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Employment Law Letter

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in this issue

Labor & Employment Law Department

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Costly Question: What Constitutes "Wages"?

There are lots of ways to compensate an employee for his or her efforts, but not all of them constitute wages under the laws relating to such payments. It might seem like the label doesn't matter much, but sometimes it matters a lot.

Take for example a decision by the Connecticut Supreme Court a few weeks ago in a dispute between a lawyer and his former law firm. He received a salary for his last year of work, but not the performance bonus he was customarily paid. When he sued, he claimed double damages under the statute that applies when an employer fails to pay "wages."

The lawyer was awarded a $50,000 bonus, but the trial and appellate courts disagreed as to whether he was entitled to double damages. The Supreme Court said that when a bonus is discretionary, and is not linked to any specific and ascertainable efforts of the employee, it does not constitute "wages" to which the double damages law applies. As a result, the law firm dodged a $50,000 bullet.

Another Connecticut judge recently ruled that a discretionary "incentive bonus" that is tied to the overall performance of the company, not just the individual employee, does not constitute wages. The decision says a bonus is only "wages" if the criteria on which it is based are entirely within the control of the employee and there is no discretion on the part of the employer.

As an example, double damages were recently awarded to a construction superintendent who sued when he was not paid a promised bonus of 25% of his salary if his projects were completed on time and on budget. A non-discretionary bonus based on "labor or services rendered by an employee, whether the amount is determined based on time, task, piece, commission or other basis of compensation" constitutes wages, the court said.

The definition of wages may also be important for other reasons. A recent U.S. District Court decision held that severance payments made by a large retail chain in a

downsizing mode were not wages, and therefore the company was not obligated for payroll taxes on these amounts. Because it had initially paid those taxes, it was entitled to a refund of over $1,000,000 plus interest!

Our advice is to consult a qualified professional before making an assumption as to whether a particular payment to an employee constitutes wages. The decision could have major wage and hour and tax implications.

Speak No Evil Of Discharged Employees

The doctrine of employment-at-will makes it difficult for a discharged employee to contest his or her termination, as long as the employer handles the process appropriately. That means treating the employee with respect, not humiliating him or her in front of others, and not broadcasting the reasons for the termination.

A good example of that last point is the recent double discharge of ESPN baseball commentator Steve Phillips and the young production assistant with whom he had an affair, Brooke Hundley. Although Bristol-based ESPN concluded its initial investigation without taking action, after the story hit the tabloids, both Phillips and Hundley were let go. Since they were both at-will employees, that was ESPN's right.

But then management made a mistake: it spoke to the press about the firings. Instead of simply saying this was an internal personnel matter about which it couldn't comment, ESPN characterized the affair as "misconduct," and said Hundley's accounts of the liaison were "inconsistent." That gave Hundley's lawyer enough ammunition for a lawsuit alleging defamation.

ESPN may be able to show their statements were not defamatory, either because they were true or because they were too innocuous to be damaging, or they may decide to settle rather than risk further publicity. However, the point is that they wouldn't have been in this position to begin with if they had just said "no comment" when asked about the firings.

Our advice to employers is to resist the temptation to publicly explain or justify a discharge decision. Juries are sympathetic toward terminated employees, and the last thing an employer needs after separating an employee is a lawsuit over what it said or did in the process.

Family Business Sues DOL Over "Child Labor"

Three generations of the Nuzzo family operate a pizzeria in Clinton. That sounds harmless, but the Connecticut Department of Labor didn't think so when it found that some of the family members were under the age of 16. They concluded that having three children (ages 8 to 13) of the current owner help out on Friday evenings and Saturdays violated the state's child labor laws, and advised him to end the practice.

Although no penalties were assessed, the owner hired a lawyer - who also happened to be a customer - and sued the state in federal court, demanding that the state DOL stay out of his family business, and not try to tell him how to raise his children. The suit alleges the children never miss school to help out at the pizzeria, never operate dangerous machinery, and are learning valuable life lessons about hard work and responsibility.

Lawyers quoted in an article about the case suggest that Connecticut should adopt a family business exception to the child labor laws, as some other states have done. That seems like a sensible idea, as long as it is carefully crafted to prevent abuse.

Look Out, Employers! Here Comes GINA

Almost everyone knows about Title VII, the ADA, the ADEA, and the many other state and federal laws prohibiting discrimination based on age, race, sex, disability, religion, pregnancy, sexual orientation, ethnicity or national origin, etc. But have you heard of the Genetic Information Nondiscrimination Act, or GINA?

The new federal law, which went into effect late last year, prohibits employers and insurers from discriminating based on a

person's genetic information. It has already spawned a lawsuit, apparently the first of its kind, here in Connecticut. A Fairfield woman claims she is a victim of discrimination based on her genetic information. When testing showed she was at risk for a form of breast cancer that ran in her family, she underwent a voluntary double mastectomy. Shortly thereafter, she was fired, notwithstanding what she describes as a long history of glowing evaluations.

GINA was intended to prevent employers and insurers from reducing costs by ridding themselves of individuals with potential medical problems. People shouldn't be disadvantaged because of a family history of diabetes, or because their parents had heart attacks at a young age. Prohibitions against disclosure of personal medical information reduce the risk of such discrimination, but the woman with the breast cancer risk voluntarily disclosed it to her employer.

Our opinion is that GINA shouldn't be a significant issue for most employers in Connecticut, who are used to accepting employee health problems as part of the cost of doing business. As an example, they are already prohibited from discriminating against employees who knowingly endanger their health by smoking, as long as they don't smoke in the workplace.

Feds Lean Left on Labor Laws

After eight years of efforts by the Bush administration to make federal labor laws a little more business-friendly, it shouldn't come as a surprise that the Obama administration is moving in the opposite direction. Some examples from just the past few months:

- With the appointment of two former union attorneys and one former management attorney to the NLRB, the Board is now at full strength, with three of the five members leaning toward labor. The final appointments were made shortly after the Supreme Court ruled that decisions made by the Board during an extended period when it had only two members were invalid.
- The National Mediation Board's new rule governing union elections for airline and railroad workers, requiring a union to win only a majority of those voting rather than a majority of those eligible to vote, has been approved by a federal appeals court.
- Federal contractors over $100,000 and subcontractors over $10,000 are now required to post notices informing employees about their right to unionize under the National Labor Relations Act.
- The Department of Labor has ruled that the definition of "son or daughter," for the purpose of allowing FMLA to be used for the serious illness of a family member, includes "*in loco parentis*" situations that are frequently found in non-traditional family settings, and that all that is normally required to prove such a relationship is a simple statement from the employee.
- The Wage and Hour Division now says that Bush-era rulings to the effect that time spent by employees changing clothing before or after work is not compensable work time were too broad, and that time spent changing into or out of protective equipment required by law, by the employer, or by the nature of the job should be paid.

S&G Notes

Our upcoming Fall Seminar for our Private Sector employees is scheduled for October 15th. We will also be offering a series of Sexual Harassment Prevention Training Seminars, in Hartford on either October 7th or October 27th and in Stamford on October 21st.

Please mark your calendars and make plans to join us. We will be sending out invitations closer to the dates indicated.

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289 Greenwich Avenue
Greenwich, CT 06830-6595
203-869-5600

12 Porter Street
Lakeville, CT 06039-1809
860-435-2539

- The Labor Department has announced plans to require employers to adopt compliance programs designed to assure that wage and hour rules and safety rules are not violated. Details have yet to be worked out, so stay tuned.

Legal Briefs
and footnotes...

IAM Wins Round 2 Over Pratt: A federal appeals court panel in New York has upheld a lower court victory for the International Association of Machinists in its fight to block Pratt & Whitney from closing its plant in Cheshire and a smaller unit in East Hartford in order to increase profits. The judges agreed with the trial court's finding that the Company failed to make "every reasonable effort" to explore options that would keep the facilities open, and to assign "extra value" to alternatives that would preserve bargaining unit work, as required by the applicable union contract. That contract expires on December 5.

CT FMLA Counts Out-of-State Workers: Under the Connecticut version of FMLA, an employer is only covered if it has at least 75 employees. But what if a larger employer has fewer than 75 workers in Connecticut? A Superior Court judge has ruled that out-of-state employees count toward the threshold. The court's reasoning included the observation that the provision in question was intended to relieve small employers from the burden of compliance, and that logic doesn't apply to big companies with a smaller presence here.

Are Lieutenants and Captains Managers? The state employee bargaining law excludes managerial employees from its coverage, so when state police lieutenants and captains tried to organize, the state said they had no right to do so. The State Board of Labor Relations disagreed, as did a reviewing court, which found that the officers didn't exercise "independent judgment" in the exercise of their primary duties. However, the Supreme Court found there was no such requirement in the statute, and sent the case back to the lower court to re-examine the case without regard to this factor.

Drug Test Not Required to Establish Violation: A UPS driver who was upset over his boss' failure to provide a helper after a work-related back injury had a confrontation with the supervisor in which he became sufficiently agitated that the supervisor insisted he undergo a drug test. When he refused, he was fired. He sued on several grounds, including the fact that he was asked to take a drug test when his employer lacked "reasonable suspicion" that he was under the influence of drugs or alcohol. UPS said there was no violation of the drug test statute because no test was actually administered. The court disagreed, and held that no test was required in order to establish a violation of the statute.

One Valid Reason For Firing is Enough: A nurse's aide was terminated after yelling at a patient to stop her from using a particular bathroom so as to avoid spreading a communicable disease. She filed a lawsuit on various grounds, including wrongful discharge in violation of public policy, because she was following the instructions of her supervisor, which were based on public health requirements. The court said even if this reason for termination violated public policy, the plaintiff herself alleged she was fired for another reason as well, namely being rude to the patient. It ruled that where there are multiple reasons for discharge, one valid reason is enough to defeat a wrongful discharge claim.