Labor & Employment Law Update

December 2017

In This Issue

VedderPrice

ADA Alert: Seventh Circuit Significantly Restricts Leave as a Reasonable Accommodation…but Cities, States and Other Circuits Take a Different View

Employers, at least those in Illinois, Indiana and Wisconsin, have finally been given clear guidance regarding how much leave an employee should be given when he or she is unable to perform the essential functions of his or her job due to a disability. The Seventh Circuit, in rulings issued in September and October 2017, has staked out a position that directly contradicts the position long taken by the U.S. Equal Employment Opportunity Commission (EEOC) that employers must provide disabled employees with an extended leave of absence as a reasonable accommodation under the Americans with Disabilities Act (ADA). In *Severson v. Heartland Woodcraft, Inc.* (Case No. 15-3754, Sept. 20, 2017), the plaintiff took twelve weeks of leave under the Family and Medical Leave Act (FMLA) and, before that leave expired, asked for an additional three-month leave of absence as a reasonable accommodation for a chronic back condition. The employer denied his request and terminated his employment. The plaintiff alleged that his request for an additional three months of leave following the exhaustion of his FMLA leave was a reasonable accommodation under the ADA.

…the court confirmed that employers must also consider reassignment to an open position available at the time as a reasonable accommodation to be explored as part of the interactive process.

The Seventh Circuit disagreed, finding that the "ADA is an antidiscrimination statute, not a medical-leave entitlement" and that "[a]n employee who needs long-term medical leave cannot work and thus is not a 'qualified individual' under the ADA." The court specifically rejected the EEOC's position, offered in an *amicus* brief, that a long-term medical leave of absence is a reasonable accommodation when the leave is of a definite and time-limited duration, requested in advance and likely to enable the employee to perform the essential functions of the job when he returns. In so ruling, the court importantly found that the EEOC interpreted the ADA as a "medical-leave statute – in effect, an open-ended extension of the FMLA[,]" and that the resulting interpretation of a reasonable accommodation, as elicited by the EEOC, was "untenable."

Notably, the Seventh Circuit held that intermittent leave is likely still protected under the ADA such that employers may have to offer it as a reasonable accommodation if it enables the employee to remain employed. In addition, the court confirmed that employers must also consider reassignment to an open position available at the time as a reasonable accommodation to be explored as part of the interactive process. Last but not least, the court explained that employers must offer light-duty assignments to disabled

employees who are not occupationally injured if light duty is already offered to employees who were occupationally injured, unless an "undue hardship" can be shown.

Doubling down on its position approximately one month later, in *Golden v. Indianapolis Housing Agency* (Case No. 17-1359, Oct. 17, 2017), the Seventh Circuit affirmed the conclusion it reached in *Severson*, holding that a request for six months of medical leave after the expiration of the 12-week FMLA period "removes an employee from the protected class under the ADA" and rendered the employee requesting that leave unqualified under the ADA.

Leave Remains a Possible Accommodation outside the Seventh Circuit

Accordingly, under the NYCHRL, extended leave, even an indefinite one, may be viewed as a reasonable accommodation.

While the *Severson* and *Golden* decisions are viewed as "wins" for employers, the plaintiff in Severson, likely with the support of the EEOC, may seek review by the United States Supreme Court. Further, and importantly, the Seventh Circuit's view is not shared by all other circuits, so the reach of *Severson* is limited for now. Furthermore, states, counties and/or cities may provide employees with rights and protections beyond what they enjoy under the ADA. For example, while the New York State Human Rights Law (NYSHRL) does not consider indefinite leave a reasonable accommodation, there is no accommodation, including indefinite leave, that is categorically excluded from the universe of reasonable accommodations under the New York *City* Human Rights Law (NYCHRL). Notably, the NYCHRL's definition of "disability," unlike the NYSHRL's definition, does not incorporate the ability to perform the job in a reasonable manner or with "reasonable accommodation." Accordingly, under the NYCHRL, extended leave, even an indefinite one, may be viewed as a reasonable accommodation. Further, under the NYCHRL it is the employer's burden to show that an accommodation would create an undue hardship.

And while indefinite leave is not a reasonable accommodation under the NYSHRL, much like under the ADA, courts have held that temporary leaves of absence, even extended leaves, may well be reasonable accommodations under the NYSHRL. Therefore, employers in New York should thoroughly engage in the interactive process and carefully undergo an analysis of the feasibility of all possible accommodations, including the availability of an extended leave of absence.

While indefinite leave has likewise been rejected as a reasonable accommodation in Washington, DC, lengthy, extended leaves remain an option employers should consider during the interactive process unless they can establish that the leave would constitute an undue hardship. The D.C. Circuit Court of Appeals addressed open-ended leaves in *Minter v. District of Columbia*, 62 F. Supp. 3d 149 (D.C. Cir. 2015) – a case involving an

employee whose doctor reported that her condition rendered her "totally disabled" and would continue "indefinitely" *after* she missed three consecutive months of work due to sarcoidosis, rheumatoid arthritis, fibromyalgia and an intervening injury. Although the doctor advised the District that the employee "hope[d] to return to work in another three months," the D.C. Circuit held that the employee was not a "qualified individual with a disability" because she would be out of work for, at a minimum, six months, and could not attend work regularly.

Despite having rejected open-ended leave as a reasonable accommodation, the D.C. Circuit left the door open with respect to requests seeking leave for a definite, albeit extended period, in *Miller v. Hersman*, 759 F. Supp. 2d 1, 15–16 (D.D.C. 2010), a case involving a federal employee seeking leave for a six-month period. The agency denied the requested accommodation but offered no evidence that the extended period of leave would have created an undue hardship. The court accordingly denied the agency's motion for summary judgment on the employee's Rehabilitation Act claim. (The standards for determining employment discrimination under the Rehabilitation Act, which applies to employees of the federal government, are the same as those used in Title I of the ADA.) Accordingly, extended leave up to six months (or even more) may be a reasonable accommodation in Washington, DC, unless an employer can demonstrate that the length of leave requested by a disabled employee would constitute an undue hardship.

Regardless of location, employers should take a fresh look at how they handle reasonable accommodation requests, including how they evaluate requests for leave, whether block or intermittent, whether they allow employees to take long-term leave for non-ADA reasons, whether they offer light duty to certain employees and how they handle reassignment to a vacant position if and when they determine that leave is not feasible and that there is no accommodation that will enable the employee to perform the essential functions of his or her position. Of course, as always, employers are encouraged to engage in the interactive process early and often, and to consult with legal counsel before making a decision to terminate an employee following a request for leave or other accommodation due to a disability. While employers operating in the Seventh Circuit now have a better idea of whether and for how long they may have to permit an employee to take leave, time off is but one of the accommodations that should be considered and evaluated as part of the interactive process.

If you have any questions regarding the issues in this article, please contact **Elizabeth N. Hall**, **Meg Inomata** or any Vedder Price attorney with whom you have worked.

Elizabeth N. Hall
Shareholder
+1 (312) 609 7795
ehall@vedderprice.com

Meg Inomata
Associate
+1 (202) 312 3374
minomata@vedderprice.com

More Than Mere Loose Ends: Immigration Compliance During Mergers and Acquisitions

Mergers and acquisitions are often complex transactions involving numerous parties and myriad moving parts. While the parties are understandably focused primarily on the economic aspects of the deal, immigration compliance is an issue that should not be overlooked. The issues related to employment transitions and assessing I-9 liability are best addressed early in the process to allow time to adequately address matters that arise.

Businesses are operating in an enhanced enforcement environment—the risks for noncompliance are real and are likely to be costly.

Employee Transitions During the Merger or Acquisition Process

During a merger, acquisition or change of entity, employers must have a comprehensive plan to ensure that the employees transitioning to the new entity do not fall out of immigration status. Employers that fail to accurately assess their immigration needs risk business disruption or loss of key employees due to visa lapses. The following are considerations for employers retaining visa holders in the H-1B, TN, L-1 and green card categories.

- **H-1B:** The new entity must update all Public Access Files for employees continuing in the same employment. If the terms and conditions of employment will change after the transaction (*i.e.*, new job duties or worksite location), the new entity must file amended H-1B petitions. Finally, a new employer should conduct an assessment of whether it is an "H-1B dependent" employer, which may trigger additional obligations.

- **L-1:** Because employees qualify for L-1 status based upon the qualifying relationship between the foreign and U.S. entities, a detailed analysis of the corporate transaction is necessary to determine whether the qualifying relationship survives or has been terminated.

- **TN:** As with H-1B employees, any change in the terms and conditions of employment must be accompanied by a new TN petition or visa. Employees continuing without change must update their employer information when an extension petition is filed.

- **Green cards:** For ongoing permanent residency applications, the new employer must determine whether it is a successor-in-interest to the former employer. If the new employer does not qualify as a successor in interest under the immigration regulations, it may be necessary to re-start the green card process on behalf of

employees. Additionally, a new employer will have to determine the applicability of regulations allowing an employee to transition their application from the former employer.

I-9 Risk Assessment Before the Merger or Acquisition Deal

Due diligence is an important part of any financial transaction. Assessing risk is usually the predominant objective in determining a fair purchase price. Businesses are operating in an enhanced enforcement environment – the risks for noncompliance are real and are likely to be costly. Here are some important considerations for pre-deal due diligence:

- **Evaluation of Seller's I-9 Compliance Culture:** This involves understanding how Forms I-9 have been completed and how they are retained, including determining whether security and record-keeping controls are compliant with regulations.

- **Conducting Audits of Seller's Forms I-9:** The ability of the buyer to conduct an audit of the seller's I-9s is crucial in assessing the value of the seller's potential liabilities. Using external immigration experts to assess I-9 compliance will help a buyer determine potential monetary fines or penalties and aid in the creation of post-deal I-9 compliance strategies.

- **Understanding Seller's Compliance Regime:** In the event of I-9 audit by Immigration and Customs Enforcement, demonstrating a good-faith attempt to maintain compliance can factor heavily into the outcome of the audit, reducing potential fines. Buyers should examine a seller's I-9 compliance policies, training and internal enforcement mechanisms in order to understand the seller's overall compliance culture.

Immigration compliance does not have to be a complex process, even though the M&A process can be. Savvy buyers and sellers will utilize experienced immigration counsel to assess risk and mitigate liability throughout the merger or acquisition transaction.

If you have any questions regarding the issues in this article, please contact **Sara B. DeBlaze**, **Ryan M. Helgeson** or any Vedder Price attorney with whom you have worked.

Sara B. DeBlaze
Counsel
+1 (312) 609 7534
sdeblaze@vedderprice.com

Ryan M. Helgeson
Associate
+1 (312) 609 7729
rhelgeson@vedderprice.com

Take a Number: States and Cities Line Up to Ban Salary History Questions

A common inquiry in interviews and applications may soon land employers in hot water. States and municipalities across the country are passing legislation barring employers from asking job applicants about their salary histories, or using such information for the purpose of preparing a salary offer of a new hire. Several of these laws go into effect in 2018, and employers should be on notice of when and where they are in place.

Over 20 states have reportedly proposed legislation prohibiting salary history questions, from Texas and Georgia to New York and Washington D.C.

While the laws vary between jurisdictions, they generally aim to prevent employers from asking salary-related questions or from screening job candidates based on salary histories until an offer is formally made to the applicant. Some of the laws have unique nuances, including prohibiting employers from contacting an applicant's former company to confirm a salary amount without the employee's written consent, even after an offer has been made. In California, employers must provide applicants with the pay scale assigned to the relevant position sought upon reasonable request by the applicant.

As we reported in June of 2017, the New York City Council approved legislation prohibiting employers from inquiring about a job applicants' salary history, which became effective October 31, 2017. New York isn't alone. Several states, cities, counties, or localities have passed substantially similar legislation. Oregon's version of this law is already active, while a slew of acts will go into effect between the end of 2017 and the middle of 2018. They include:

- Delaware (effective December 14, 2017)
- Albany County (effective December 17, 2017)
- California (effective January 1, 2018)
- Puerto Rico (effective March 2018)
- San Francisco (effective July 1, 2018)
- Massachusetts (effective July 1, 2018)
- Philadelphia (planned effective date of May 23, 2017 stayed pending legislation challenging the constitutionality of the law).

Numerous other states and municipalities are following the trend. Over 20 states have reportedly proposed legislation prohibiting salary history questions, from Texas and Georgia to New York and Washington, D.C. Additionally, Pittsburgh and New Orleans have implemented similar laws that apply strictly to certain public workers.

Illinois juggled passage of a statewide ban on salary history with HB 2462, which was only recently resolved. After the Illinois House and Senate originally passed the bill with large bipartisan support, Governor Bruce Rauner issued a veto. The Illinois House voted to override the veto, but a November 9th vote in the Illinois Senate fell seven votes short of its own override, thereby letting the veto of the bill stand. The failure to pass it at the state level may provide an opening for Chicago or Cook County to pass similar legislation at the local level.

The laws are intended to close the gender gap between men and women, wading into territory normally covered by sex discrimination laws or equal pay acts. Employers in the jurisdictions implementing these laws will need to update their application forms. Further, hiring managers and interviewers will need to be trained to avoid questions prompting disclosure of salary at a previous position. Employers not yet impacted by the trend should be on the lookout for proposed legislation within their own city or state.

If you have questions regarding how these laws may apply to you, please contact **Elliot G. Cole** or any Vedder Price attorney with whom you have worked.

Elliot G.Cole
Associate
+1(312) 609 7590
ecole@vedderprice.com

Recent Accomplishments

Nicolas Anaclerio and **Joseph K. Mulherin** achieved dismissal of a significant class action for a national direct marketing company. Associates **Michelle T. Olson**, **Christopher A. Braham** and **Jennifer B. Cook**, also contributed to this win. The team applied a creative and aggressive strategy to moot the case, including establishing the unfitness of representative plaintiffs and forcing their withdrawal and rebutting the plaintiffs' attempts to substitute a new named plaintiff.

Sadina Montani recently won an appeal with the D.C. Department of Employment Services (DOES) on behalf of a modeling agency. DOES determined through

an initial audit that certain models were employees, rather than independent contractors. After a lengthy appeals process, DOES reversed its finding.

Amy L. Bess co-chaired the PLI annual Employment Law Institute in October, a two-day program on evolving employment law issues, that is designed for private practice attorneys, in-house counsel and HR professionals. Ms. Bess also spoke on a panel addressing "Thorny Workplace Accommodation Issues," such as leaves of absence, medical information accessible to employers under the ADA and return-to-work challenges and accommodations. Fellow Vedder Price shareholder **Joseph K. Mulherin** presented on employee and independent contractor classification, "gig economy" issues, joint employer relationships and service agreements.

Ayse Kuzucuoglu shared the presentation of a live 90-minute Strafford CLE webinar, "Litigation Holds in Employment Lawsuits: Creating an Early and Effective Plan for Collecting and Preserving ESI," on September 26. The webinar provided guidance to employment litigators on the complexities in creating and implementing litigation holds in collective, class action and individual lawsuits in the employment law arena.

Thomas M. Wilde presented an FMLA Compliance program to the human resources and management teams of a national manufacturing company in Los Angeles on October 25.

Sadina Montani hosted a live webinar presented by the DC Bar Pro Bono Center in September. The program, entitled "Exempt or Not Exempt – That Is the Question," discussed the exemptions and requirements regarding employee overtime under DC and federal laws.

New Labor & Employment Law Associates at Vedder Price

Dion L. Beatty as a student at Chicago-Kent College of Law, won competitive awards on both the Trial Advocacy and Moot Court teams and served as student editor of the *Employment Rights and Employment Policy Journal*. He earned the top grade in Employment Relationships, Employment Litigation, Trial Advocacy and Client Counseling, among other courses. In addition to his JD, Dion has earned a Master of Science in Human Resources and an MBA from DePaul University, as well as a Master of Social Work and Bachelor of Arts in Sociology from the University of Michigan. He clerked at two boutique litigation firms in Chicago, was a summer associate at Vedder in 2016 and a judicial extern for The Honorable Ann Claire Williams at the US Court of Appeals for the Seventh Circuit. Prior to law school, Dion acquired substantial experience as a Human Resources professional while employed in several businesses and was a Presidential Management Fellow while employed with the Social Security Administration for several years. He is fluent in Spanish and holds PHR certification and SHRM-CP designation.

Growing up in Detroit, Dion knew that he wanted to be a lawyer and was constantly aware of labor and employment issues. His broad work experience and focused education are the source of his understanding of client circumstances and the means to accomplish their goals.

Fabian Limon is pursuing a Master of Law in Employee Benefits at The John Marshall Law School while he begins work as an associate with Vedder Price. As a "One L" at John Marshall in 2014, Fabian was intrigued practically from Day One by the experience and intellect of a legal writing professor who was a former labor and employment lawyer. That led to becoming an avid member of the Trial and Moot Court teams and participation in six separate competitions, five of which involved employment issues. Additionally, he is fluent in Spanish and worked in the International Human Rights Clinic at the law school on refugee and asylum cases.

Fabian earned a Bachelor of Science degree at the University of Illinois and, following in his father's footsteps (40 years in uniform), he briefly served as a patrol officer with a suburban Chicago police department. Wholly committed to helping resolve and manage labor and employment issues, Fabian was delighted to become part of Vedder Price after spending two summers in our summer associate program (2015 and 2016).

Haley P. Tynes comes to the practice of labor and employment law from a diverse background of geology and environmental science, a civil and criminal judicial internship in a US district court in central New York and a business and securities fraud internship in a US Attorney's Office. She earned a Bachelor of Science degree with *cum laude* honors from Hofstra University and many additional academic awards. While at Brooklyn Law School, Haley served as associate research editor on the *Journal of Law and Policy*, was a Moot Court Honor Society trial division competitor and was awarded an international business law fellowship, a Lisle Scholarship and a legal academic award. She was president of the school's Labor and Employment Law Association, the Brooklyn Law School Student Bar Association and the Brooklyn Business Law Association and graduated with *cum laude* honors in 2017. Haley is very excited to join Vedder Price.

Lowell B. Ritter was awarded a Bachelor's degree in Business, concentrating in Human Resource Management, with distinction from Indiana University South Bend and received his law degree from the University of Notre Dame Law School *cum laude*, where he was awarded the ABA-Bloomberg BNA Award for Excellence in the Study of Labor and Employment Law. It was during his undergraduate studies that he was inspired to pursue a career practicing law, particularly solving legal issues in the workplace. During his time at Notre Dame, Lowell was executive articles editor for the *Notre Dame Journal of Legislation* and was an extern with the National Immigrant Justice Center, where he assisted in representing an asylum seeker. He was also a summer associate at Vedder Price and a legal extern at Whirlpool Corporation, where he worked directly with in-house labor and employment counsel, gaining valuable insight into employers' day-to-day challenges. Each engagement contributed varied exposure and experience to Lowell's well-rounded education in labor and employment law, policy, compliance, risk management and litigation.

Labor & Employment Law Group Members

Chicago

Thomas M. Wilde (Chair) ... +1 (312) 609 7821
Aaron R. Gelb (Editor) ..... +1 (312) 609 7844
Thomas G. Abram ..... +1 (312) 609 7760
Bruce R. Alper ..... +1 (312) 609 7890
Nicholas Anaclerio ..... +1 (312) 609 7538
Dion L. Beatty ..... +1 (312) 609 7940
Mark I. Bogart ..... +1 (312) 609 7878
Elliot G. Cole ..... +1 (312) 609 7590
Christopher T. Collins ..... +1 (312) 609 7706
Jennifer B. Cook ..... +1 (312) 609 7882
Thomas P. Desmond ..... +1 (312) 609 7647
Emily C. Fess ..... +1 (312) 609 7572
Elizabeth N. Hall ..... +1 (312) 609 7795
Thomas G. Hancuch ..... +1 (312) 609 7824
Benjamin A. Hartsock ..... +1 (312) 609 7922
J. Kevin Hennessy ..... +1 (312) 609 7868
John J. Jacobsen, Jr. ..... +1 (312) 609 7680
Edward C. Jepson, Jr. ..... +1 (312) 609 7582
Daniel B. Lange. ..... +1 (312) 609 7870
Fabian Limon ..... +1 (312) 609 7972
Philip L. Mowery ..... +1 (312) 609 7642
Joseph K. Mulherin ..... +1 (312) 609 7725
Margo Wolf O'Donnell ..... +1 (312) 609 7609
Caralyn M. Olie ..... +1 (312) 609 7796
Michelle T. Olson ..... +1 (312) 609 7569
Cara J. Ottenweller ..... +1 (312) 609 7735
Robert F. Simon ..... +1 (312) 609 7550
Patrick W. Spangler ..... +1 (312) 609 7797
Kenneth F. Sparks ..... +1 (312) 609 7877
Kelly A. Starr ..... +1 (312) 609 7768
Mark L. Stolzenburg ..... +1 (312) 609 7512
Jessica L. Winski ..... +1 (312) 609 7678
Anna Zielinski ..... +1 (312) 609 7602

New York

Kimberly R. Greer ..... +1 (212) 407 7647
Ashley B. Huddleston ..... +1 (212) 407 7793
Neal I. Korval ..... +1 (212) 407 7780
Blythe E. Lovinger ..... +1 (212) 407 7770
Daniel J. LaRose ..... +1 (212) 407 6989
Marc B. Schlesinger ..... +1 (212) 407 6935
Hayley P. Tynes ..... +1 (212) 407 6997
Jonathan A. Wexler ..... +1 (212) 407 7732

Washington, DC

Amy L. Bess ..... +1 (202) 312 3361
Meg Inomata ..... +1 (202) 312 3374
Sadina Montani ..... +1 (202) 312 3363

London

Esther Langdon ..... +44 (0)20 3667 2863
Jonathan Maude ..... +44 (0)20 3667 2860

San Francisco

Brendan G. Dolan ..... +1 (415) 749 9530
Ayse Kuzucuoglu ..... +1 (415) 749 9512
Lucky Meinz ..... +1 (415) 749 9532
Lowell B. Ritter ..... +1 (415) 749 9506
Brittany A. Sachs ..... +1 (415) 749 9525
Heather M. Sager ..... +1 (415) 749 9510

Los Angeles

Christopher A. Braham ..... +1 (424) 204 7759
Thomas H. Petrides ..... +1 (424) 204 7756

VedderPrice

Labor & Employment Law Group

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.

Stay Connected