinary action by a business . . . solely for the certified medical use or manufacture of" marijuana. Accordingly, an employer may be subject to a discrimination claim if it fires or disciplines an employee for lawfully consuming or manufacturing marijuana under the Act.

The Act contains two exceptions. First, it does "not bar the enforcement of [an employer's] policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance." Second, the Act does "not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding." The exceptions are important in that an employer may, for example, still restrict the use of marijuana in the workplace and have policies prohibiting employees from working while impaired by marijuana.

Given the protections afforded to "Certified Patients," the Act has significant implications for New York employers, especially with regard to potential discrimination claims, drug testing and workplace drug policies. Following are a few key points for New York employers to note in order to minimize the risk of liability:

- Certified Patients are deemed disabled under the NYSHRL. Whether an accommodation is necessary will depend on the particular circumstances, including the type of business, the employee's position and the employee's need for medical marijuana. Employers should engage in an interactive process with any employee who is a certified marijuana patient.

- Employers are not required to allow a Certified Patient to use marijuana in the workplace.

- Employers with federal contracts or funding that are subject to federal regulations may fall under an exception. The Act does not require an employer to take any action that would cause it to lose a federal contract or funding.

- Employers should be proactive and ensure that their human resources managers and supervisors understand an employer's obligations and how to handle employees who are certified to use medical marijuana. Employment counsel can be called on to assist with training managers/supervisors.

Employers are encouraged to have employment counsel review their drug testing and substance abuse policies to ensure compliance. Multistate employers should understand their obligations to employees in each state, as they may vary.

- Employers are encouraged to have employment counsel review their drug testing and substance abuse policies to ensure compliance. Multistate employers should understand their obligations to employees in each state, as they may vary.

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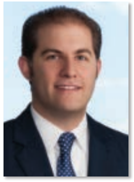

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Brexit: Employment Law Implications for U.S. Businesses Operating in the UK

On June 23, 2016, the UK voted in a referendum to leave the European Union (EU). Prime Minister David Cameron resigned the next day, and Theresa May took office on July 13, 2016. While the process for withdrawal from the EU is set out in Article 50 of the Lisbon Treaty, P.M. May has said that she will not begin the withdrawal process before the end of 2016. Needless to say, there is a long way to go. Indeed, some experts anticipate that the process could take ten years to complete.

Another hot topic for employers is how the right of free movement of workers between the UK and remaining EU member states will be affected. This, of course, could have consequences on the ability of employers to manage a skilled and experienced cross-border workforce.

What will the implications be for employment law in the UK? Much will depend on the future relationship between the UK and the EU. P.M. May's Brexit Secretary, David Davis, has said his ideal outcome would be tariff-free access to the single market. While observers wait to see the details of the UK's negotiating position, it is safe to say that the UK's relationship with Europe will depend on the UK maintaining some level of compliance with the EU regime, which may well include employment law, as well as the handling/treatment of data security, trade secrets and confidential information.

In the meantime, it will for the most part be business as usual, and our message to employers is not to panic.

Much of EU employment law is firmly embedded in the UK's national consciousness. Indeed, the UK has often been ahead of the EU in terms of employment law (for example, in the right to paid holidays and paid maternity leave). There is no reason to believe that businesses are champing at the bit to scale back workers' rights, nor do we expect to see root-and-branch rewriting of legislation. Put another way, nobody believes that the government will attempt to revoke the Equality Act so that employers are free to discriminate against someone because of being pregnant or gay.

The UK's departure from the EU will, however, give the UK more control over its employment legislation and open the way to a more flexible and less regulated regime. For example, the government may scrap certain pieces of EU-derived employment legislation that never sat well with or became properly embedded in UK law, such as:

- limits on working time and weekly maximum limits on working hours;
- certain complex and technical aspects of statutory holiday rights (including the European requirement that workers on sick leave and maternity leave continue to accrue holiday) and in relation to on-call time and compensatory rest time;
- the Agency Workers Regulations;
- certain aspects of the Transfer of Undertakings Regulations; and
- certain provisions relating to collective consultation requirements, and obligations in respect of works councils and information and consultation bodies.

Another hot topic for employers is how the right of free movement of workers between the UK and remaining EU member states will be affected. This of course could have consequences on the ability of employers to manage a skilled and experienced cross-border workforce. Again, this very much depends on what the relationship between the UK and the EU looks like after Brexit, and, in particular, whether the UK retains access to the single market, one of the considerations that makes Britain attractive to U.S. employers.

If the process so far has taught us anything, it is that predictions are dangerous, and that employers will have to wait and see.

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


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Recent Accomplishments

Patrick W. Spangler, **Jeanah Park** and **Joshua Nichols**, acting on behalf of a financial services client, obtained a temporary restraining order against a former employee and a competitor in the Circuit Court of Cook County related to the theft of trade secret and confidential information.

Thomas M. Wilde and **Christopher A. Braham** achieved early dismissal of a putative wage-and-hour collective action in federal court in Phoenix, resolving contractor misclassification claims on an individual basis on behalf of a national logistics company.

J. Kevin Hennessy and **Caralyn M. Olie** helped a company win a union election vote by a 4:1 margin at a long-term care facility in Iowa without any unfair labor practice charges or objections to the election results. Similar employer victories were obtained in New Hampshire with a global third-party logistics provider and in Illinois with a large manufacturer.

Bruce R. Alper and **Emily C. Fess** defended a major medical center from allegations by an incumbent faculty member that she was not promoted, was undercompensated and was harassed due to employment discrimination and retaliation. After obtaining summary judgment for our client in federal district court, we successfully defended the appeal of that decision.

Thomas M. Wilde and **Emily C. Fess** won summary judgment in federal court in Nashville on behalf of a manufacturing client. The plaintiff alleged reverse discrimination and harassment.

J. Kevin Hennessy won a contested labor arbitration in Indiana sustaining the termination of a warehouse worker who was on an extended medical leave of absence. The favorable result was obtained despite the presence of an ADA compliance clause in the labor agreement.

Charles B. Wolf, **Patrick W. Spangler** and **Benjamin A. Hartsock** won an appeal in the Seventh Circuit Court of Appeals, which upheld the judgment of the U.S. District Court for the Western District of Wisconsin. Vedder Price represented fiduciaries of a private company ESOP in a class action trial and ultimately prevailed at the damages phase of the litigation, obtaining a ruling that the fiduciaries should be fully indemnified by the sellers in the transaction. The case subsequently settled, and the appeal resolved several challenges to the settlement agreement and, significantly, reaffirmed prior Seventh Circuit precedent allowing for indemnification by co-fiduciaries.

Thomas M. Wilde and **Emily C. Fess** obtained early dismissal of defamation claims against a manufacturing client. The plaintiff was a former employee who alleged he was defamed during the company's investigation of his alleged misconduct.

Thomas G. Hancuch and **Cara J. Ottenweller** obtained a summary decision for an educational institution in a disability discrimination claim pending before the Illinois Human Rights Commission. The case involved an employee's discharge for refusing to cooperate with the employer's investigation into her suspected misuse of medical leave. The administrative law judge upheld the employer's right to discharge the employee when she failed to produce requested medical records, and rejected her claim that the employer's action was due to her disability.

Blythe E. Lovinger recently joined the firm's New York office as a Shareholder in the Labor & Employment group. Blythe has more than two decades of experience representing employers and senior executives in employment litigation before federal and state courts, administrative agencies and arbitration panels. She defends clients against claims of discrimination, harassment and retaliation, and has extensive experience prosecuting and defending cases involving trade secrets, restrictive covenants, unfair competition and related business tort claims. Blythe also regularly advises clients on a wide range of employment issues, including disciplinary actions and terminations; employment, consulting and separation agreements; employment policies and practices; reductions in force; investigations of employee misconduct; and litigation avoidance. She also conducts anti-harassment and other specialized training programs for clients.

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