

PAYMENT REQUIRED FOR UNUSED VACATION PAY

BY GAIL S. PERRY



Gail S. Perry

Two recent Supreme Court cases are increasing the size of the final paycheck due many employees upon separation from their employment. Final paychecks must include commission, even if all employer-defined conditions for earning it have not been met, and all earned but unused vacation pay.

The opinions are prompting review of employee handbooks and policy manuals for inconsistency with these directives. Employers are removing language that reduced or eliminated unused vacation banks if termination was without notice, and are abolishing "use it or lose it" vacation policies. They are modifying definitions of how and when commissions are earned to mesh with the statutory trigger for when they are fully payable, that is, when the order is on file.

The context for the Supreme Court cases is the Wage Payment and Collection Act. The Act defines wages as "compensation for labor or services rendered by an employee, including fringe benefits, when previously agreed to and conditions stipulated have been met by the employee." An agreement that defines wages contrary to that statutory definition is void.

ROSELAND - VACATION PAY

In *Roseland v. Strategic Staff Management*, an employee handbook and related benefits information provided that the company's employees earned vacation time for continuous service after one year, with increases in the amount of time earned after two years and five years. The company's published policies provided that unused vacation time would not carry over from year to year and that employees would not be paid for unused vacation time upon resignation or termination. Two separated employees sued Strategic for the unpaid vacation time, alleging that the policy conflicted with the Nebraska Wage Payment and Collection Act because unused vacation time constituted earned wages as defined by the Act. The District Court found in favor of the employees.

The Court of Appeals reversed, based upon a 2004 case in which the Nebraska Supreme Court specifically looked to the provisions in a company's handbook to determine whether a previous employee of that company was entitled to receive earned but unused vacation pay. The Court of Appeals said the language contained in a company's

handbook is dispositive of whether an employee is entitled to be paid for earned but unused vacation time upon termination.

The Supreme Court reversed in favor of the employees, finding that the Court of Appeals misapplied the 2004 decision. The Supreme Court held that an employer's policy to refuse to pay an employee for vacation time that accrued prior to termination conflicts with the Act and that "accrued vacation time, which is part of an employment agreement, is due and payable as wages upon termination of employment."

SANFORD - COMMISSIONS

Also in 2006, a separate three-judge panel of the Court of Appeals determined that even future commissions constitute wages under the Act in at least some instances. In *Sanford v. Clear Channel Broadcasting*, Sanford was employed to sell advertising for Clear Channel and was compensated solely on a commission basis. Consistent with the standard within the broadcast industry, the Clear Channel policy, to which all salespersons agreed, was to not pay salespersons commissions on any advertising that was sold by the salesperson prior to separation from the station, but which had not aired prior to the salesperson's final day of employment. The policy applied whether separation from employment with the station was voluntary or involuntary.

After she was terminated, Sanford sued Clear Channel for commissions on advertising she had sold, but which had not been aired prior to her date of separation. The Court of Appeals decided in the employee's favor, determining that wages, as defined by the Act, included commissions for "orders on file" with an employer at the time of termination of employment. Thus, the Court held, an employment agreement that conflicts with such a definition, even if the policy is common within the industry, is void because it is prohibited by the Act.

The Wage Payment and Collection Act has an expanded role based on these two decisions and requires a re-examination of post-termination payroll practices. Failure to comply with the Act may result in the sanction of double or triple damages to a wrongfully unpaid employee, as well as payment by the employer for the employee's attorney fee.

DRUG TESTING CONSIDERATIONS: SOME WHYS AND HOWS

BY CYNTHIA R. LAMM



Cynthia R. Lamm

Does your business have a written policy against the use of illegal drugs? Do you have established written guidelines regarding drug testing? Promotion of a drug-free workplace has many advantages, including increased productivity, decreased absenteeism, a safer work environment, fewer medical claims and lower employee theft. The benefits of a drug-free work environment can be seen financially through lower health insurance costs and decreased workers' compensation premiums.

Promoting a drug-free workplace has become not only a priority, but a requirement for many employers. Even when an employer is not required by federal laws or regulations to implement a drug-free work policy, or to drug test employees, many are finding advantages to implementing drug testing policies. Employee safety can be boosted in those businesses where employees have close contact with the public, or perform safety or information-sensitive work. A drug testing policy can also help an employer insulate itself against potential claims of negligent hiring or negligent retention of employees who the employer knew or should have known had a substance abuse problem. As a general rule, everyone can be drug tested within reason. Restrictions or limits to testing may apply, depending on the nature of the employment relationship, the timing of drug test administration, the type of drug tests administered, and the manner in which they are administered.

Generally, circumstances in which drug testing is appropriate include:

- when an employee has provided consent;
- when there is a reasonable basis to suspect an employee is using drugs at work or is under the influence of alcohol. (An unsubstantiated rumor is an insufficient basis upon which to subject an employee to drug testing);
- after an employee is involved in an accident if the employer's policy so provides;

- randomly, if there is a policy in place, tests are given on an unannounced basis, and employees are selected randomly;
- to follow up when an employee returns to work after completing rehabilitation or counseling for substance abuse;
- periodically, at specified times for employees who have returned to the workforce after testing positive, or for employees working in safety or security-sensitive positions; and
- prior to hire when an applicant has been provided a conditional offer of employment. (While alcohol screening is of little value and is disfavored, preemployment drug tests can be lawfully required if administered in the right circumstances and in the right manner.)

If a business is considering a written drug-free workplace policy, it is important that the policy follows the laws and regulations of the State of Nebraska. Some important regulations include:

- that when a drug test is positive, a secondary, scientific test be conducted to confirm the positive test result;
- all confirmatory tests, except confirmatory breath tests, must be performed by a clinic, hospital, or laboratory which is certified pursuant to federal law; and
- test results cannot be disclosed by the employer or its agent to the public, unless required by law, or to the employee upon the employer's request.

The Health and Human Services regulations provide additional guidance concerning testing methods and scientific testing techniques which have been approved for confirmation of positive findings of alcohol or drugs in a preliminary test.

Q&A

- Q.** We are tired of having our exempt employees lose or damage company tools or equipment without paying for the damage. Can we deduct from the salaries of exempt employees or require them to reimburse us for loss or damage to company property without affecting their exempt status under the Fair Labor Standards Act (FLSA)?
- A.** According to a Letter Ruling issued by the Wage and Hour Administration on March 10, 2006, such deductions would violate the salary basis requirements of the FLSA and are impermissible. Subject to certain exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work. According to Department of Labor (DOL) regulations, salaries must be "guaranteed" or paid "free and clear." None of the exceptions to the salary basis test contemplates charging employees for loss or damage to company property. In fact, DOL regulations prohibit reductions in compensation due to the quality of work performed by the employee. The DOL has specifically rejected proposals to change the Regulations to make exceptions for restitution or fines an employer might assert based upon employee misconduct. As for non-exempt employees, deductions for lost or damaged property cannot reduce the employee's pay below required minimum wage or overtime entitlement amounts.



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