The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed

CONTENTS

Maryland

Maryland Employers Need to Review Vacation Pay Policies

by Eric Paltell

For many years, Maryland employers have operated on the assumption that they were not required to pay employees all accrued but unused vacation at termination. However, two recent developments in Maryland law have called this practice into question, and require that employers revisit how they handle the payout of unused leave at termination.

In August 2007, the Maryland Court of Special Appeals -- in an unpublished, non-precedential decision -- ruled that accrued, unused paid time off (PTO) constitutes a "wage" under the Maryland Wage Payment and Collection Law and must be paid to employees upon termination. The Court's decision in *Catapult Technology Ltd. v. Wolfe*, No. 997 (August 20, 2007) was a dramatic departure from established Maryland law, where both judicial and administrative guidance had permitted employers to determine whether and when accrued but unused leave time would be paid to departing employees.

The initial reaction to the *Catapult Technology* case was one of only mild concern, since the case was unpublished. Then, in late 2007, the Maryland Department of Labor, Licensing and Regulation ("DLLR") revised its "Maryland Guide" to track the Court of Special Appeals holding in *Catapult Technology*. The Guide now states:

When an employee has earned or accrued his or her leave in exchange for work, an employee has a right to be compensated for unused leave upon the termination of his or her employment regardless of the employer's policy or language in the employee handbook.

See http://www.dllr.state.md.us/labor/wagepay/wpunusedvacpay.htm.

So what should an employer in Maryland do? First, keep in mind that there is no binding court decision requiring that accrued vacation be paid at termination, nor is there a statute that clearly requires such payments. Also keep in mind that – as the *Catapult Technology* court stated – "DLLR's guidance is certainly not law." Nevertheless, we should expect that employees will rely on the *Catapult Technology* case and the recent change in position by DLLR to argue for payment of all accrued but unused leave (except sick leave) at termination. Under Maryland's Wage Payment & Collection Statute, employees can recover three times the unpaid vacation pay, plus attorneys fees, if they are not paid all accrued leave that they are entitled to at termination.

To protect against these claims, Maryland employers should give serious consideration to revising the way leave is characterized in employee policy statements. If a policy manual states that vacation pay is not earned, but rather that it is a benefit current employees are eligible to receive in return for continued employment, we believe that the employer may not have to pay out vacation at termination. The *Catapult Technology* court based its holding on the fact that PTO *accrued* based on the number of hours worked and therefore was an earned benefit which must be paid at termination. Likewise, DLLR's Maryland Guide requires that leave be paid when "an employee has earned or accrued leave in exchange for work." If the policy manual states that leave is not earned or accrued, we believe it may not be payable at termination.

We recognize that changing a policy manual to state that vacation is not an earned benefit may not be feasible for every employer. For example, many payroll systems show "accrued leave" on pay stubs; such practices would create the impression that leave is an earned benefit no matter what the policy manual says. If an employer is in a position where it is not practical to change a policy manual to eliminate references to accrued or earned leave, then the employer should

consider eliminating PTO programs, providing for accrual on a weekly or monthly basis instead of allowing for immediate accrual at the beginning of the year, and instituting caps on accruals (meaning, for example, that once an employee has achieved a certain amount of accrued leave, he or she cannot accrue any more leave until their balance falls below this threshold amount).

We encourage all of our Maryland clients to take a look at their leave policies and prepare to revise them as needed to respond to these new developments. As always, we are available to provide assistance to our clients to determine which approach works best for their needs.

Immigration

Lost Earnings for Injured Illegal Aliens: Metaphysical Judicial Guidance From the Granite State

by Peter S. Saucier

When a legal proceeding among litigants who are mutual wrongdoers reaches the bench, each judge must decide which wrongdoer will bear the onus of loss. A measure of moral justice, rather than law, often drives the decision. The Supreme Court of New Hampshire faced just such a decision when an illegal alien was the victim of negligence at a construction work site.

Facts and Setting

Wal-Mart Stores, which has established an unenviable record of late concerning employment of illegal aliens, decided to build a facility in Manchester, New Hampshire. A chain of construction contracts linked Wal-Mart to Rosa: Wal-Mart contracted with Wrenn Associates, Inc., to build the store; Wrenn contracted with Partners In Progress, Inc., to paint the building; Partners contracted with Eagle General Laborers, to paint the interior; and Eagle hired Hudson Rosa to do some of the painting. An aerial lift fell on Rosa at the job site and injured him. Rosa found a dutiful lawyer to defend his interests by suing everyone up the chain.

It developed that Rosa was a Brazilian citizen without the legal right to work in the United States. The New Hampshire state trial judge who drew the case was confronted with a number of messy problems. Judge William Groff was able to articulate the issues in three thorny questions that he forwarded to the Supreme Court of New Hampshire for guidance as to several questions, two of which were:
(1) 'Is the plaintiff permitted to introduce evidence and make a claim of lost wage/earning capacity when he is not legally entitled to work in the United States at the time of his accident?'; and
(2) 'If he is entitled to bring a claim for lost wage/earnings [sic], should those be limited to earnings that he could anticipate receiving in his country of full citizenship?'

The New Hampshire Supreme Court took on the task of answering those questions.

Supreme Court Decision in Hoffman

In *Hoffman Plastic Compounds, Inc. v. NLRB*, the Supreme Court articulated national policy. Briefly, the Court ruled that the National Labor Relations Board could not award damages that would contravene the Congressional policy disapproving of the employment of illegal aliens. In the Court's view, the comprehensive scheme of verification obligations embodied in the immigration precluded the NLRB from awarding damages to illegal aliens.

The State Law Experience

It was not clear from Hoffman whether articulated public policy at the federal level altered the approach that state courts would be required to take in assessing liability and damages under state law for victims who also were illegal aliens. Following *Hoffman*, several courts addressed the impact upon state law with mixed results that flowed from assorted approaches. Two opinions cited by the Rosa court illustrate the legal lay of the land.

The first case concerned a tort action based upon Florida law of products liability and negligence. Felipe Valdivia Ignacio, an undocumented alien, was crushed and killed by a forklift in a construction site accident. Among the defenses raised by the company that had rented the forklift to the contractor was an assertion that Ignacio's estate could not recover damages in United States wages because he was an illegal alien. The company won. The holding of Hoffman governed the interpretation of state law.

The post-Hoffman experience in New York is somewhat different. A site owner and general contractor were each sued after an employee sustained injuries falling from scaffolding. New York has a Scaffold Law that permits tort damages in such cases. United States District Judge Colleen McMahon wrote:

"This case involves a claim for relief under New York State law. No federal cause of action is asserted . . . I therefore look to the law of New York, not the Labor Relations Act, for guidance."

Judge McMahon dispelled any doubt that she intended her opinion to be broad, and its view of Hoffman to be narrow:

[T]he fact is, undocumented aliens do obtain work in the United States. Recognizing this incontrovertible fact, New York's public policy does not bar compensation in the form of back pay for undocumented workers who are injured in the manner of the instant plaintiff.

Answering a Harsh Question with a Temperate Response

The five justices of the New Hampshire Supreme Court had before them facts and circumstances that called for the careful weighing of competing public concerns. The United States Supreme Court left one large unanswered question in the wake of Hoffman – can an illegal alien recover wages in United States dollars under state law. The court easily decided that illegal aliens have a right to sue in state court. Presented with the stark choice between whether illegal aliens may or may not recover lost wages in United States dollars, the New Hampshire Supreme Court issued a temperate reply – it depends. The defendants had argued that an illegal alien, to the extent he can recover damages, is limited to the earnings he might have earned in his native land. The Court wrote:

While we agree that, in most circumstances, the defendants are correct, there are some circumstances in which an illegal alien's lost earning capacity may be measured by what he could have earned in the United States.

Defining those special circumstances was the next challenge faced by the Rosa court.

Striking a Judicial Balance

Illegal aliens are not allowed to be employed in the United States and earn United States wages. The law obligates any employer who learns that an employee is an undocumented alien to

sever the relationship immediately and stop paying the employee. In that regard, the law militates against paying an injured worker whom the employer discovers to be illegal. Otherwise, a worker who would be terminated by mandate of law in any other circumstance would be rewarded with wages because he became injured before the discovery. On the other hand, an unsavory employer inclined to take a flexible view of the law could hire undocumented aliens with abandon, and "discover" the illegal status of any person who became injured. If no United States wages would then be due, the savings could be immense.

The need to carry out the public policy embodied in legislation is strong, while the temptation to look the other way in hiring illegal aliens is evident to any skeptical court. That creates the type of paradox that introspective courts must resolve. The New Hampshire Supreme Court did not shy away from the task.

The general rule articulated by the New Hampshire court is that "an illegal alien may not recover lost United States earnings, because such earnings may be realized only if that illegal alien engages in unlawful employment." Nonetheless, the state has a strong interest in deterring all law breakers. That, the court reasoned, extended to those who may have a pecuniary interest in fostering the hiring of illegal aliens. That competing interest is better served by requiring the illegal employer to be responsible for lost wages in United States dollars.

So, the New Hampshire Supreme Court decided that balancing the interests was the way to determine whether damages for lost wages in United States dollars would be afforded to an injured undocumented alien. Employers are required to review original documents that establish the identity of each new employee, and that person's right to work in the United States. That review is certified on a form popularly known as a Form I-9. Although there are other employer obligations, such as a duty to investigate "suspicious circumstances," the main imposition is dutiful completion of the Form I-9.

Stating the court's holding simply, the answer to the question is: If the employer properly reviewed documents and completed the Form I-9, and provided that the employer did not deliberately fail to investigate suspicious circumstances, then lost wages in United States dollars are not available to an illegal alien who is injured. Otherwise, they are available. That balance, the court concluded, places the party responsible for the illegal employment – the employee who acted with deceit, or the employer who acted with neglect – at risk for greater loss.

Implications of the Rosa Holding

Latin American workers are ubiquitous in the workplace in the United States. According to a recent Pew Trusts report, there are some 11 million undocumented aliens in the United States, 6 million of whom are from Mexico. Damage assessments for injuries can be immense. According to several sources, including the New York Sun of March 8, 2005, an illegal alien recently obtained a $4 million settlement for injuries from a scaffolding accident. This issue is not just here to stay, it is mushrooming.

Other state courts soon will be confronted, if not deluged, with cases like Rosa, and will have to navigate through this stormy area. It remains to be seen to what extent the New Hampshire Supreme Court's decision will lead the way. For now, it appears that the battle over measuring lost wages in United States wages, which no doubt will involve billions of dollars, well may turn upon the simple clerical act of the direct employer in completing the Form I-9. That gives management employment lawyers a powerful new answer to a client question that before now netted only a nebulous and timid response: "So, what happens if I don't fill out those I-9s?"

FMLA

President Bush Expands FMLA to Cover Servicemember Leave

by Darrell VanDeusen

As a part of the National Defense Authorization Act for Fiscal Year 2008, the House and Senate passed legislation that amends the Family and Medical Leave Act of 1993 to cover an employee's absence from work to care for a "blood relative" who becomes injured or ill while on active duty or in a contingency operation. President Bush signed the legislation on January 28, 2008. The changes in the law are immediate. While unquestionably well intentioned, this amendment to the FMLA will complicate application of the Act.

The final version of the FMLA expansion creates two new types of FMLA leave:

"Active duty leave" will provide 12 weeks of FMLA leave during a 12 month period to a spouse, son, daughter, or parent of an individual who has received a call up notice. An eligible employee may use up to 12 weeks of FMLA leave because of a "qualifying exigency" that exists because the employee is on or has been called to active duty in the Armed Forces. The Department of Labor will be responsible for deciding what constitutes a "qualifying exigency."

"Caregiver leave" will provide 26 weeks of FMLA leave during a single twelve month period for a spouse, son, daughter, parent, or nearest blood relative to provide care to a "recovering servicemember." An eligible employee who is the primary caregiver of a servicemember with a combat-related "serious injury or illness" may take up to 26 weeks of FMLA leave in a single 12-month period to care for the injured servicemember. The restriction here of a "single" leave year limits this leave to a one-time only use.

A "recovering servicemember" is defined as a member of the Armed Forces who suffered an injury or illness while on active duty that may render the service person unable to perform the duties of their office, grade, rank, or rating. A "serious illness or injury" is independently defined as an injury or illness incurred in the line of duty that may render the member medically unfit to perform their duties. This definition is different from the definition of a "serious health condition" and will undoubtedly be interpreted differently.

The legislation identifies "next of kin" as a new category of eligible employee entitled to FMLA leave to care for an injured servicemember, in addition to spouse, son, daughter, or parent. Next of kin is defined as the nearest blood relative to the servicemember.

The maximum leave available in any twelve month period is a total of 26 weeks. The legislation caps FMLA leave in any one year to a total of 26 weeks. Employers may require certification to verify the call to active duty and/or the need for FMLA leave due to care for an injured servicemember. Intermittent leave will be available, and employees will be able to take the leave in increments of the shortest time periods tracked by their employers' payroll system.

It appears that the law will be effective immediately, but employers will need time to prepare for and comply with the changes and the DOL will need time to prepare regulations. Given the amount of time it has taken the DOL to offer revisions to the existing regulations, this may be a while. There has been some suggestion among commentators

that President Bush has agreed to sign this legislation in return for some "employer-friendly" revisions to the existing regulations.

Employers should immediately become familiar with the requirements of the FMLA amendments, and update their FMLA policies. Although it will be a while before the DOL comes up with final regulations, employers should consider the amendments effective immediately. Employees who believe that they may meet the requirements for leave should notify their employers as soon as possible, and be patient as everyone begins to attempt to better understand the changes to the law.

Here are some areas that are likely to cause conflict until the regulations provide additional guidance:

Who's your daddy and how many "next of kin" can you have? Has Congress now required employers to become experts in genealogy? The amendment provides that, in addition to spouse, son, daughter, or parent, the "nearest blood relative" gets to take servicemember family leave. But who determines who the closest blood relative is? Does Human Resources need to know whether a second cousin or first cousin twice removed is a closer blood relative?

If an employee provides notice of the need to take servicemember family leave as "next of kin," how will the employer be able to establish that the employee is the closest blood relative? What does the employer do if it learns there is a closer blood relative? This expanded coverage could also present a situation where a number of family members work for the same company are all on the same level of "next of kin." Can they all take up to 26 weeks of leave? At the same time? And have job protection?

What's the difference between a "serious illness or injury" and a "serious health condition"? The definition of serious health condition is one of the areas the DOL plans to address when it revises the existing FMLA regulations. Other than the fact that the serious illness or injury has to occur in the line of duty on Active duty, is there more to it? There must be a difference or Congress could have retained the same language, covering a "serious health condition that arises in the line of duty on Active duty."

It would appear that a serious health condition as currently defined should be more inclusive than a serious illness or injury. For example, and perhaps most obviously, pregnancy should probably not count as a serious illness or injury, since it presumably does not occur in the line of duty, even if it happens while the servicemember is on Active duty. But what about other conditions that have been found to be serious health conditions, like sleep apnea or high blood pressure?

What is "any qualifying exigency"? Even Congress tells us we have to wait for regulations on this one. Any "qualifying exigency" will entitle an employee to FMLA leave when a spouse, son, daughter, or parent (but not next of kin) is called to active duty, has an impending call to active duty, or is on active duty. The mind reels at the possibilities here. With no direction from Congress, the DOL can define the term as broadly as it wants. Given the broad strokes with which the Clinton administration's DOL wrote the 1995 regulations, it could be deja vu all over again.

Employers never have a good feeling about knowing they will have to comply with a law that is so remarkably undefined. That is exactly what employers will have to do with FMLA military leave for the near future. The learning curve will be high. For now, an employer's best bet is to interpret the amendments in the same manner as they have treated the FMLA since 1993 - to preserve the balance between workplace and family that is at the heart of the Act.

Arbitration Follies

The Wheels on the Bus Go Round and Round

by Peter S. Saucier

Bruce Boice, a bus mechanic for the Southeastern Pennsylvania Transportation Authority, a loyal member of Local 290 of the Transport Workers Union, thought nothing about stashing repair orders in his locker and falsely certifying that safety-sensitive repairs had been performed. The buses were returned to the roads with Boice's imprimatur. When SEPTA discovered the problem, Boice lost his job.

Apparently unaware that public transportation safety merits careful protection, a labor arbitrator decided that Boice should get a second chance, and that preposterous decision was upheld on the initial appeal. Thankfully, the Pennsylvania Commonwealth Court, paying attention to reality and current events, reversed that decision. No word on why the TWU pursued the matter in the first place.

Kollman's Corner

Rewarding Misconduct and Mediocrity

by Frank L. Kollman

I was once told by a union business agent that his philosophy was to "protect the worst employee." He was a decent fellow, and he was just doing his job. I could not, however, help but think that his philosophy was hurting the employer and the other members of the union. The best employee would always get paid the same as the worst employee, and mediocrity would get rewarded.

Unions frequently have to grieve terminations of employees for fear of being sued themselves for not "representing the employee fairly." That means that employees who should be fired will often be brought back to work because some arbitrator thought the company did not prove, to his or her satisfaction, that the employee had engaged in misconduct that commonsense would tell the average person took place. I have been involved in arbitration where the employee should have been put in jail, instead of just fired, and the union fought like a mental patient to bring the creep back to work.

Recently, it became easier for employees to bring retaliation charges against their employers. Complaining employees, even those that have no basis for their complaints, can acquire extra protections against termination just because they have been a "squeaky wheel." My feeling is that sometimes the wheel is so bad that you need to replace it, rather than waste time greasing it over and over again. Unfortunately, I am afraid that retaliation laws will create a new class of protected employees: the professional jerk. Plaintiff's lawyers will start advising employees to start making regular complaints over a variety of issues to their companies to divert attention from their poor performance. That way, when the company has no choice but to fire them, they will have a basis to sue.

One of my partners and I talked last week about the anti-discrimination laws and reached two conclusions. First, these laws have successfully eliminated virtually all intentional workplace discrimination. Second, these laws have given many employees super status over their non-minority counterparts. A healthy white male employee in his twenties or thirties will get fired long before any other employees engaging in the same misconduct. Yes, I know that some will argue that that is reverse discrimination, subject to the same anti-

discrimination laws. As a practical matter, reverse discrimination is rarely a viable legal argument.

I do not see the trend reversing itself any time soon. Our legislators and courts will continue to reward misconduct and mediocrity by enacting more laws to expand the coverage of anti-discrimination provisions or by interpreting current laws to go far beyond what was originally intended. There is a tendency to overreact to stories about someone "unfairly" losing his or her job. In most instances, a closer examination will show that the employee was unfair to his employer and deserved the discipline he or she received. It is the rare employer who fires anyone these days who is doing a good job. The law we end up with frequently creates more protections for the professional jerk than the class of employees the law was designed to protect.

The situation is even worse in the public sector. Government employees have better retirement benefits than private employees, and they have far more protections from discharge. The next time you wonder if we have created a class of poor government employees, try to get a government employee to correct a mistake. It is a lot like trying to convince a country in the Middle East to compromise.

For more thoughts and comments by Frank Kollman, visit his blog at http://kollmanlaw.com/blogs

EEOC

EEOC Owes Small Employer $36,000 for Frivolous Lawsuit

by Kelly C. Hoelzer

Eagle Quick Stop ("Eagle") is a convenience store located in Hattiesburg, Mississippi. In September 2005, the EEOC brought a lawsuit against the store on behalf of a former employee claiming retaliation in violation of Title VII of the Civil Rights Act. Evidence produced in discovery by both the EEOC and Eagle revealed that the store only had nine employees during the relevant time period, far short of the 15 employee threshold required for coverage under Title VII.

Even though the EEOC knew that Eagle was too small an employer to meet Title VII's jurisdictional requirement, the agency pressed on with the litigation. Eventually, as would be expected, the court granted summary judgment to the employer in February 2007.

In later proceedings, the court ruled that the EEOC must pay Eagle approximately $36,000 in attorneys fees because "whether a result of negligence, incompetence, or the force of bureaucratic momentum," the EEOC continued to litigate after learning the employer had less than 15 employees. The court rejected the EEOC's argument that Eagle should have reduced the amount of attorneys' fees by "doing more to defeat the commission's claim sooner," instead chastising the agency for not voluntarily dismissing the claim. EEOC v. Eagle Quick Stop d/b/a Sid's Discount Fuel, Case No. 2:05-cv-2074 (S.D.Miss. Nov. 29, 2007).

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