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## **U.S. Securities and Exchange Commission (SEC) Ends Prohibition on General Solicitation for Private Offerings Under Rule 506**

As part of the rulemaking implementing sections of the JOBS Act of 2012, the SEC on July 10 adopted rules eliminating the prohibition against advertising and general solicitation of purchasers for private placement offerings of securities conducted pursuant to Rule 506 of the Securities Act of 1933. The rules become effective 60 days after publication.

A new subsection 506(c) permits offering Rule 506 securities through general solicitation if:

- All purchasers of the offered securities are accredited investors (as defined in Rule 501), and
- The issuer takes “reasonable steps to verify” that the purchasers are accredited investors.

In determining the accredited investor status of a purchaser the issuer is to use a “principles based approach” which looks at the nature of the purchaser and the kind of accredited investor status the purchaser claims, the amount of information the issuer has about the purchaser, and the nature of the offering (e.g., any minimum investment amount).

In addition the new rule provides for four non-exclusive methods of verification that will be considered “reasonable steps” if used by an issuer:

- For verification based on income status: review of the purchaser’s Form 1040, Form W-2, or Schedule K-1 of Form 1065 for the two most recent years along with a statement from the purchaser that the purchaser has a reasonable expectation of income in the current year sufficient to grant accredited investor status.
- For verification based on net worth: a statement from the purchaser dated within the prior three months listing all assets and liabilities necessary to make a determination of net worth (to include bank statements, brokerage statements, certificates of deposit, independent appraisals of property, and a credit report from one of the three national consumer reporting agencies).
- Verification will be deemed reasonable if the issuer obtains a written statement from an attorney, certified public accountant, or registered broker dealer that that party has taken reasonable steps to verify that the purchaser is an accredited investor within the last three months and that the party has determined that the purchaser is an accredited investor.

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- Verification will be deemed reasonable for any investor who invested in the same issuer's earlier Rule 506 offering requiring accredited status and is now investing in the new Rule 506(c) offering if the issuer obtains a certification from the investor that he qualifies as an accredited investor.

Note also that issuers may continue to make offerings without advertising and general solicitation under the old Rule 506 [which the SEC will renumber as Rule 506(b)].

## **U.S. Supreme Court Addresses Definition of "Supervisor" for Claims Under Title VII**

On June 24 the U.S. Supreme Court issued its decision in *Vance v. Ball State University et al.* [570 U.S. \_\_\_\_ (2013)] addressing the definition of an employment "supervisor" in the context of discrimination claims under Title VII of the Civil Rights Act [P.L. 88-352] and attendant liability of an employer for a supervisor's conduct.

Title VII makes it an unlawful employment practice for an employer "...to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Federal courts have held that Title VII applies not only to actions with immediate economic impact (e.g., termination, demotion, pay cuts) but also to the creation or perpetuation of a discriminatory, racially hostile work environment.

In earlier cases the Court has held that an employer is directly liable for the creation of a racially hostile work environment by an employee if the employer was negligent in preventing or addressing the offensive behavior and can be vicariously liable for an employee's creation of a hostile work environment if the employee was the plaintiff's supervisor.

In the case below the court determined that the plaintiff's (Vance's) co-worker while having some, disputed, authority over Vance did not have the power to "hire, fire, demote, promote, transfer, or discipline" and therefore was not Vance's supervisor and thus no vicarious liability for hostile work environment attached to the employer.

On appeal here Vance relied in great part on the definition of supervisor found in U.S. Equal Employment Opportunity Commission (EEOC) guidance which focused on the number and importance of tasks which a party could assign to another employee to be considered a supervisor. In rejecting the EEOC standard, the Court noted that such a standard is one of "remarkable ambiguity" since terms like "sufficient authority" to assign a "limited number of tasks" have no clear meaning. Use of that standard would, the Court declared, present "daunting problems for the lower federal courts and for juries."

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Instead, the Court's holding was explicit that "...any 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'".

## **New Publication To Guide Business Use of Social Media**

The Minnesota Department of Employment and Economic Development (DEED) and the law firm of Gray Plant Mooty have collaborated on a new publication, *A Legal Guide To The Use Of Social Media In The Workplace*. The *Guide* is written as a primer on legal issues affecting a business' use of social media in various aspects of business operations and is intended to alert the user to issues which might not be immediately apparent in the use of such social media. Topics include social media and the employment relationship (an area of considerable recent federal action by the U.S. Department of Labor), ownership of social media accounts (including those used by employees for business purposes), intellectual property protection, privacy issues, compliance with securities laws (especially in light of the still uncertain status of "crowdfunding"), marketing issues, and compliance with social media platforms terms of use.

The *Guide* is available free of charge in hard copy or on CD from the Minnesota Department of Employment and Economic Development by calling 651-556-8425 or 800-310-8323.

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