Labor & Employment Law Update

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VedderPrice

Oops, He (or She) Did It Again! Implementing a Best-In-Class Harassment-Free Workplace Program to Help Your Company Stay Out of the Headlines

Sex sells. And draws clicks, too, on Facebook, Twitter or the countless other sites people visit to get their news. Whether it was the salacious details surrounding Anita Hill's allegations about Clarence Thomas decades ago or the more recent accusations that cost Bill O'Reilly his Fox News gig, it does not take much to get people talking about sexual misconduct in the workplace. Much has already been written about the risks of coddling superstar employees and over-reliance on confidentiality provisions in settlement agreements that may not be as airtight as some think. This article, however, is intended simply as a refresher of the basic, nuts-and-bolts aspects of an effective harassment prevention program. While faithful adoption of these suggestions is not a magic talisman for warding off all claims, regular and reliable adherence to these steps will put employers in a better position to defend and possibly reduce the number of claims.

While video/online training may be the only feasible option for many employers, live sessions give employees and managers alike the opportunity to discuss nuances, ask questions and raise concerns.

Policies and Procedures. It goes without saying that employers should regularly review and update their policies and procedures to ensure compliance with the latest laws and trends. They should be written in words that employees can readily understand. Include the harassment policy in the handbook, post copies in the workplace and make it available on the company's intranet so employees have access to it at all times. (Some employers even reprint their basic anti-harassment policy on every employee's pay stub.) Consider the languages commonly spoken by employees and whether there are segments of the workforce that do not read or understand English. If so, invest in translation services and confirm that employees understand the option to have the policy translated for them, if needed. The harassment policy should provide multiple avenues of complaint, ideally including Human Resources, a toll-free telephone number and online. Regardless of the avenues provided, giving employees the ability to make complaints anonymously

can limit the ability of claimants to later argue they failed to complain out of a fear of retaliation.

Management and Employee Training. Whenever possible, conduct mandatory (separate) training sessions for employees and management. Employees should hear how seriously the company takes workplace harassment, understand what sort of behaviors are prohibited and be told how to lodge a complaint, as well as what to expect once a complaint is received. It is important to dispel myths and emphasize the company's commitment to preventing both harassment and retaliation. Whether the company uses internal trainers or a third party, many clients prefer to involve attorneys (either internal or external) when training managers. Lawyers can credibly describe the legal risks for the organization when managers fail to adequately respond to harassment situations, as well as emphasize the potential for personal liability, which can be particularly persuasive. Whenever possible, senior leaders should attend these sessions, affirming the company's commitment to a harassment-free workplace. While video/online training may be the only feasible option for many employers, live sessions give employees and managers alike the opportunity to discuss nuances, ask questions and raise concerns. Quite often, issues will surface during or immediately after management training, providing the opportunity to take proactive steps. Human Resources should doggedly track attendance to ensure that every employee completes the training in a timely manner and to ensure that sign-in sheets are used for live sessions. Last but not least, the training should include a review of the company's policy, emphasizing that the company prohibits all types of harassment. The trainer(s) should be sure to include and discuss case studies so the attendees get a clear and practical picture of what is not acceptable behavior and how, as managers, they must respond. Employees should also be encouraged to speak up when they witness inappropriate behavior, and to feel empowered to address situations in the workplace directly that make them uncomfortable.

Zero tolerance is an important yet misunderstood concept.

Investigations. There are a host of considerations regarding how to conduct an effective investigation—enough to justify an entire article. (Check this space in the future.) Every investigation should be prompt and thorough, leaving no

stone unturned whenever a complaint is received. Keep in mind that even if the employee is a chronic complainer, some form of an investigation should be conducted in response to every complaint. Ideally, one or more individuals should be trained in how to conduct investigations *and* will have **actually done** them. Senior HR leadership should maintain oversight over the matter to ensure that it is being handled appropriately. Developing and adopting internal investigation protocols, with recommended timelines, is another best practice to consider. If the company does not have a qualified investigator on staff or if that person is fully occupied, consider retaining a professional investigator or outside attorney. Once the investigation is completed, it is essential that someone close the loop with the complaining employee. While that need not include disclosing the specific action taken against the accused, the complainant should be assured that appropriate steps have or will be taken. Encourage the complainant to immediately let the company know if the original issue recurs or they believe that they are being retaliated against. To the extent that the investigation determines that policies were violated, it is essential that the company take appropriate remedial action against the offender. Zero tolerance is an important yet misunderstood concept. While action should indeed be taken whenever a violation occurs, that does not mean termination is always the appropriate action. And employers should make sure not to "punish" anyone who made a good faith report, even if found to be unsupported. (And be mindful of subtle ways in which a complainant may feel ostracized for having come forward.) Every situation is unique and requires a careful and thoughtful response.

If you have any questions about this article or wish to discuss how your company can enhance its harassment-free workplace compliance efforts, please contact **Amy Bess**, **Aaron Gelb**, **Heather Sager** or any Vedder Price attorney with whom you have worked.

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Employers Questions about Salary History Are History

The New York City Council recently approved legislation that prohibits employers from inquiring about a job applicant's salary history. The bill was approved on April 5, 2017, just one day after Equal Pay Day. Mayor Bill de Blasio signed the bill into law on May 4, 2017.

To comply with this new legislation, employers should amend their written applications, interview questions and on-boarding policies to remove references to a job applicant's salary history.

The legislation, Int. No. 1253-A, provides that it is an unlawful discriminatory practice under the New York City Human Rights Law for an employer, employment agency or employer's agent to:

1. Inquire about the salary history of a job applicant for employment; or

2. Rely on the salary history of a job applicant to determine the applicant's salary or benefits during the hiring and contract negotiation processes.

The law broadly defines "to inquire" and "salary history." "To inquire" is defined as "to communicate any question or statement to an applicant, an applicant's current or prior employer . . . or to conduct a search of publicly available records or reports for the purpose of obtaining an applicant's salary history." "Salary history" is defined as "the applicant's current or prior wage, benefits or other compensation."

An employer is not prohibited, however, from discussing a job applicant's expectations regarding salary or benefits. Moreover, if a job applicant voluntarily shares his/her salary history with an employer without any prompting by the employer, the employer may consider the salary history in determining the job applicant's salary and benefits, and may further verify the job applicant's salary history.

The legislation includes certain exceptions. For example, the law does not apply to a current employee's application for internal transfer or promotion. The legislation also does not apply to public employee positions for which salary or benefits are determined pursuant to procedures established through collective bargaining.

Further, the law does not preclude an employer from conducting a background check or verifying a job applicant's disclosure of information not related to salary. However, if the background check or verification discloses a job applicant's salary history, an employer may not rely on the disclosure to determine the job applicant's salary or benefits.

Proponents of the new legislation contend that the law will promote gender pay equity, as they argue that job applicants who were underpaid in the past should not be condemned to always being underpaid. Similar legislation was recently enacted in Massachusetts and in the City of Philadelphia. The Massachusetts law will take effect in July 2018 and the Philadelphia law will take effect in May 2017. Nationwide, over 180 bills have been introduced to reduce the pay gap since 2016.

To comply with this new legislation, employers should amend their written applications, interview questions and on-boarding policies to remove references to a job applicant's salary history. Further, employers should ensure that all employees involved in the recruitment and hiring process understand how expansively the law defines "inquire" and "salary history."

The New York City law will take effect on October 31, 2017. The law follows Mayor de Blasio's Executive Order 21, signed in November 2016, which prohibits New York City agencies from inquiring about a job applicant's salary history before extending a conditional offer of employment to the job applicant.

If you have any questions regarding this new legislation, please contact **Blythe E. Lovinger**, **Kimberly R. Greer** or any Vedder Price attorney with whom you have worked.

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California Corner: The Road to Nowhere—Final Approval of Lyft Settlement Dodges the Issue of Driver Classification

On March 16, 2017, U.S. District Judge Vince Chhabria of the Northern District of California issued an order granting final approval of a $27 million settlement between Lyft, Inc. and its drivers. *Patrick Cotter, et al. v. Lyft, Inc.*, Case No. 3:13-cv-04065-VC. In *Cotter*, former and current Lyft drivers sued the company, claiming that Lyft violated various laws and regulations by classifying drivers in California as independent contractors rather than employees. Judge Chhabria held that, although the settlement agreement is "not perfect," it is "reasonable."

Notably, the Lyft settlement does not resolve the central issue of whether Lyft drivers are independent contractors or employees, nor does it require Lyft to change its classification of drivers as independent contractors.

In addition to paying $27 million to resolve the claims, Lyft agreed to (1) change its Terms of Service to specify the types of actions that could result in deactivation of a driver's account and to provide for the payment of arbitration fees and costs by Lyft; (2) implement an optional pre-arbitration negotiation process to resolve disputes; (3) create a "favorite driver" option that will result in benefits to drivers who are chosen as a "favorite"; and (4) provide drivers with additional information about potential Lyft passengers before drivers accept ride requests from passengers.

Notably, the Lyft settlement does not resolve the central issue of whether Lyft drivers are independent contractors or employees, nor does it require Lyft to change its classification of drivers as independent contractors. In granting final approval of the settlement agreement, Judge Chhabria acknowledged that the status of Lyft drivers under California law remains "uncertain" going forward.

Judge Chhabria had previously rejected a proposed settlement agreement between Lyft and the plaintiffs that provided for a smaller settlement amount of $12.25 million. He found that the proposed settlement amount grossly underestimated the value of the drivers' claim for reimbursement of expenses and was based on an arbitrary treatment of the PAGA penalties. The Teamsters objected to the settlement, arguing that any settlement must include a reclassification of the Lyft drivers. Judge Chhabria rejected this argument, saying that such policy concerns are best directed to the legislative or executive branches, not to the court.

As a result, the legality of the manner in which companies like Uber and Lyft classify those individuals who are providing services in exchange for a fee as part of the on-demand "sharing" economy remains uncertain. While the courts will continue to apply the various tests used to analyze whether individuals should be classified as independent contractors or employees, there is an unmistakable trend among many agencies to designate service providers as employees. As long as companies like Lyft and Uber continue to treat such individuals as independent contractors, they will continue to face lawsuits and agency actions. Companies that are part of the on-demand sharing economy should continue to monitor developments in the law and assess, on an ongoing basis, the risks associated with classifying service providers as independent contractors. Treating them as employees from the outset can help avoid costly legal battles involving claims for unpaid wages, reimbursement of expenses, penalties and interest. Of course, it may well make the preferred business model unprofitable.

If you have questions regarding the issues in this article, please contact **Lucky Meinz**, **Heather Sager** or any Vedder Price attorney with whom you have worked.

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Seventh Circuit Issues Groundbreaking Decision: Holds That Sexual Orientation Discrimination Is Sex Discrimination Under Title VII

On April 4, 2017, a full *en banc* panel of the Seventh Circuit held in *Hively v. Ivy Tech Community College* (Case No. 15-1720) that sexual orientation discrimination is a form of sex discrimination under Title VII. In its decision, the Seventh Circuit found that it is a "common sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex."

The *Hively* ruling is the first of its kind from a federal appellate court and creates a split among the federal circuits. In March 2017, for example, the Second Circuit ruled that it lacked the ability to overturn prior precedent, holding that Title VII does not preclude sexual orientation discrimination (although two judges noted that it might soon be time to revisit the issue), while the Eleventh Circuit specifically found that sexual orientation is not a protected characteristic under Title VII. *See Christiansen v. Omnicom Grp., Inc.,* No.16-748 (2d Cir. Mar. 27, 2017); *see also Evans v. Georgia Reg'l Hosp.*, No.15-15234, 2017 WL 943925, at *5-6 (11th Cir. Mar. 10, 2017). Given the split, this question is ripe for consideration by other circuits and may be one for the Supreme Court to tackle.

While significant on the federal level and more generally because of its impact on the social and legal landscape affecting the LGBTQ community, the *Hively* holding is consistent with the laws of various states and cities within the Seventh Circuit, such as Illinois and Wisconsin. Employers with operations in the Seventh Circuit and elsewhere are nonetheless encouraged to review their policies and training materials to ensure that they are up to date and consistent with *Hively*.

For further information and guidance, please contact **Elizabeth N. Hall** (312-609-7795), **Caralyn M. Olie** (312-609-7796) or any other Vedder Price attorney with whom you have worked.

Dress Codes and Religious Symbols at Work in the EU

The European Court of Justice (ECJ) recently issued long-awaited decisions on two cases—one from France (*Bougnaoui and another v Micropole SA* (Case C-188/15)) and one from Belgium (*Achbita and another v G4S Secure Solutions NV* (Case C-157/15))—addressing whether an employer can lawfully prohibit women from wearing a hijab at work.

These decisions form part of a fascinating line of cases, in UK and other EU member states, which look at the legality of banning the wearing of religious symbols at work, including the wearing of a cross.

These cases were the first to present claims of religious discrimination under the Equal Treatment Framework Directive to the ECJ. Accordingly, EU employers were eager to learn how the ECJ would handle these issues—not only of law, but also of social policy and politics—in our rapidly changing world.

Interestingly, the ECJ concluded that a ban on Islamic headscarves at work can be lawful but stopped short of saying that a blanket ban is lawful. According to the ECJ, an employer could ban employees from wearing a hijab at work only if the employer could prove that:

- such a measure is appropriate and necessary in the particular circumstances;
- it has a rule prohibiting the wearing of visible signs of political, philosophical or religious belief, which covers all such manifestations of belief without distinction (i.e., it does not single out the hijab or any particular religion); and
- it not only has the rule, but it genuinely pursues it in a consistent and systematic manner and only covers workers who interact with customers.

These decisions form part of a developing line of cases, in UK and other EU member states, which look at the legality of banning the wearing of religious symbols at work, including the wearing of a cross. They also come at a time when this is a particularly sensitive topic politically, given the fears about the rise of fundamentalism and recent terrorist attacks in Europe. Several EU states have moved to ban Muslim headwear in public, making this an area of increased scrutiny and heated political debate in several EU states.

Together, the *Micropole* and *G4S Secure Solutions* decisions have received a significant amount of attention, both from the press and politicians. Meanwhile, in the UK, the Advisory, Conciliation and Arbitration Service (ACAS) is due to publish a dress code policy in July 2017, which is expected to cover this sensitive topic. Now is a good time for employers—particularly those who operate in global businesses and with diverse workforces—to consider and review their approach to religious symbols at work, and dress codes more broadly.

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 or any Vedder Price attorney with whom you have worked.

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Recent Accomplishments

Tom Wilde and **Sadina Montani** won a jury trial in federal court in Miami on behalf of a global corporation. The plaintiff claimed he was laid off because of his age after 20 years of service. The jury returned a complete defense verdict after just 90 minutes of deliberations.

Aaron R. Gelb secured the complete withdrawal of an OSHA citation (and accompanying fines) issued to a client that operates a series of distribution centers and warehouses. Mr. Gelb appeared with the employer at an informal settlement conference with OSHA, filed a notice of contest and convinced OSHA to withdraw the citation before discovery commenced at the Occupational Safety and Health Review Commission.

Margo Wolf O'Donnell, Shareholder and Chair of the Vedder Price Diversity Committee, was selected by *Best Lawyers* as a "Woman of Influence" in their "Women in the Law" Spring Business Edition. Fifteen women attorneys from across the country were chosen in the first-ever collaboration of the Coalition of Women's Initiatives in Law and *Best Lawyers*. Ms. O'Donnell is widely quoted by various national media outlets on topics relating to the prevention of litigation and has received numerous accolades for her work. She is a past recipient of the Coalition Leadership Award and has been recognized by *Best Lawyers* in Commercial Litigation since 2013.

Promoted: Mark L. Stolzenburg, Vedder Price Shareholder

The principal focus of Mark's practice is labor-management relations. He began his legal career as a field attorney at the National Labor Relations Board and joined Vedder Price in 2007. Mark negotiates collective bargaining agreements, counsels employers on day-to-day issues regarding the collective bargaining relationship, assists employers with union organizing and decertification campaigns and represents employers before the National Labor Relations Board, in labor arbitrations and in labor-related litigation. He also represents employers in ERISA lawsuits filed by union Taft-Hartley pension and benefit funds. Mark also has extensive experience representing management in employment-related litigation filed in federal and state courts and administrative agencies and counsels employers on how to avoid such litigation. Mark is a graduate of Cornell University's School of Industrial and Labor Relations and the Washington University School of Law.

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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, 50+ professionals are dedicated solely to workplace law and are consistently ranked as top-performing lawyers.

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