EMPLOYMENT RELATIONS

Employment Update

SPRING 2008

Payout Of Accrued But Unused Leave At Termination: The Rules Change—Yet Again!

Last fall, Maryland Department of Labor, Licensing and Regulation (DLLR) changed its long-standing policy with regard to the payout of accrued but unused leave when an employee is terminated.

Under the former policy, which had been in effect for a number of years, an employee's accrued but unused leave was considered a wage and payable as a terminal benefit when the employment ended. DLLR, however, recognized that when an employer had a written policy known to the employee that provided for the forfeiture of any accrued leave upon termination, the policy would apply and the employer would not be required to make a payout of the accrued but unused leave.

In fall 2007, DLLR announced that it was changing its position. According to DLLR, an employer could no longer restrict the payout of accrued but unused vacation leave, but, rather, had to pay it out on termination, regardless of any written policy the employer may have. Based on this change in enforcement policy, Maryland employers began modifying their prior policies regarding the payout of accrued vacation leave.

Apparently concerned with DLLR's abrupt change in policy, the Maryland Legislature passed emergency legislation (Senate Bill 797) that reversed the policy change to allow an employer to refrain from paying any accrued but unused leave to a terminated employee if (1) the employer has a written policy that limits the payout of accrued leave to employees, (2) the employer has notified the employees of this policy, and (3) the employee is not entitled to payment for the accrued leave at termination under the terms of the employer's written policy.

This legislation was enacted as an emergency measure and approved by the Maryland Legislature. The Governor signed the legislation on April 24, 2008, and, by its terms, it immediately becomes effective on that date.

Bottom Line: Former Practice Remains Lawful

Maryland employers can resume their prior practice of limiting the payout of accrued but unused vacation benefits upon termination. In order to have such a policy, it must be clearly stated in writing and provided to employees in advance. Keep

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in mind, however, that even when an employer has a clear policy that provides for the forfeiture of accrued vacation and other leave benefits upon termination, many savvy employees, aware of that policy, will make sure that they use every last minute of their accrued leave before they announce their departures.

Kevin C. McCormick

Significant Changes in Employment Eligibility Procedures

The Department of Homeland Security's publication last year of a rule concerning "safe harbor" procedures for employers who receive "no match letters" from the Social Security Administration (SSA) or Immigration and Customs Enforcement (ICE), set off alarm bells in the business community. "Mismatch" letters from SSA are intended to alert employers that the social security number and name provided by the employer do not match information in the SSA system. Such mismatches can result from typographical errors, name changes, and transposed numbers as well as a number of other reasons that do not reflect on a person's lawful status in the U.S. Mismatch letters from ICE usually follow an audit of an employer's records, either by ICE or the Department of Labor, and concern the validity of employment authorization documents used by employees to verify their employment eligibility when completing the Form I-9.

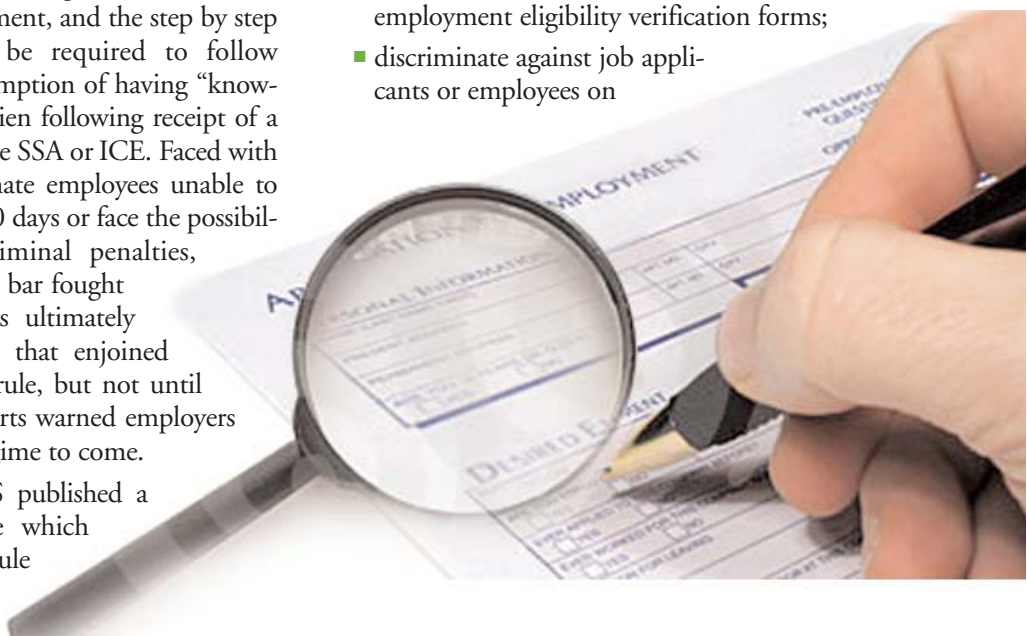
The new rule issued by DHS was notable mostly for its new definition of a "knowing hire" of an alien unauthorized to accept employment, and the step by step procedure employers would be required to follow if they wanted to avoid a presumption of having "knowingly hired" an unauthorized alien following receipt of a "no-match letter" from either the SSA or ICE. Faced with the choice of having to terminate employees unable to clear up the mismatch within 90 days or face the possibility of fines and possible criminal penalties, employers and the immigration bar fought back. The new regulation was ultimately stalled by a successful lawsuit that enjoined DHS from implementing the rule, but not until countless seminars and legal alerts warned employers of the stiff new enforcement regime to come.

On March 28, 2008, DHS published a "Supplemental" proposed rule which essentially restates the prior rule with very minor modifications intended to clarify some language and address the legal concerns which caused the court to suspend implementation of the rule last year. If anything, the DHS's action underscores that regulations tying the mismatch letters to an employer's actual or constructive knowledge that an employee is not authorized to work will become law, and employers who disregard their obligations to verify the employment eligibility of their employees do so at their peril.

At a symposium on worksite enforcement issues last November, the speakers made clear that increased enforcement activity by ICE has taken a particularly hard edge. Civil sanctions, which formed the backbone of the enforcement efforts under the Immigration Reform and Control Act of 1986 (IRCA), are now secondary to criminal actions. Among these, the most common are charges of "harboring" aliens, which may be brought where an employer is alleged to have knowingly hired ten or more aliens. Employers found to have engaged in harboring, smuggling, or unlawful transportation of unlawful aliens can face up to five years in prison and fines up to $5,000 per violation. Although ICE has said that its mission is to target "egregious violators," the fact that SSA was prepared to mail out thousands of mismatch letters last year in conjunction with the intended effective date of the rule, makes clear the larger enforcement role ICE expects the mismatch letters to play in raids to come.

Shortly before it issued the Supplemental proposed rule, DHS also issued a new schedule of civil penalties for violations of IRCA, which implemented the employment verification procedure and the Form I-9. The newly increased penalties became effective as of March 27, 2008, and will result in the imposition of higher fines for employers who commit the following actions made unlawful under IRCA:

- knowingly employ unauthorized aliens;
- fail to comply with the requirements relating to employment eligibility verification forms;
- discriminate against job applicants or employees on



the basis of citizenship or nationality; and/or

- participate in immigration-related fraud.

The penalties, previously adjusted for inflation in 1999, will increase an average of 25%. The minimum penalty for knowingly employing an unauthorized alien will increase to $375 from its current $275. For higher civil penalties, the increase is substantially more significant. For example, the maximum penalty for a first violation increases from $2,300 to $3,300 and the maximum penalty for multiple violations increases from $11,000 to $16,000 per employment of unauthorized alien. The fact that these penalties are "per violation" means they can add up to substantial fines relatively quickly.

Because ICE and DHS will be looking to worksite enforcement as a key part of their efforts to tamp down on illegal immigration, employers now need to look carefully at their employment eligibility verification procedures and implement (if they have not already done so) a clear and unambiguous policy that provides, at a minimum, for:

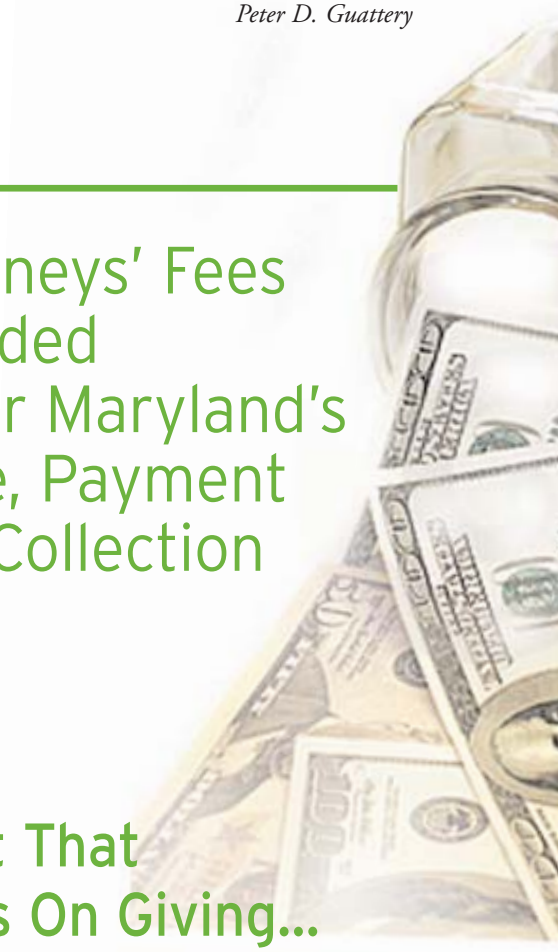
- The timely and accurate completion and retention of Form I-9s for all employees hired after November 6, 1986;
- Procedures for the termination or revocation of offers of employment for individuals who fail to provide the necessary documentation required by the Form I-9;
- A tickler system that alerts the employer to individuals whose employment authorization is expiring and weeding out Form I-9s that an employer is no longer required to maintain under the law;
- A training program for all persons who will be preparing the Form I-9s; and
- A requirement for regularly scheduled audits of IRCA compliance.

Such a program, together with thorough self-audits, will go a long way to ensuring compliance and minimizing risks in the event that ICE agents visit the work site. An audit procedure, in particular, will ensure proper storage, maintenance and accurate completion of the Form I-9, and implement a procedure for handling problems with authorization, including mismatch letters. The process will also place the company in a much better position to negotiate a favorable outcome should the work site enforcement action turn up evidence of unlawful hires. Good faith actions can mitigate potential civil fines and may be a key in deflecting criminal prosecution.

Finally, employers should also be aware that their responsibility for compliance may extend to their independent contractors and subcontractors, where the employer has knowledge that the employees of the contractor or subcontractors are unauthorized. As a result of enforcement activity over the past several years, companies that retain labor under contract, such as a housekeeping or grounds keeping business, have been increasingly turning to employer certifications and opinion letters from counsel to confirm that the independent contractor is in compliance with U.S. immigration laws. These contractual requirements have, in turn, imposed the policy and audit procedures noted above on the independent contractors at the risk of losing the contract. While these terms may be seen as overkill by the smaller company, the contractors need to keep in mind that the larger business presents the most attractive target to ICE has the greatest potential for news and accumulated fines, and ICE has shown no lack of creativity in digging up evidence to show that a company has knowledge of the unauthorized status of its contractor's workers.

In short, the field of work site enforcement is changing dramatically. The increasingly aggressive efforts by ICE and DHS to put teeth into IRCA should be seen as a warning bell to employers to put their I-9 houses into order as soon as possible. Waiting until an ICE agent is at the door will almost certainly be too late.

Peter D. Guattery



Attorneys' Fees Awarded Under Maryland's Wage, Payment And Collection Law

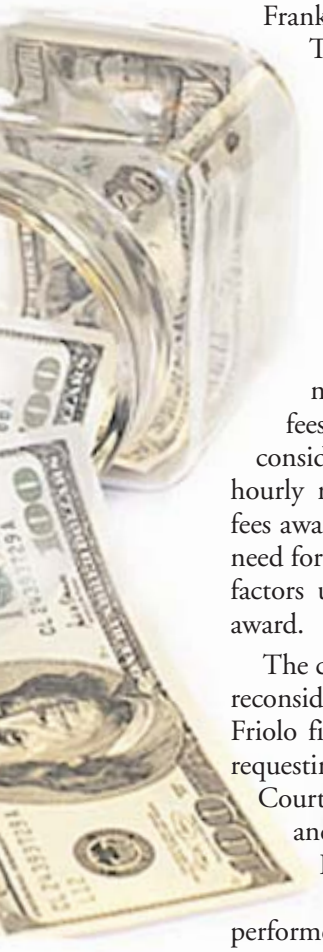
A Gift That Keeps On Giving...

As many Maryland employers are aware, a successful claimant under the Wage, Payment and Collection Law or Maryland's Wage and Hour Law can recover wages, possible liquidated damages, and an award of attorneys' fees. In some cases, the attorneys' fees award may be much larger than the amount of wages that were improperly withheld in the first place.

A recent decision from the Maryland Court of Appeals underscores the significance of an attorneys' fee award under Maryland's wage statutes by holding that the successful claimant is entitled to receive attorneys' fees not only for the underlying litigation, but also for the time spent litigating over the appropriateness of the attorneys' fee award. Maryland's top court has given a green light for "fees on fees" claims, in which the only issue to be resolved is the size of the attorneys' fee award.

Background Facts

In 2001, Joy Friolo sued Douglas Frankel, M.D., and the Maryland/Virginia Med Trauma Group, to recover unpaid bonuses and overtime pursuant to Maryland's Wage and Hour Law and the Wage Payment and Collection Law. A jury returned a verdict in favor of Friolo for $6,841 in bonuses and $4,937 in overtime pay. The jury, however, expressly denied Friolo any liquidated damages under the Maryland Wage Payment and Collection Law.



Frankel and the Trauma Group paid the judgment. Thereafter, Friolo filed a motion for attorneys' fees in the amount of $63,399. The Circuit Court reviewed the motion and awarded attorneys' fees in the amount of 40 percent of the judgment, $4,711 as attorneys' fees, plus $1,552 in costs.

Unhappy with that award, Friolo noted an appeal. Upon review, the Maryland Court of Appeals held that the trial court's award of attorneys' fees was improper and that the court needed to reconsider the request for attorneys' fees using a lodestar approach, in which the court considers more than simply the hours spent times the hourly rate in determining the appropriate attorneys' fees award. Moreover, Maryland's top court stressed the need for the trial court to give a clear explanation of the factors used in arriving at the ultimate attorneys' fee award.

The case was remanded back to the Circuit Court for reconsideration of the attorneys' fee award. On remand, Friolo filed a supplemental petition for attorneys' fees, requesting $127,810 in total attorneys' fees. The Circuit Court considered Friolo's request, as well as the guidance from the Court of Appeals, and awarded Friolo $65,348 in attorneys' fees based primarily on the hourly rate of the attorneys who performed the work, the number of hours expended in connection with the litigation, the complexity of the litigation, the success rate of the different parts of the litigation, and the uniqueness of the issues.

The attorneys' fee award was appealed yet again to the Court of Special Appeals. Maryland's intermediate appellate court vacated the attorneys' fee award and remanded the case back to the Circuit Court to reconsider the request for attorneys' fees. Specifically it noted that Friolo was not entitled to attorneys' fees for appellate and post-judgment services that were unrelated to protecting the underlying judgment, securing the specific relief afforded by the trial court, overturning a grossly disproportionate award, or an outright denial of attorneys' fees.

Dissatisfied with this result, Friolo requested that the Maryland Court of Appeals weigh in on the question of whether a successful litigant can recover additional attorneys' fees spent primarily to enhance the initial award of attorneys' fees in the underlying litigation.

Maryland's top court agreed that the Circuit Court should consider the degree of success that the claimant has in his or her appeal (including success in procuring an increase in the attorneys' fees awarded or in correcting the trial court's methodology in determining the amount of the attorneys' fees awarded) when determining the appropriateness of an attorneys' fee award under the lodestar formula. The matter has now been remanded back to the trial court to consider, for the third time, the appropriate attorneys' fees to be awarded in this case, in which Friolo recovered less than $12,000 in bonuses and overtime pay.

Even though that judgment was promptly paid, under the court's ruling, Friolo may seek attorneys' fees for all of the time spent pursuing the various post-trial motions and appeal focused solely on an appropriate attorneys' fee award.

Bottom Line

Litigation concerning the award of attorneys' fees in employment lawsuits often takes on a life of its own and consumes more time than the underlying litigation, resulting in a fee award that may be significantly larger than the amounts recovered by the employee. As in this case where the unused wage claim amounted to less than $12,000, the ultimate attorneys' fee award will probably be more than two times that amount.

While there are undoubtedly many legitimate reasons for adequately compensating counsel who successfully bring these claims, this recent decision may encourage some to pursue their claims for attorneys' fees more aggressively with the hope of recovering an even bigger award. (*Joy Friolo v. Douglas Frankel, et al.*, Maryland Court of Appeals No. 107, Sept. Term 2006, Filed Feb. 27, 2008.)

Kevin C. McCormick

Amendments to the Jobs for Veterans Act of 2002

This past year, the U.S. Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) finally issued a new set of regulations implementing the Jobs for Veterans Act of 2002 (JVA), a piece of legislation Congress passed over five years ago to amend the outdated Vietnam Era Veterans Adjustment Assistance Act of 1974 (VEVRAA), 38 U.S.C. § 4212.

Summary of Changes Under JVA:

The regulations amended the affirmative action provisions of VEVRAA to:

- Raise the monetary threshold of covered federal contracts;
- Provide new definitions of covered veterans; and
- Revise the existing job posting requirements.

Modifying the Government Contract Thresholds

The JVA and new OFCCP regulations apply only to contracts entered into on or after December 1, 2003. Contractors who entered into a contract on or before December 1, 2003, will be required to comply with the original tracking, reporting, and job listing requirements under VEVRAA. Those contractors holding some contracts covered by VEVRAA and others covered by the JVA must comply with both.

Raising the Coverage Threshold

The JVA raises the coverage threshold from $25,000 to $100,000. Contractors with a contract worth less than $100,000 that was entered into or modified after December 1, 2003, are not covered by the new regulations. However, older contracts equal to or in excess of $25,000 must comply with the old VEVRAA regulations.

Changing the Definition of Covered Veterans

Prior to the passage of the JVA, VEVRAA required contractors to provide equal employment opportunity, and take affirmative action to hire and promote the following categories of veterans:

- Vietnam-era veterans;
- Special disabled veterans;
- Veterans separated from active duty within the last year; and
- Veterans who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized.

The JVA expands the coverage for veterans with disabilities by modifying the definition of "covered veterans." Previously, VEVRAA covered veterans rated as having 10% to 20% serious employment handicap or a disability rated 30% or more by the Department of Veteran Affairs.

The new JVA regulations also expand coverage to include the following categories of veterans:

- Disabled Veteran: (1) A veteran of the U.S. military, ground, naval or air service who is entitled to compensation (or who but for the receipt of military retired pay would be entitled to compensation) under laws administered by the Secretary of Veterans Affairs, or (2) a person who was discharged or released from active duty because of a service-connected disability.
- Recently Separated Veteran: Any veteran during the three-year period beginning on the date of such veteran's discharge or release from active duty in the U.S. military, ground, naval or air service.
- Armed Forces Service Medal Veteran: Any veteran who, while serving on active duty in the U.S. military, ground, naval or air service, participated in a United States military operation for which an Armed Forces service medal was awarded pursuant to Executive Order 12985.
- Other Protected Veteran: Any veteran who served on active duty in the U.S. military, ground, naval or air service during a war or in a campaign or expedition for which a campaign badge has been authorized, under the laws administered by the Department of Defense.

Revising Job Posting Requirements

The original VEVRAA regulations required contractors to externally list all job openings and allowed contractors to satisfy this requirement by listing openings with America's Job Bank, which advertised open positions nationally through a single web portal. America's Job Bank ceased operations on June 30, 2007, leaving contractors scrambling to satisfy the job posting requirement without manually listing open positions with each state employment agency. The new JVA regulations require contractors to list their jobs with an "appropriate service delivery system." Contractors may now satisfy the job posting requirement under the JVA by sending openings to a state workforce agency job bank or employment service in the area where the job opening occurs. OFCCP maintains links to all state workforce agencies on its website at http://www.dol.gov/esa/ofccpindex.htm.

Summary

By changing the definition of covered veterans, raising the monetary threshold of covered federal contracts and revising job posting requirements, the JVA and OFCCP's made several significant amendments to the VEVRAA's affirmative action regulations.

For more information, please contact Heather A. James, chair of the firm's Government Contracts section, at hjames@wtplaw.com or 410.347.8775.

EEOC Reports Sharp Rise In Job Bias Charges

On March 5, 2008, the EEOC reported that it had received a total of 82,792 private sector discrimination charge filings last fiscal year (ending September 2007) – the highest volume of incoming charges since 2002 and the largest annual increase (nine percent) since the early 1990s.

According to the EEOC's data, allegations of discrimination based on race, retaliation and sex were the most frequently filed charges, continuing a long-term trend. Additionally, nearly all major charge categories showed double digit percentage increases from the prior year – a rare occurrence.

Here is a brief summary of what the EEOC reported:

- Race charges continue to be the most common, amounting to over 30,000, up 12 percent from the prior year;
- Retaliation claims of over 26,000 represented an 18 percent jump from the prior year, and a 100 percent increase from fiscal year 1992;
- Sex and gender claims totaled over 24,000, spiking up seven percent;
- Age claims amounted to over 19,000, representing a 15 percent increase from the prior year; and
- Disability claims totaled over 17,000, up 14 percent from the prior year.
- National origin claims at 9,369 increased 12 percent.
- Claims alleging religious discrimination amounted to a little over 28,000, showing a 13 percent increase from the prior year and 100 percent increase since 1992.

Last year, for the first time, retaliation was the second highest charge category behind race, surpassing sex-based charges in total filings with the EEOC offices nationwide. (Historically, race has been the most frequently filed charge since the EEOC became operational in 1965.)

During fiscal year 2007, pregnancy charges surged to a record level of over 5,500, up 14 percent from the prior fiscal year's record of 4,900. Sexual harassment filings increased for the first time since fiscal year 2000, numbering 12,510, which is up four percent from prior fiscal year's total of 12,025. Additionally, a record 16 percent of sexual harassment charges were filed by men, up from nine percent in the early 1990s.

In addition to reporting on the increased number of discrimination charges being filed, the EEOC also announced that it had recovered approximately $345,000,000 in total monetary relief for charging parties, up 26 percent from the prior year's total of $274,000,000. Nearly $55,000,000 was obtained through EEOC litigation and more than $290,000,000 through administrative enforcement, including mediation.

Additionally, the EEOC obtained substantial nonmonetary relief, such as employer training, policy implementation, reasonable accommodations, and other measures to promote discrimination-free workplaces.

As businesses work through these difficult economic times, resulting in increased layoffs and terminations, it is very likely that the number of discrimination charges will continue to increase.

Kevin C. McCormick

Mark Your Calendars

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Annual Employment Law Update Seminar

Friday, October 3, 2008

The Tremont Grand, Baltimore, MD

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