

# The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed



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## Leave

# Maryland Enacts Emergency Legislation Regarding Pay Outs

by Eric Paltell



*Eric Paltell attended the signing ceremony and is standing behind Governor O'Malley*

On April 24, 2008, Governor O'Malley signed into law Senate Bill 797. This emergency legislation, which was drafted by the author and takes effect immediately, returns to Maryland employers to the right to have a written policy which determines whether or not unused leave time must be paid to a departing employee. The legislation reverses the effects of a 2007 unpublished court decision and subsequent change in policy by the Maryland Department of Labor, Licensing and Regulation ("DLLR").

As we have previously reported, in August 2007, the Maryland Court of Special Appeals issued an unpublished decision which held that accrued, unused paid time off ("PTO") must be paid to employees upon termination, regardless of what the employer's policy said about payment of unused leave to terminating employees. The Court's decision in *Catapult Technology Ltd. v. Wolfe* was contrary to established Maryland law, where both judicial and administrative guidance had long permitted employers to determine

whether accrued but unused leave time would be paid to the departing employees. Shortly thereafter, in November 2007, the DLLR reversed its position and adopted the Court's holding in *Catapult* as its position in the Maryland Guide to Wage Payment and Employment Standards.

Following the DLLR's change in position, many of our clients contacted us to express their concerns about the impact of the change in the law on their business. Nonprofits with generous leave policies now faced the prospect of being required to pay out substantial unused leave balances to departing employees, as well as the obligation to carry these balances as accrued liabilities on their books. Some clients were concerned that any employee who quit or was terminated in the three years preceding the change in the law might now file suit to recover their unpaid leave, as well as triple damage penalties and attorneys' fees. Other employers asked us to help them limit liability by revising their policies to limit the amount of leave employees could

accrue. The result of the *Catapult* decision and the change in DLLR position was that both employers and employees suffered, as companies faced the prospect of a new liability, while employees would be given less leave and less flexibility in using their leave.

As a result of our client concerns, I decided to ask the Maryland Chamber of Commerce's Employment Relations Committee (on which both Darrell VanDeusen and I sit) to consider finding a sponsor in the Maryland General Assembly who would support a legislative effort to reverse the effects of the *Catapult* decision and the DLLR change in policy. As those of you who are familiar with Maryland politics know, getting pro-business employment legislation through the Maryland General Assembly is no easy task. Nevertheless, we succeeded in getting bipartisan sponsorship from Senators John Astle (Democrat) and Allan Kittleman (Republican), and we teamed with the Maryland Association of Non-Profit Organizations, the Chesapeake Human Resources Association, and the Maryland Chapter of the Society of Human Resources Management ("SHRM") to draft legislation and lobby the General Assembly. Much to our pleasant surprise, the legislation passed the Senate and the House unanimously and was declared an Emergency Bill, meaning that it takes effect on the date that it was enacted (April 24, 2008).

Under the provisions of the new law, an employer is required to give notice of leave benefits to employees at the time they are hired. If the employer gives such notice to employees, and the employer has a written policy that places limits on the circumstances under which unused leave will be paid to employees at termination, then that written policy governs a departing employee's right to unused leave. On the other hand, if the employer does not have a written policy in place, or fails to give notice of leave benefits to employees at the time they are hired, then the employee is entitled to be paid for accrued but unused leave (exclusive of sick leave) at termination. Because of the emergency nature of the legislation, the law also provides that, if an employee was terminated on or after November 1, 2007, but prior to April 24, 2008, the employee is not entitled to accrued leave at termination if the employer had a written policy placing limits on the payment of accrued leave at termination and the policy was communicated to the employee prior to his or her termination.

The passage of SB 797 is an important victory for Maryland employers, and should serve to benefit both employers and employees. Under the new law, employee will be made aware of their leave rights when they are hired, and employers will have the freedom to grant generous leave benefits without having to treat these benefits as an accrued liability which must be paid to former employees.

#### FMLA

### **New FMLA Poster on Military FMLA Issued by DOL** by Darrell VanDeusen

The Department of Labor (DOL) has issued a poster on Military FMLA. This is a mandatory posting for FMLA covered employers and should be placed next to the current FMLA poster advising employees of their FMLA rights. The poster provides general information on military FMLA, which was signed into law by the President in January. The DOL has not yet issued regulations on military FMLA, but employers are still required to follow the law, which provides for: (a) up to 26 weeks of FMLA leave to care for a spouse, son, daughter, parent, or next of kin of a servicemember who has suffered a serious illness or injury in military combat; and (b) up to 12 weeks of FMLA leave due to a "qualifying exigency" related to active military duty in support of a contingency operation. Get your copy of the new DOL poster at: <http://www.dol.gov/esa/whd/fmla/NDAAAmndmnts.pdf>

#### Workplace Investigations

### **Super Sleuth School Principal May Be Liable For Videotaping Teachers In Locker Room** by Kelly C. Hoelzer

Here is a good example of why you should always talk to human resources before conducting an investigation into possible employee misconduct.

Dearborn High School in Dearborn, Michigan, employs three male physical education teachers. These teachers share an office, which also serves as their locker room and changing area. The only way to access their locker room is through the boys' locker room.

School administrators suspected one of the physical education teachers of stealing from the student locker rooms. The principal and school police liaison agreed to install two hidden video cameras in the teachers' office/locker room, hoping to catch the alleged perpetrator in the act of putting stolen items into his desk. The images from the hidden cameras were not displayed live, but were recorded and stored for 30 days on the school's video security system.

After two of the teachers discovered the hidden cameras, they complained to the principal. After finally conferring with the school district's Human Resources Director, the principal removed the cameras.

The teachers sued the school district and the principal in federal court alleging violations of their constitutional right to privacy guaranteed by the Fourth Amendment, as well as various state tort and statutory claims, including one for invasion of privacy. The court determined that as public employees, the teachers had a constitutional right to be free from unreasonable searches by their public employer. Given that their office also served as a locker room where they changed clothes, and was accessible only by going through the students' locker room, the court found that the teachers had a reasonable expectation of privacy in that area.

The court ruled, however, that the school district was not liable because it did not have a policy of installing video cameras in staff offices and because it was immune from liability under Michigan law. The school principal, on the other hand, was not entitled to summary judgment and could be held personally liable for her violation of the teachers' constitutional rights and for violations of Michigan tort law and a statute prohibiting video surveillance in private places. Perhaps the principal could have avoided her legal troubles if she had simply contacted the Human Resources Director before investigating. See *Helisek v. Dearborn Public Schools*, No. 06- CV-12369-DT (E.D. Mich. Mar. 31, 2008).

#### Paid Leave

### **Love Leave** by Darrell VanDeusen

Legislation has been proposed that would grant workers the right to a week of paid leave for a "love vacation." This is in addition to regular vacation time,

sick leave and paid holidays. The purpose of this leave is to reduce the high divorce rate and “revive passion in a population whose workdays are growing longer.” During those seven days, “couples could devote themselves to each other both at an erotic and emotional level and find their way back to the path of love in order to find the wellspring of love again.” This proposed legislation has 13 co-sponsors.

Before you start panicking, you should note that this legislation has been proposed in Finland where employees are already entitled to 35 days of vacation and paid holidays per year.

You can view a news article on the issue at <http://www.boingboing.net/2008/03/16/finish-mp-proposes.html>.

### Kollman's Corner

## Differing Views

### by Frank L. Kollman

I believe in diversity, and I believe in tolerance. While I may favor columnists, politicians, authors, and other commentators because they share my views, I am far from certain I would personally like any of them. In fact, I do not necessarily share the same political views and values of my closest friends and family, but I get along with them fine. I guess personality for some people is the result of forces different from views and values.

It is always interesting to me to watch people who once shared the same beliefs become bitter enemies. They may continue to share the same beliefs, but they begin to doubt the purity of the other's commitment. Earlier this week, a fist fight broke out between two unions - the SEIU and the California Nurses Association - because they both want to represent the same group of employees. Shiites and Sunnis are both committed to Islam, and apparently mutual annihilation. John Adams and Thomas Jefferson became bitter enemies over issues relating to France and England, though they had been close friends for many years.

I suspect that many of the problems of the workplace are not related to differing views, but extremism and intolerance. Where there is mutual respect, grievances, charges, and lawsuits tend to be less frequent. Where there is distrust, extremism, and intolerance, there is strife. Yes, there will be fundamental disagreements at times, but fistfights, mutual annihilation, a complete breakdown in

communications, and revenge are rarely the correct response.

I am a dyed-in-the-wool management guy, and I may not always understand employees, unions, and government employees. I will, however, continue to try to understand and respond, when I can, with tolerance. Good managers should do the same.

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

### Arbitration Follies

## It's Only Mostly Stealing

### by Peter S. Saucier

A bartender at the Frenchman's Reef Lobby Bar was visited by an undercover investigator who purchased two drinks. He paid cash and watched the bartender scan a coupon for free drinks before placing it in the register and pocketing the cash. The bartender had been caught by another undercover agent pulling the same trick a year earlier, but was not terminated. Presented with these facts, an arbitrator put the bartender back to work. His reasoning speaks for itself: “In the Arbitrator's opinion, while what [the bartender] did was serious it was not as serious as if he did not record the sale at all and simply pocketed the money. That would have been a clear case of stealing and embezzlement. In this instance [the bartender] substituted one form of payment for another. The complimentary drink coupon had a value that was equivalent to, or even greater than the cost of the vodka/cranberry.”

Kollman & Saucier, P.A.  
The Business Law Building  
1823 York Road  
Timonium, MD 21093  
P. 410.727.4300  
F. 410.727.4391

To be added to our mailing list or if you have comments or questions, please email us at [kgauvey@kollmanlaw.com](mailto:kgauvey@kollmanlaw.com).