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# Employer Update

## Supreme Court's *Vance* Decision Casts Long Shadow Over Future Title VII Cases

*By Gary D. Friedman and Ami G. Zweig*

**In This Issue**



In a decision that will likely result in numerous workplace harassment cases being dismissed at the summary judgment stage and compel employers to more clearly delineate the job responsibilities of their employees to identify those who have "the authority to take tangible employment actions," the US Supreme Court surgically narrowed the scope of who constitutes a "supervisor" under Title VII in its recent *Vance v. Ball State Univ.,* No. 11-556, 2013 WL 3155228 (U.S. June 24, 2013) decision. In flatly rejecting the EEOC's definition of "supervisor" as "nebulous," "murky," and a "study in ambiguity," the Court adopted a standard that *neither of* the parties on appeal had proposed but that could be "readily applied" by litigants, courts, and juries, and was consistent with the Court's attempt to balance the interests of employers and employees in its seminal decisions in *Faragher v. Boca Raton*, 524 U.S. 775 (1998) and *Burlington Industries Inc. v. Ellerth,* 524 U.S. 742 (1998). Now, only those who have the "authority to inflict direct economic injury" will be viewed as supervisors, which will sharply limit the number of instances in which employers can be held strictly liable for workplace harassment.

### Case Background

Maetta Vance, an African-American employee in Ball State University's dining services department, filed EEOC charges against the University in December 2005 and August 2006, alleging, *inter alia,* that fellow employee Saundra Davis had used racial epithets and had made a threatening remark to Vance.[1] Vance then filed suit in the Southern District of Indiana, bringing a Title VII hostile work environment claim against the University.[2] On summary judgment, Ball State argued that it was not liable for Davis's alleged conduct because Davis was merely Vance's co-worker, not her supervisor. This distinction is crucial because under the *Faragher/Ellerth* framework, employers are liable for a co-worker's harassing or discriminatory conduct only if the employer was *negligent* in discovering or remedying the conduct, but are *strictly liable* for such conduct committed by a supervisor, unless the supervisor's conduct did not result in a tangible employment action and the employer establishes, as an affirmative defense, that it exercised reasonable care to prevent and correct the harassment and the plaintiff unreasonably failed to take advantage of these preventive or corrective opportunities. *See Vance*, 2013 WL 3155228, at *3.

The district court agreed with Ball State, citing the controlling Seventh Circuit standard that a "supervisor is someone with the power to *directly* affect the terms and conditions of the plaintiff's employment" – meaning, "the power to hire, fire, demote, promote, transfer, or discipline an employee" – powers that Davis did not have vis-à-vis Vance.[3] Finding that the University was not negligent in discovering or remedying Davis's conduct, the district court granted summary judgment for Ball State. On appeal, the Seventh Circuit affirmed, noting the existence of a circuit split on the definition of "supervisor" in Title VII cases but reiterating that it "ha[d] not joined other circuits in holding that the authority to direct an employee's daily activities establishes supervisory status under Title VII."[4] The Supreme Court granted Vance's petition for a writ of certiorari to decide the proper test for supervisory status under Title VII: the Seventh Circuit's more restrictive test, which had been adopted by the First, Third, Sixth, and Eighth Circuits, or the more expansive test propounded by the EEOC and adopted in the Second, Fourth, Ninth, and Tenth Circuits, which focuses on the authority to oversee an employee's daily work assignments.[5]

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Surprisingly, in arguing its case before the Supreme Court, Ball State conceded that "the 'hire, fire, demote' test" – despite the backing of five Circuits – "does not necessarily capture all employees who may qualify as supervisors[,]" but rather, "vicarious liability also may be triggered when the harassing employee has the authority to control the victim's daily work activities in a way that materially enables the harassment."[6] In fact, at oral argument, Justice Scalia scolded the University for not defending the Seventh Circuit standard, remarking that "[w]e took [this case] principally to decide whether the Seventh Circuit rule … was right or not. And you don't even defend that. So there is nobody here defending the Seventh Circuit."[7] However, Ball State simply contended that, on the record facts, Davis was not Vance's supervisor even under the more expansive test.

## The Supreme Court's Decision

Unmoved by Ball State's agreement with Vance that the Seventh Circuit test was overly restrictive, the Supreme Court adopted the Seventh Circuit test in a 5-4 decision written by Justice Alito and joined by Chief Justice Roberts and Justices Scalia, Kennedy, and Thomas, holding that "an employer may be vicariously liable for an employee's unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a 'significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[8]

In *Vance*, the Court's laser-like focus was on creating a standard that had clarity and would avoid a fact-intensive analysis in nearly every case. Specifically, the Court derided the EEOC Enforcement Guidance as "a study in ambiguity" and remarkably "vague," as it relied on such "nebulous" concepts as "sufficient authority," authority to assign more than a "limited number of tasks," and authority that is exercised more than "occasionally." By contrast, the Seventh Circuit test "can be readily applied" and will often allow for supervisor status to be resolved at an early stage of litigation, thereby "simplif[ying]" matters for the jury. Under the EEOC's approach, the Court explained, "the danger of jury confusion" would be "particularly high" because the jury would be "faced with instructions on alternative theories of liability under which different parties bear the burden of proof."

The Court rejected Vance's reliance on definitions of "supervisor" in other contexts, finding that in colloquial uses the term "lacks a sufficiently specific meaning to be helpful for present purposes" and that the National

Labor Relations Act's broad definition of "supervisor" "reflect[s] the NLRA's unique purpose, which is to preserve the balance of power between labor and management," and is therefore "inapposite in the context of Title VII, which focuses on eradicating discrimination." Rather, the Court explained, because "supervisor" does not appear in Title VII but "was adopted by this Court in *Ellerth and Faragher*[,]" its meaning is best understood through "the highly structured framework that those cases adopted[,]" which "draws a sharp line between co-workers and supervisors" – *i.e.*, those who have "'been empowered by the company *as a distinct class* of agent to make economic decisions affecting other employees under his or her control'" (emphasis in original). Under the *Ellerth/Faragher* framework, the Court determined, "the authority to take tangible employment actions is the defining characteristic of a supervisor" – which includes the "authority to inflict direct economic injury" – thereby making the Seventh Circuit test consistent with Supreme Court precedent.

> **Undoubtedly, *Vance* is a significant victory for employers, as it limits the circumstances in which companies will face strict liability under Title VII and, likely, the other federal anti-discrimination statutes.**

## Justice Ginsburg's Dissent

In a blistering dissent joined by Justices Breyer, Sotomayor, and Kagan, Justice Ginsburg took the Court's majority to task for "ignor[ing] the conditions under which members of the work force labor, and disserv[ing] the objective of Title VII to prevent discrimination from infecting the Nation's workplaces." She explained that "[w]hat mattered" in *Faragher* and *Ellerth* was that the harassers "took advantage of the power vested in them as agents of [their employer] to facilitate their abuse[,]" and lamented that the majority "misses the forest for the trees" because "[a] supervisor with authority to control subordinates' daily work is no less aided in his harassment than is a supervisor with authority to fire, demote or transfer." Fearing that the majority's "decidedly employer-friendly" decision "will leave many harassment victims without an effective remedy and undermine Title VII's capacity to prevent workplace harassment[,]" Justice Ginsburg called on Congress to "correct this Court's wayward interpretation of Title VII" (as it did in passing the Lilly Ledbetter Fair Pay Act of 2009), stating, "The ball is once again in Congress' court to correct the error into which this Court has fallen, and to restore the robust protections against workplace harassment the Court weakens today."

## Implications for Employers

Undoubtedly, *Vance* is a significant victory for employers, as it limits the circumstances in which companies will face strict liability under Title VII and, likely, the other federal anti-discrimination statutes, such as the Americans with Disabilities Act and the Age Discrimination in Employment Act, neither of which define the term "supervisor." *Vance's* definition of "supervisor" is unlikely to apply in the context of the NLRA, since Justice Alito specifically distinguished Title VII supervisory status from NLRA supervisory status, or to the Fair Labor Standards Act, as the regulation concerning the FLSA's "executive" exemption incorporates concepts similar to the EEOC Enforcement Guidance, such as directing the work of other employees and having input into – but not ultimate authority regarding – hiring and firing decisions. *See* 29 C.F.R. § 541.100(a)(3)-(4).

However, *Vance* is likely to have an impact on determining what constitutes an "adverse employment action" in the context of Title VII (and ADEA and ADA) retaliation claims. Under *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), alleged retaliatory activity is actionable if it is "materially adverse," meaning that "it well might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" In determining what constitutes a materially adverse employment action, courts should view this question through the prism of *Vance* and its focus on activities that inflict "direct economic injury."

In the wake of *Vance*, employers should carefully review scope and chains of authority as reflected in job descriptions, employee handbooks, organizational charts, and other pertinent company documents to determine their accuracy and whether they clearly delineate who does and does not have the authority to make decisions with respect to hiring, firing, demotions, reassignments, and other tangible employment actions. However, employers should be wary of the consequences of being overly restrictive in defining who has this authority, as doing so might, in addition to impairing business operations and company decision-making, adversely impact the employer's ability to assert the attorney-client privilege in certain situations (under the framework established by *Upjohn Co. v. United States*, 449 U.S. 383 (1981)), and might force that narrow band of top-level supervisors to delegate their authority to subordinates who have closer contact with the affected employee, which may qualify these lower-level employees as supervisors under Title VII.

It is also important for employers to recognize the limitations of *Vance's* reach. For starters, it remains to be seen just how restrictive courts will be, in practice, in defining what constitutes "economic consequences" for purposes of determining supervisory status. In addition, although many state and local laws follow Title VII jurisprudence on key principles such as "supervisory status," some jurisdictions expressly exceed the boundaries of Title VII and may not be inclined to follow *Vance*. For instance, California's Fair Employment and Housing Act provides a statutory definition of "supervisor" that incorporates the EEOC's Guidance definition of "the responsibility to direct" other employees (Cal. Gov't Code § 12926(r)). Similarly, New York City's Human Rights Law, though it does not define "supervisor," has been held to be "more compatible with" the "broader conception [of supervisor status] adopted by the Second Circuit[.]"[9] Particularly given the statutory mandate that the NYCHRL be "construed liberally for the accomplishment of [its] uniquely broad and remedial purposes" regardless of whether federal or state anti-discrimination laws have been so construed (New York City, N.Y., Code § 8-130), it remains to be seen whether courts interpreting the NYCHRL will apply *Vance* in harassment and discrimination cases.

Finally, it is essential for employers to remember that *Vance* does not altogether preclude liability for workplace harassment. Employers must remain vigilant in maintaining and enforcing robust anti-harassment policies, keeping a strong framework in place for reporting and investigating internal complaints about harassment, and providing regular anti-harassment trainings for their employees – particularly those with supervisory authority.

Litigants should keep an eye out for whether Congress might heed the dissent's plea for legislation overturning the *Vance* decision, as it did in enacting the Lilly Ledbetter Fair Pay Act of 2009, the first bill signed into law by President Obama, whose Administration has maintained a focus on gender equality in the workplace through the creation of the National Equal Pay Task Force. But barring any such legislative activity, *Vance* is the law of the land, and employers should review their policies and practices to ensure that they are in a position to benefit from the Supreme Court's decision.



1 *Vance v. Ball State Univ.*, 646 F.3d 461, 465-67 (7th Cir. 2011).

2 *Vance v. Ball State Univ.*, 2008 WL 4247836, at *11 (S.D. Ind. Sept. 10, 2008).

3 *Vance*, 2008 WL 4247836, at *12 (quotation marks and citations omitted) (emphasis in original).

4 *Vance*, 646 F.3d at 470.

5 *See* Petition for a Writ of Certiorari at 14-15, *Vance v. Ball State Univ.*, No. 11-556 (U.S. Oct. 31, 2011), 2011 WL 5229301, at *13-16.

6 Brief for Respondent at 1-2, *Vance v. Ball State Univ.*, No. 11-556 (U.S. Oct. 19, 2012), 2012 WL 5208645, at *1-2.

[7] Transcript of Oral Argument at 35, *Vance v. Ball State Univ.*, No. 11-556 (U.S. Nov. 26, 2012), 2012 WL 5903151.

[8] *Vance*, 2013 WL 3155228, at *7.

[9] *O'Neil v. Roman Catholic Diocese of Brooklyn*, 927 N.Y.S.2d 818 (Sup. Ct. 2011), aff'd, 949 N.Y.S.2d 447 (2012), leave to appeal denied, 20 N.Y.3d 860 (2013).

# NYDOL's Proposed Wage Deduction Regulations

*By Jeffrey S. Klein, Nicholas J. Pappas, and Celine J. Chan*

In a previous article, we discussed the wage deduction legislation that Governor Cuomo signed into law in September 2012, which amended New York Labor Law § 193 and expanded the types of deductions that an employer permissibly may make from employees' wages.[1] Although the legislation took effect in November 2012, the new law also provides that wage deductions must comply with regulations promulgated by the New York Department of Labor (NYDOL). N.Y. LAB. LAW § 193(1)(c)-(d). To that end, approximately six months after the effective date of the new law, the NYDOL published its proposed wage deduction regulations in the May 22, 2013 issue of the *New York State Register*, and received public comments through July 6, 2013. Although these regulations provide some guidance to employers, importantly, they are not yet in final form, and employers should be aware that they are still subject to potential revisions. In this article, we review the newly proposed regulations, including new rules regarding wage deductions for overpayments and salary advances and deductions "for the benefit of the employee." We also make some practical suggestions that employers may wish to consider in anticipation of complying with these proposed regulations.

## Deductions "for the Benefit of the Employee"

The amended Labor Law § 193 states that employers may make certain enumerated deductions from employee wages.[2] N.Y. LAB. LAW § 193(1)(b).

In addition to the permissible wage deductions specifically listed in the statute, § 193(1)(b) contains a "catch-all" that also permits deductions for other "similar payments for the benefit of the employee." The proposed regulations seek to clarify that wage deductions are considered to be "for the benefit of the employee" when they provide financial or other support for the employee, the employee's family, or a charitable organization, and are limited to the following seven categories: (i) health and welfare benefits; (ii) pensions and retirement benefits; (iii) child care and educational benefits; (iv) charitable benefits; (v) representation dues and assessments; (vi) transportation; and (vii) food and lodging. The NYDOL's proposed regulations also provide some illustrative examples of the types of deductions permitted within each of the aforementioned categories.

The proposed regulations warn that mere "convenience" is not a recognized benefit for determining whether any given wage deduction is "for the benefit of the employee." For example, according to the NYDOL, if an employer offers to cash an employee's paycheck, the employer may not deduct a fee for providing that service because mere convenience of a paycheck cashed by an employer does not provide the requisite "benefit to the employee." Moreover, the proposed regulations explain that although employers are not precluded from making deductions in all cases where there is a benefit *to the employer,* any "deductions that result in financial gain to the employer at the expense of the employee" may call into question whether a given deduction truly provides the requisite "benefit to the employee."

The proposed regulations also include a non-exhaustive list of deductions that the NYDOL deems "not similar" to the permissible deductions that may be taken "for the benefit of the employee," including: (i) employee purchase of tools, equipment, and work attire; (ii) recoupment of unauthorized expenses; (iii) repayment of employer losses; (iv) penalties for misconduct or resigning without notice; and (v) contributions to political campaigns.

The proposed regulations would eliminate the current regulation requiring that any non-enumerated deductions for "similar payments for the benefit of the employee" not exceed ten percent of the gross wages due to the employee in a payroll period.

## Deductions for Overpayments

The amended Labor Law § 193 permits an employer to deduct from an employee's wages for an overpayment due to mathematical or other clerical error. N.Y. LAB. LAW § 193(1)(c). The proposed regulations do not expressly require written authorization or consent from employees for employers to make wage deductions for such overpayments. However, the proposed regulations do govern the specific timing – depending on the size of the overpayment to be reclaimed – and the required content of a Notice of Intent that employers must provide to employees regarding their intent to commence deductions to recover such overpayments. But the proposed regulations do not specify the manner – whether paper or electronic – by which employers are permitted to provide the required Notice of Intent.

The proposed regulations require employers to adopt a procedure whereby employees may dispute the alleged overpayment and/or terms of recovery, or seek to delay recovery. The proposed regulations specifically detail the way in which employees may contest an alleged overpayment, and how and when employers must respond to employees' challenges. Employees must be informed in the Notice of Intent to commence deductions of the employer's available dispute resolution procedure, including the process by which employees may contest the overpayment and/or terms of recovery or a reference to where such description of the process is located. Employers must also specifically provide, in the Notice of Intent, the date by which the employee shall contest the overpayment. Furthermore, the proposed regulations expressly indicate that any dispute resolution procedures in existing or new collective bargaining agreements that provide at least as much protection as described in the proposed regulations will be deemed to comply with the regulations.

If an employee invokes the employer's dispute resolution process to challenge an overpayment, the employer may not commence any wage deductions until at least three weeks after issuing a final determination following the steps of the employer's dispute resolution procedure. An employer's failure to afford employees a compliant dispute resolution procedure creates a presumption that a contested deduction was impermissible.

> **Approximately six months after the amended wage deduction law became effective, the New York Department of Labor published proposed regulations that would cover wage deductions for overpayments and salary advances and deductions "for the benefit of the employee."**

If an employer may properly proceed to recover an overpayment following a final determination in the dispute resolution process, two different rules govern the amount of permissible recovery. If the overpayment is less than or equal to the employee's net wages after other permissible deductions in the next wage payment, the employer may recover the entire overpayment from the next wage payment. But if the recovery would exceed the employee's net wages in the subsequent wage payment, the employer may not recover more than 12.5% of the gross wages from the next wage payment, nor shall the deduction reduce the employee's effective hourly wage below the state minimum wage.

## Deductions for Advances

The amended Labor Law § 193 permits an employer to deduct from wages for repayment of salary advances. N.Y. LAB. LAW § 193(1)(d). The proposed regulations define "advance" as the "provision of money by the employer to the employee based on the anticipation of the earnings of future wages." While the proposed regulations state that certain monies provided, if accompanied by interest or fees, are *not* advances, the regulations do not expressly provide whether the definition of "advances" includes other elements of compensation, such as advanced vacation pay. The proposed regulations prohibit employers from giving or deducting any additional advances until the existing advance has been repaid in full.

Pursuant to the proposed regulations, prior to giving any advance to an employee, the employee shall give written authorization for the repayment deduction(s) to be made. This authorization must specify the amount of the advance, the amount to be deducted to repay the advance, in total and per wage payment, and the dates each deduction will be taken. The authorization would also have to include notice that the employee may contest any deduction which is not in accordance with the advance authorization. According to the proposed regulations, the authorization can be revoked only prior to the employer providing the advance. The proposed regulations also permit employers to include, as part of the advance authorization, a "total reclamation" provision, effectively enabling employers to deduct the remaining balance of the advance from

**Although the proposed regulations are not in their final form yet, employers should be prepared for certain provisions to impose additional pay practice obligations, which may cause employers to incur related costs.**

the employee's last wage payment should employment end prior to the expiration of the other terms of the written advance authorization.

As with deductions for overpayments, the proposed regulations require employers to implement a dispute resolution procedure that enables employees to dispute the amount and frequency of deductions not made in accordance with the terms of the written authorization notice. The proposed regulations also detail the employer's response obligations to an employee's objection. Should an employee use the employer's dispute resolution procedure, the employer shall cease deductions until it replies to the employee's objection and any appropriate adjustments are made. Any delay in repayment due to the dispute resolution procedure will extend the authorized time frame within which the employer may deduct to recover the advance. Just as with deductions for overpayments, an employer's failure to implement the requisite dispute resolution process will create a presumption that the contested deduction was prohibited.

## Remedies

If an employer takes deductions from an employee's wages in violation of § 193, the Labor Law provides a number of remedies. First, if an employee prevails on a wage claim under Article Six of the Labor Law, the employer will be liable for costs and reasonable attorney's fees, and unless the employer proves that it had a good faith basis for believing that its underpayment of wages was in compliance with the law, then the employee shall also be entitled to recover from the employer liquidated damages in the amount of 100 percent of the total amount of wages found to be due. N.Y. LAB. LAW § 198(1-a). Moreover, an employer, as well as the officers and agents of any corporation, partnership, or limited liability company, who knowingly commits a wage payment violation by failing to pay the wages of any of its employees in accordance with the provisions of the Labor Law, may be subject to criminal penalties and fines. N.Y. LAB. LAW § 198-a(1). The term "knowingly" has been interpreted as requiring actual "knowledge of the existence of the facts constituting a crime." *See People v. Lustig,* 94 Misc.2d 669, 673 (N.Y. City Crim. Ct. 1978), *rev'd on other grounds,* 101 Misc.2d 54 (N.Y. Sup. Ct. 1979). Finally, the NYDOL also has the authority to seek civil penalties in the amount of $500 per violation of the Labor Law. N.Y. LAB. LAW § 197.

## Practical Considerations

The proposed regulations currently are subject to revision based on comments received during the public comments period. In their present form, however, the proposed regulations expressly limit an employer's ability to provide a "convenient" method for employees to pay for incidental expenses incurred at the workplace unless they are deemed "for the benefit of the employee" and fall within one of the permissible categories. While it appears that "welfare benefits" is the category within which such incidental expenses could most likely fall, employers will undoubtedly seek further clarification from the NYDOL and courts as to the scope of these "welfare benefits," particularly since the examples in the proposed regulations are expressly "not exclusive."

Although the proposed regulations are not yet in their final form, employers should still be prepared for certain provisions to impose additional pay practice obligations, which may cause employers to incur related costs. First, employers should begin developing their dispute resolution procedures for overpayment and advance deductions, and training their managers and human resources staff to implement, execute, and monitor the processes appropriately. Indeed, the failure to comply with this aspect of the proposed regulations could seriously inhibit an employer's ability to defend against a claim of unlawful deductions.

Employers also should begin drafting template Notice of Intent forms for deductions of overpayments and authorization forms for salary advance deductions and deductions made "for the benefit of the employee" to conform to the requirements of the proposed regulations, recognizing of course that the requirements are still subject to revision.

Employers should also review their employee handbooks and payroll systems to ensure that policy statements and payroll systems (some of which may be automatic) are updated to comply with the timing and frequency regulations in connection with wage deductions. For example, employers would have to make clear in their policies that once an employee has received an advance, the employer will not give any further advances until any existing advance has been fully repaid. Payroll systems could also be configured to recognize when any outstanding advance balance remains in an employee's name. Employers may also wish to evaluate whether their payroll systems are capable of handling any newly permitted wage deductions in compliance with the proposed regulations.

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[1] *See* Jeffrey S. Klein and Nicholas J. Pappas, *Pending Amendments to New York Wage Deductions Law*, NYLJ, Aug. 6, 2012, available at http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202565947237&slreturn=20130612163227.

[2] *See id.*

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