VEDDER PRICE

Labor Law

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Labor and employment law trends of interest to our clients and other friends.

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Cookie-Cutter Employment Policies Don't Cut It

Seventh Circuit Decision Underscores Need to Tailor Policies to the Workforce

A solid defense to a claim of sexual harassment is evidence that the complaining employee never reported the harassment before filing a charge. But what if the company's anti-harassment policy doesn't explain how employees should report such matters, or fails to identify the person to whom complaints should be made?

In an effort to cut costs, or simply because they think all policies are essentially the same, employers may be tempted to use a canned anti-harassment policy downloaded from the internet or sent to them by an HR colleague at another company. Be careful. Cutting corners can be costly if the policy is not geared to your workforce or properly administered.

In *EEOC v. V&J Foods, Inc.*, No. 05-C-194 (November 7, 2007), the U.S. Court of Appeals for the Seventh Circuit (Illinois, Indiana and Wisconsin) recently held that a fast food company, with a workforce comprised mostly of teenagers holding their first paying jobs, could not rely on its current policy to avoid liability for sexual harassment because that policy did not describe a reasonable mechanism for employees to lodge complaints. What is "reasonable" depends on the employment circumstances, including the capabilities of the workforce. "Knowing that it has many teenage employees, the company was obligated to suit its procedures to the understanding of the average teenager," the court said. V&J did not meet this obligation. Indeed, in the court's view the policy was so poorly drafted it was likely to confuse adults.

The policy did not clearly identify the person or persons to whom an employee could report harassment. Although stating that complaints in general should be made to the district manager, that position was not included in the list of corporate managers identified in an employee handbook. There was evidence that employees confused district managers with restaurant or general managers. Because the harasser in this case was a restaurant manager, the court considered it possible that an employee would believe the only avenue of recourse was to complain to the harasser.

V&J pointed out that there was a "hotline" number on a statement included with each employee's pay check. However, the number appeared in an inconspicuous place and did not identify the person to ask for when calling the hotline. Further, the stated purpose of the hotline was to enable employees to "comment" about the company. The court noted that a "comment" is not the same as a complaint.

The court went on to describe a reasonable and inexpensive complaint mechanism. V&J should have posted a brief notice in a break area (where it would not be seen by customers) telling employees wishing to lodge a harassment complaint to call a toll-free number included in the notice. That number, the court

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said, would ring in the human resources office, where it would be answered by someone who would inform the caller that they had reached human resources.

If the managers responsible for implementing the policy are not adequately trained, the mere existence of a reasonable policy may be insufficient to avoid liability. V&J compounded its problem by failing to train its managers. When the female plaintiff asked a male assistant manager for a phone number to report the harassment, he said he wasn't sure there *was* such a number, or that he could give it out if it existed. When he did provide a number, it was the wrong number. The plaintiff, on her own initiative, located and called the home phone number of a woman from the corporate training office, who apparently hung up on her.

The reach of the *V&J* decision extends beyond the fast food industry. Employers generally should revisit their anti-harassment policies and confirm that they are appropriately tailored to the workforce. On the most basic level, be sure your employees can read the policy. If you have large numbers of employees whose native language is other than English, have the policy translated into that other language. To account for varying levels of sophistication or if there are issues or behaviorial patterns present in one area and not the other, you may need separate policies for different segments of your workforce. If you have employees who work at times when the human resources representatives are off duty, be sure the policy provides a complaint mechanism during non-regular business hours.

To underscore your intolerance for workplace harassment, periodically reissue the policy to your employees. Make sure you have a regular, documented practice of distributing the policy to new hires. And train your managers. They must understand what harassment is and be prepared to step in if they see it. They also must know how to respond if asked for help or to explain the policy.

Just as you should avoid cookie cutter policies, steer clear of one-size-fits-all training programs. There are many vendors willing to sell you live, on-site training or computer-based learning modules. Many of them are good, but check to see if they are relevant. Video segments showing examples of inappropriate conduct may be unhelpful to a workforce of production and maintenance workers, or to consultants who work in your customers' factories.

Vedder Price regularly counsels employers on developing and administering employment policies and investigating harassment and discrimination complaints. If you have questions about such matters or EEO issues in general, please call Aaron Gelb (312-609-7844) or any other Vedder Price attorney with whom you have worked.

More Amendments to the New York Labor Law

Employers Must Document Compensation of Commissioned Salespeople to Avoid Pay Disputes

As of October 16, 2007, New York employers must enter into written compensation contracts with salespeople who are paid on commission, or risk an adverse finding on compensation terms in any NYS DOL proceeding. NY CLS Labor § 191(1)(c). Specifically,

- employers must prepare a document showing the terms of the commissioned salesperson's compensation;
- the document must describe how wages, salary, drawing account, commissions and all other monies earned and payable will be calculated (if the document provides for a recoverable draw, the frequency of reconciliation must be included);
- the document must also describe the payment of wages, salary, drawing account, commissions and all other monies earned and payable in the event of termination of employment by either party;
- the document must be signed by the employer and salesperson; and
- the document must be kept on file by the employer for at least three years and made available upon request to the New York State Department of Labor ("NYS DOL").

The required document content is limited to compensation matters. The signing of the document by the employer and commissioned salesperson does not change the status of such salespersons who are employed at will. However, it would be prudent to make specific reference in the document to the salesperson's at-will status.

If an employer fails to produce such documentation upon request of the NYS DOL in connection with any proceeding, the NYS DOL will assume that the terms of compensation alleged by the salesperson are accurate, even if the employer says otherwise.

Salary Threshold Increase for Wage Payment Exemptions Affecting Executive, Administrative or Professional Employees

Currently, "bona fide executive, administrative or professional" employees whose earnings are in excess of $600 per week are excluded from certain of the statute's wage payment provisions. As of January 14, 2008, the threshold number will increase to $900. NY CLS Labor § 190(7). Consequently, such employees earning less will have to be paid at least semi-monthly, and employers will have to obtain written consent in order to pay them by direct deposit. *See* NY CLS Labor § 192. This change does *not* raise the amount that executive, administrative or professional employees must be paid in order to qualify for exemption from New York state overtime requirements (that amount remains $536.10 per week).

New Civil Penalties for Violation of Day of Rest/ Meal Period Requirements

Criminal prosecution has been the only (and rarely used) method of enforcement available to the NYS DOL for violations of section 161 (generally mandating at least one day of rest per week) and section 162 (requiring that certain categories of employees be provided meal breaks). As of January 14, 2008, however, the NYS DOL will also be permitted to seek civil penalties for these violations. NY CLS Labor § 218. Civil penalties for repeat offenders may reach $3,000 per violation. This change will not create any private right of action; the right to seek civil penalties will remain exclusively with the NYS DOL.

If you have any questions about these recent amendments, or about state or federal labor and employment law in general, please contact Alan Koral (212-407-7750), Jonathan Wexler (212-407-7732), Daniel Green (212-407-7735), or any other Vedder Price attorney with whom you have worked.

In Illinois, Conversion to At-Will Status Requires Bargained-For Consideration

HR professionals and in-house counsel are often faced with the challenging task of getting out from under commitments in old employee handbooks, such as promises of progressive discipline, discharge only "for cause" or tenured employment. The Illinois Supreme Court and the U.S. Court of Appeals for the Seventh Circuit ruled in the late 1990s that an employer could not revoke such "employment contracts" by unilaterally implementing a revised handbook containing "at-will" disclaimers. Nor would the mere continuation of employment under a revised handbook provide sufficient consideration for conversion to at-will employment status.

These decisions did not provide Illinois employers with much help as to what kind of consideration would be necessary to bind the employee. However, the Illinois Appellate Court has just ruled that an employer must provide "bargained for" consideration in order to convert an employment contract to an at-will employment relationship. *Ross v. May Co. d/b/a Marshall Field's & Co.*, Case No. 1-06-0239 (November 13, 2007).

In *Ross*, the plaintiff claimed that Marshall Field's breached his employment contract when it terminated him without following the progressive discipline policy contained in a 1968 employee handbook (which did not have an at-will employment disclaimer) in effect when he was hired. Marshall Field's later revised the handbook to include disclaimers, but the court held that those subsequent disclaimers could not modify the employment contract created by the 1968 handbook because the plaintiff received no consideration to support his conversion to at-will employment. The court held that no consideration existed even though Marshall Field's continued to employ the plaintiff with

new benefits because the new benefits were available to all eligible employees. The court said that Marshall Field's should have bargained with the employees bound by the old handbook and obtained their consent to at-will status in exchange for consideration over and above continued employment.

What does this decision mean for Illinois employers? First, it affects only employers who have modified or are considering modifying a handbook that previously created an employment contract. Second, while the court said that Marshall Field's was "exaggerating" the "logistical nightmare" scenario of trying to individually bargain with each employee, we now know that something more than continued employment or a workforce wide rollout of new benefits is needed to support a conversion to at-will status. So, when deciding, for example, to implement an individualized bonus, employment arbitration agreement, stock option or incentive plan, consider tying those new benefits to a written acknowledgement of "at will" employment status. Creative thinking and careful drafting will be required.

If you have any questions about your employee handbook or employment contracts, please contact J. Kevin Hennessy (312-609-7868), Angela P. Obloy (312-609-7541) or any Vedder Price attorney with whom you have worked.

VEDDER, PRICE, KAUFMAN & KAMMHOLZ, P.C.

About Vedder Price

Vedder, Price, Kaufman & Kammholz, P.C., is a national full-service law firm with over 250 attorneys in Chicago, New York, Washington, D.C. and New Jersey. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, and health care, trade and professional association, and not-for-profit law.

Questions or comments concerning the newsletter or its contents may be directed to its Editor, James S. Petrie (312-609-7660), or the firm's Labor Practice Leader, Bruce R. Alper (312-609-7890), or the Managing Shareholder of the firm's New York office, Neal I. Korval (212-407-7780), or in New Jersey, John E. Bradley (973-597-1100).

Chicago
222 North LaSalle Street
Chicago, Illinois 60601
312-609-7500
Fax: 312-609-5005

New York
1633 Broadway
47th Floor
New York, New York 10019
212-407-7700
Fax: 212-407-7799

Washington, D.C.
875 15th Street, N.W.
Suite 725
Washington, D.C. 20005
202-312-3320
Fax: 202-312-3322

New Jersey
Five Becker Farm Road
Roseland, New Jersey 07068
973-597-1100
Fax: 973-597-9607

www.vedderprice.com