



DEMOCRATS WIN TO AFFECT MINIMUM WAGE, IMMIGRATION AND LABOR



Gary W. Wright
 "The days of a business-friendly Congress are gone...?"

The Democrats swept to victories in the U.S. House and Senate, state governorships, and in many state legislative races. The Democrats apparently gained 30 House seats for a 232-203 majority, and 6 Senate seats for a 51-49 majority. The

days of a business-friendly Congress are gone, although the Democratic majority is going to have a difficult time reaching consensus as to priorities and policies?

Both Senator Ted Kennedy, and soon to be House Majority Leader Nancy Pelosi, have promised a new minimum wage increase bill to be introduced within the first 24 hours of the next Congress, and plans for increasing the federal minimum wage approximately \$2.00 per hour over the next 2 years. President Bush has stated that he hopes to find "common ground" with the Democrats on a minimum wage bill, and also on another issue that has been vexing Congress, an immigration reform bill. The immigration reform bill that had been approved by the Republican Senate, but rejected by the Republican House, had provided a road to legal status for many undocumented workers as well as a guest-worker program that would authorize additional temporary visas. Republicans have been divided on the immigration issue but the President may pick up support from the Democrats on this issue. It appears that the anti-immigrant sentiment was not reflected in recent elections, as tough anti-immigration supporters did not attract the expected votes to off-set the loss of Hispanic votes. A more ominous possibility in the upcoming Congress relates to legislative proposals to grant unions recognition without secret ballot elections, based on their production of authorization cards signed by a majority of employees. Republican leaders

in Congress had managed to avoid a Congressional vote on the issue.

A possible irony in recent elections, however, is that both major political parties may become slightly more conservative. A number of Republican moderates were defeated in the elections, while the Democrats won in part by recruiting more-conservative candidates than they had run in the past. Nevertheless, the new Congress will be led by old-line liberal Democrats, who will be pushing a much more liberal agenda.

VACATION PAY ALERT



Jerome D. Pinn
 "... what should an employer do in light of the Tennessee Attorney General's recent opinion, if they wish to avoid paying separating employees (or perhaps only those employees whose employment is terminated involuntarily) vacation pay."

A recent opinion issued by the Tennessee Attorney General, changes the legal standards that have been applied to the payment of vacation to Tennessee employees upon their termination of employment, both voluntary and involuntary, if it is agreed with by the Tennessee courts.

Although opinions of the Tennessee Attorney General are not binding on the courts, they are often deemed to be persuasive regarding how Tennessee laws should be interpreted.

Only last year, the Tennessee Department of Labor (DOL) issued a decision, in Gamble v. Sonic Automotive d/b/a Crest Cadillac (Docket

No. 20009-04/05), in which the DOL found that the Tennessee vacation pay statute, Tenn. Code Ann.

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SEVERANCE AGREEMENT ALERT



Ronald G. Daves
"Recently, courts in various jurisdictions have held that severance agreements, in which employees promise, in exchange for consideration received from the employer, not to file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"), or to withdraw a pending EEOC charge, are, on their face, retaliatory."

Employers should be aware that they may be assuming the risk of a legal retaliation claim if they enter into severance agreements with separating employees if the agreement contains certain types of provisions. Recently, courts in various jurisdictions have held that severance agreements, in which employees promise, in exchange for consideration received from the employer, not to file a discrimination charge with the Equal Employment Opportunity Commission ("EEOC"), or to withdraw a pending EEOC charge, are, on their face, retaliatory. On August 8, 2006, the United States District Court for the District of Maryland held in EEOC v. Lockheed Martin Corp., 444 F. Supp.2d 414 (D. Md. 2006), that presenting a severance agreement with an overbroad release could be itself retaliatory. In that case, Lockheed Martin entered into a severance agreement with an employee who had previously filed a discrimination charge with the EEOC. The severance agreement provided that the employee must withdraw her pending EEOC charge. The EEOC filed suit against Lockheed Martin, arguing that the company had unlawfully retaliated against the employee under Title VII of the Civil

Rights Act of 1964 on two grounds: (1) by conditioning the employee's receipt of severance benefits on the withdrawal of her EEOC charge, and (2) by requiring the employee to waive her right to file an EEOC charge. The court agreed with both arguments.

On the first issue, the court found that the employer had engaged in retaliation by requiring the employee to dismiss her EEOC charge in order to receive severance benefits. The court found that, if the employer was going to provide severance benefits to employees, it could not provide them only to employees who refrain from engaging in the protected activity of filing an EEOC charge. On the second issue, the court found that the severance agreement's release of claims was retaliatory on its face, because it required the employee to waive her right to file an EEOC charge, a protected activity under Title VII.

The court held that "conditioning severance payments on an employee agreeing not to file a charge with the EEOC is facially retaliatory" in violation of Title VII (and other civil rights laws). The court distinguished between a person filing lawsuits for personal relief (which can be waived), and the filing of a charge with the EEOC, because the recognized purpose of the latter is "to inform the EEOC of possible discrimination", which may affect numerous employees, not just the employee filing a charge. The EEOC is legally required to investigate charges of discrimination.

Other potentially retaliatory conduct would include requiring employees, as part of a written agreement, to avoid participating in an EEOC investigation

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or proceeding, or to avoid assisting others who file EEOC charges. Non-assistance agreements are legally void as being against public policy, because the EEOC acts not only on behalf of private parties, but also to vindicate the public interest in preventing employment discrimination. Not only are non-assistance agreements unenforceable, they may be found to be retaliatory.

Based upon the court's opinion in the Lockheed Martin case, and similar opinions from other courts, employers might wish to refrain from conditioning the receipt of severance payments on the waiver of the right to file an EEOC charge, or the withdrawal of such a charge. Not all courts are in agreement on this issue, however.

On October 24, 2006, in the case of EEOC v. Sundance Rehabilitation Corp., 2006 WL 3007322 (6th Cir. Oct. 24, 2006), the United States Court of Appeals for the Sixth Circuit (which has jurisdiction over employers located in Tennessee, Kentucky, Ohio and Michigan) held in a 2-1 decision that an employer does not engage in unlawful retaliation under Title VII merely by offering separating employees a severance or separation agreement containing a promise not to file an EEOC charge. In the Sundance case, the employer offered a separation agreement to a separating employee in which the employee was asked to agree that she would "not institute, commence ... or otherwise pursue any ... complaint, claim [or] charge" against the employer "in any administrative, judicial or other forum" with respect to any acts or events occurring during her employment.

The EEOC argued that the separation agreement constituted a per se violation of the anti-retaliation provisions of Title VII and other federal anti-discrimination laws, amounting to a "preemptive strike against future protected activity." The EEOC argued that the separation agreement improperly conditioned severance pay on promises from the terminated employee not to file charges with the EEOC, nor to participate in EEOC proceedings, and allowed the employer to sue for the return of the payments if the former employee engaged in such protected activity.

The Sixth Circuit observed that courts have held that prohibitions on filing charges with the EEOC are void and unenforceable as against public policy. It agreed that allowing the filing of charges to be obstructed by enforcing a waiver of the right to file a charge could

impede the EEOC in enforcing the civil rights laws, because the EEOC depends upon the filing of charges to notify it of possible discrimination. However, the court also noted that, while an employee cannot waive her right to file a charge with the EEOC, she could waive the right to recover damages in her own lawsuit, and the waiver of a right to file a cause of action was not invalid just because it was conjoined with a void waiver of the right to file an EEOC charge. The court noted that the EEOC's position was that the "offering the separation agreement itself amounts to retaliation", because it contained a promise that the employee would not file an EEOC charge. The court rejected this position. Key to the court's decision was that the separation agreement did not appear to prevent the employee from participating in EEOC proceedings, which would have rendered it unenforceable. The court held that including an unenforceable charge-filing ban in a separation agreement does not make the mere offering of such an agreement in and of itself retaliatory.

The court found that the employee had not been deprived of anything by the offering of the separation agreement. Those employees who rejected the agreement did not give up any rights. Those employees who accepted the agreement could later argue that the non-charge filing provisions are unenforceable and possibly keep the money paid to them.

Thus, under the current state of the law, employers operating with the Sixth Circuit may continue to offer separation/severance agreements to separating employees containing promises not to file EEOC charges without thereby engaging in retaliation under the federal anti-discrimination laws. Employers operating in other jurisdictions may or may not be able to do so. Also, in most jurisdictions, it is permissible to have employees agree to forego any personal legal relief stemming from the filing of an EEOC charge.

Given the closeness of the 2-1 decision in the Sundance case, employers in the Sixth Circuit should stay abreast of further legal developments on this issue. Also, the U.S. Supreme Court may later be called upon to resolve the split among the courts on this issue.

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VACATION PAY ALERT continued from page 1

50-2-103, required employers to pay separating employees for any accrued unused vacation, regardless of the circumstances surrounding the termination of employment. The vacation pay statute provides that:

The final wages of an employee who quits or is discharged shall include any vacation pay or other compensatory time that is owed to the employee by virtue of company policy or labor agreement. This [statute] does not mandate employers to provide vacations, either paid or unpaid, nor does it require that employers establish written vacation pay policies.

In *Gamble*, a former employee claimed that he was wrongfully denied pay for his accrued vacation after he was discharged by his employer for cause. The employer claimed the employee was not entitled to payment based upon a clear statement in its employee handbook that any unused vacation would be forfeited if an employee was terminated for cause. The DOL ruled that, while company policy would control the method by which employees accrued vacation, Tenn. Code Ann. 50-2-103 “mandates the payment” of any accrued vacation pay or other compensatory time accrued under the policy by the employee. According to DOL, the statute did not give employers discretion whether or not to pay accrued compensation. Once accrued, the statute required all compensation to be paid to the terminated worker, irrespective of whether the termination was voluntary or involuntary.

On November 13, 2006, the Tennessee Attorney General issued an opinion (Opinion No. 06-169) in which he concluded that “[u]nless the employer’s policy ... specifically requires compensation of unused vacation pay ... to an employee upon his or her termination of employment, Tenn. Code Ann. 50-2-103 does not require that an employee’s final wages include such compensation.” The Attorney General noted that the Tennessee DOL has interpreted Tenn. Code Ann. 50-2-103(a)(3) to require the payment of unused accrued vacation pay to an employee when he or she quits or is discharged, even if the employer’s policy disallows such payment. He noted that the DOL views vacation pay as “accrued” and, therefore, protected from an employer’s policy that would forfeit such compensation. Under the DOL’s interpretation of Tenn. Code Ann. 50-2-103(a)(3), absent a binding agreement regarding unused vacation pay that allows forfeiture of vacation, an employee’s final wages must include unused vacation pay.

The Attorney General construed the vacation pay statute differently. He concluded that, unless the employer’s policy requires compensation of unused vacation pay or other compensatory time to an employee upon his or her termination of employment, Tenn. Code Ann.

50-2-103(a)(3) does not require that an employee’s final wages include such compensation.

The Attorney General noted that the statute’s plain text predicates payment to an employee of unused vacation upon the existence of a company policy that provides such compensation. Under the statute, an employee’s final wages upon termination must include vacation pay “that is owed by virtue of company policy or labor agreement.” The Attorney General observed that the phrase “by virtue of” means “because of”. Therefore, an employee’s final wages should include unused vacation pay only if an employer established a vacation policy, and that policy obligates the employer to pay for vacation upon termination.

The Attorney General held that the text of the employer’s company policy would dictate whether an employee’s “final wages,” under Tenn. Code Ann. 50-2-103(a)(3), “shall include any vacation pay or other compensatory time.” He found that the statute effectively gives the force of law to an employer’s policy on the issue of whether unused vacation pay is owed to an employee at his or her termination.

What about the Tennessee DOL’s interpretation to the contrary? The Attorney General stated that “[w]e respectfully disagree with the Department’s construction of 50-2-103(a)(3).” He noted that, under the DOL’s interpretation, if the employer has a policy that forfeits any unused vacation pay, the DOL would nevertheless require that the employee’s final wages to include vacation pay because the employee already would have “accrued” it. But, the Attorney General stated, “[t]his interpretation disregards the effect of the employer’s unused vacation policy contrary to the plain meaning of 50-2-103(a)(3).” According to the Attorney General, if the employer’s vacation policy specifically disallows such compensation upon an employee’s termination, the employee’s “final wages” would not include vacation pay because this pay would not be owed “by virtue of company policy.” Tenn. Code Ann. 50-2-103(a)(3).

So, what should an employer do in light of the Tennessee Attorney General’s recent opinion, if they wish to avoid paying separating employees (or perhaps only those employees whose employment is terminated involuntarily) vacation pay? It should consider drafting its vacation policy to provide for an express non-payment of any unused vacation, stating that such vacation is forfeited upon termination of employment. Similar language can be used with respect to other forms of benefits, such as sick time, paid time off (PTO), etc. Additional legal guidance should be forthcoming from the Tennessee courts, whose opinions on these questions would be legally binding upon employers, unlike the Attorney General’s opinions.

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