

The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed



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DISCRIMINATION LAW
Kollman & Saucier, P.A. is proud to sponsor the Maryland Public Employers Labor Relations Association Fall Conference. Eric Paltell will be speaking on Legal Issues Surrounding Background Checks. We encourage you all to attend. To register, contact: Kathy Whitehead, c/o Harford County Government, Economic Development 220 S. Main Street, Bel Air, MD 21014
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Maryland Employment Law

Maryland's New Right to Sue For Discrimination in State Court

by Eric Paltell

On October 1, 2007, there will be a dramatic change in the way workplace discrimination claims are resolved in Maryland. After more than 40 years of being required to pursue these claims in federal courts, employees alleging employment discrimination will be able to bring a lawsuit in state courts - a right they previously did not have unless they worked in Prince George's, Howard, or Montgomery Counties.

The amendments to Article 49B, which were signed into law by Governor O'Malley last Spring and take effect October 1st, also give Maryland employees the right to sue for alleged acts of discrimination that were previously not actionable. In addition to claims available under Title VII, the Age Discrimination in Employment Act ("ADEA"), and the Americans With Disabilities Act ("ADA"), Maryland law allows employees to sue for discrimination and harassment based on family status, marital status, and sexual orientation - categories not protected by federal law.

For Maryland employers, this change in the law requires that companies reassess the risks associated with an employment discrimination lawsuit. Unlike federal judges, most state court judges do not regularly hear discrimination cases. As a result, we should expect that, at least initially, state court judges may be less inclined to dismiss a case on summary judgment than their federal counterparts would be. This means employers face a greater likelihood that the case will go to trial, with the added investment of time and expense that goes with litigating in front of a jury.

We should also expect that, over time, Maryland will begin to develop a body of discrimination law that differs in some respects from federal law, just as has happened in New Jersey, Michigan, California, and other states that permit employees to sue for employment discrimination in state court. For example, in California, unlike under federal law, a

disability need not "substantially" limit a major life activity to be protected - it is enough that it imposes some limitation on the employee. We should not be surprised if Maryland's appellate courts eventually establish definitions of terms such as "hostile work environment" and "reasonable accommodation" that deviate from those established by the federal district and appellate courts.

One of the most immediate concerns about the new law is the absence of any statute of limitations on the filing of a discrimination law suit. As presently drafted, the statute provides that an employee may file suit for discrimination so long as they have filed a charge of discrimination with some agency (federal, state, or local) and waited at least 180 days since the date they filed the charge. There is no requirement that the charge of discrimination be timely filed (in other words, it could be filed years after the alleged discrimination), and there is no deadline within which the employee must file suit. This means that employers could be faced with lawsuits challenging personnel decisions that occurred years earlier. However, the Maryland Chamber of Commerce (with the assistance of the author) is working with the statute's drafters to introduce amendments in the next General Assembly session to address these issues. Our hope is that in 2008, the law will be amended to provide for a time frame within which a lawsuit must be filed, as well as a requirement that any charge of discrimination be timely filed as a prerequisite to filing suit under Article 49B.

So what should a Maryland employer do to prepare for the changes being wrought by the new private right of action under Article 49B? The following steps could go a long way towards minimizing an employer's risk:

1. Make sure your managers are trained (and retrained) in how to properly administer discipline and document performance issues;

2. Review and revise your employee handbook to make sure that employees are put on notice of the company's rules and expectations;

3. Review and revise supervisory manuals which set forth the guidelines for disciplining employees, conducting evaluations, and administering company policies;

4. Make sure that your company conducts periodic workplace harassment training. The training should be done at two levels -- one for managers, and a separate training program for staff. Keep records to show that employees have been trained;

5. Make sure that any complaints of discrimination and harassment are promptly investigated. Where evidence of discrimination or harassment is found, take prompt and effective steps to correct the action; and

6. Review and revise your document retention policies. This applies to both electronically stored information and hard copies. Although Maryland state courts have not yet adopted the federal standards regarding the preservation of electronically stored information, Maryland employers should still be wise to follow the federal standards to prepare for state court litigation.

The change in Maryland law does not mean that "the sky is falling" for employers. It does mean, as Bob Dylan would say, that "the times they are a changin'." The sooner employers in Maryland take steps to prepare for and adapt to the new law, the better position they will be in to minimize their risk.

Immigration Law **No-Match Letters on Hold by Ken C. Gauvey**

Last month we wrote about the implementation of the Social Security "no-match" regulations issued by the Department of Homeland Security. The original implementation date was scheduled for September 14, 2007. However, thanks to a lawsuit filed by the AFL-CIO, ACLU and National Immigration Law Center, a federal judge put the program on hold.

The lawsuit alleges that DHS does not have the right to utilize the Social Security Administration as an arm of the DHS in order to enforce immigration laws. The government's position is that employers are required to follow-up with Social Security no-match letters anyway, so, the new regulations do not add any additional burdens to employers.

Judge Maxine M. Chesney granted a temporary restraining order on the enforcement of the no-match regulations. Arguments will be heard on October 1, 2007 to determine whether the no-match regulations will go into effect.

Since the lawsuit was filed, another federal agency, the Small Business Administration's Office of Advocacy, has written the DHS indicating that the DHS has failed to comply with the Regulatory Flexibility Act. This Act requires that federal agencies are to investigate the impact on small businesses before establishing rules effecting them.

Kollman & Saucier will be sending out an additional e-mail if the courts decide on the legality of the no-match letters before our next issue of this newsletter.

Maryland Employment Law **Maryland Court Rules On Terminating Employees Entitled to Unpaid Leave Time by Eric Paltell**

In an unpublished August 2007 decision, the Maryland Court of Special Appeals ruled that terminated employees are entitled to be paid for accrued but unused vacation, even though they had not given the two weeks advance notice of resignation required by their employee handbook. The Court's decision in Catapult Technology Ltd. v. Wolfe is a dramatic departure from established Maryland law. If the case is not reversed on appeal, Maryland employers may need to revisit their policies regarding vacation accrual and pay outs.

The case arose when Catapult, a government contractor in Montgomery County, learned that it was going to lose its contract with the United States Department of Transportation. When Catapult could not assure its employees that it would have jobs for them, the employees accepted positions with the successor contractor. As a result, the employees gave Catapult notice of their intent to resign, effective immediately.

Under Catapult's employee handbook, employees were required to give two weeks notice of their intent to resign. According to the handbook, "if the employee terminates their employment without first providing at least two weeks notice in writing, that employee forfeits any right to any universal leave that may have been accrued while employed by the company." Relying on the handbook, Catapult refused to pay ac-

crued but unused "universal leave" to the resigning employees.

The employees brought suit in Montgomery County Circuit Court, seeking payment for their accrued but unused leave. The court ruled in their favor, finding that leave was accrued based upon the numbers of hours the employees worked, and, once accrued, it was a vested benefit similar to wages that could not be withheld at termination. The Court of Special Appeals affirmed the trial court, relying upon the Court of Appeals' decision in Medex v. McCabe, 372 Md. 28 (2002), which held that employees are entitled to incentive and commission payments "when the employee does everything required to earn the wages." In the Catapult case, the Court of Special Appeals reasoned that leave is given "in remuneration" for employees' work and that, once the hours are worked, the employee is entitled to be paid whatever leave they earned for those hours of work.

On its face, the Catapult decision is very troubling. Two federal courts had previously ruled that an employer could have a policy which requires employees to give advance notice of resignation as a condition to receiving accrued but unused vacation pay at termination. Additionally, the Maryland Department of Labor had even stated on its website that an employer could legally have such a policy in Maryland. Even though it is unpublished, the Catapult decision will give employees ammunition to challenge the failure to be paid all accrued but unused vacation pay at termination. Moreover, creative lawyers may argue that the Catapult case means that employers cannot have a "use it or lose it" vacation policy, where unused leave is not carried over from year to year.

However, the picture may not be as bleak as it initially appears for Maryland employers. The decision is an unpublished decision, meaning it is not binding authority. Indeed, the fact that the Court of Special Appeals chose not to publish the decision is encouraging, and may be an indication that the Court is not yet ready to make a wholesale change in Maryland law. We should also keep in mind that the facts of the Catapult case were bad, especially since the employer allegedly misled the employees into thinking they would not lose their jobs and also threatened the employees with violating the company's non-compete agreement if they quit to work for the successor contractor. Lawyers often say that "bad facts make bad law," and that may just be the case here. Although Maryland employers need to recognize that they may now be liable to pay out accrued vacation bal-

ances at termination, we should wait to see whether the Court of Appeals agrees to hear the case before making any changes in our policies.

Firm News

Keep Up

by Ken C. Gauvey

As you can tell, there are some significant changes in Maryland employment law coming in the very near future. Creating a right to sue for discrimination in Maryland state courts has the potential to completely change the landscape of discrimination law in Maryland. Additionally, the Court of Special Appeals' dramatic departure from established Maryland law in creating a right to unused vacation time even when an employee walks off the job may soon require every Maryland employer to review their vacation policies.

To keep up with these changes, Kollman & Saucier will be offering training and education in this changing landscape of Maryland employment law. On October 17, 2007, the Chesapeake Human Resources Association ("CHRA") will be holding a conference at the Conference Center at Sheppard Pratt. Eric Paltell will be speaking at the conference on Maryland's new right to sue for discrimination in Maryland state court. We encourage you all to attend. To find out more information, go to www.chra.com

On October 26, 2007 Darrell R. VanDeusen, author of Lexis/Nexis's Family & Medical Leave; Wages & Hours, will be presenting at MICPEL's seminar entitled "Employment Discrimination: Dealing with Administrative Agencies and Handling Litigation in State & Federal Courts. For more information on this seminar, please go to <http://www.micpel.edu>

On December 5, 2007 Frank L. Kollman, Peter S. Saucier, Darrell R. VanDeusen and Ken C. Gauvey will be presenting a seminar on 2007 Employment Law Developments to include employer immigration law concerns as well. For more information on this seminar, go to: http://www.lorman.com/seminars/seminar_details.php?pid=179723.

We hope that you can make one of these events, or one of our future events. In the meantime however, if you have any questions, feel free to call or e-mail us.

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