

Nebraska Supreme Court Changes the Rules on Vacation Pay

Most Nebraska employers understand that there is no legal requirement for a private-sector employer to provide paid vacation or time off in Nebraska. Consequently, Nebraska employers have traditionally possessed significant flexibility in how they structured their vacation, paid time off and other leave benefits. Over the years one recurring issue Nebraska employers have faced is whether an employer is obligated to pay unused vacation, paid time off or leave to an employee upon termination. While past court decisions have indirectly suggested that employers could refuse to pay unused vacation upon termination, the Nebraska Supreme Court has now definitively answered the question with a resounding “NO!”

On October 20, 2006, the Nebraska Supreme Court issued its long-awaited decision in *Roseland v. Strategic Staff Management, Inc.*, 272 Neb. 434 (2006). In *Roseland*, three employees voluntarily resigned from their employment with Strategic. At the time of their resignations, the employees had accrued unused vacation ranging from one to three weeks. Each of the employees demanded payment for this unused accrued vacation, but Strategic refused to make payment, citing language in its employee handbook that stated “[u]pon termination, employees will not be paid for unused vacation time.”

The former employees filed suit against Strategic and the trial court found that Strategic’s employee handbook directly conflicted with the Nebraska Wage Payment and Collection Act (“Act”) and therefore was void. This decision was later reversed by the Nebraska Court of Appeals, citing a prior Nebraska Supreme Court decision that suggested that the terms of an employer’s employee handbook govern this issue. The Nebraska Supreme Court agreed to review these lower court decisions, and in *Roseland* concluded that the trial court was correct and ruled in favor of the former employees.

Specifically, the Nebraska Supreme Court noted that 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, whether the amount is determined on a time,

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task, fee, commission, or other basis. Wages shall include commissions on all orders delivered and all orders on file with the employer at the time of termination of employment less any orders returned or cancelled at the time suit is filed.

NEB.REV.STAT. §48-1229(4). Subsection (3) of Section 48-1229 defines “fringe benefits” as including “sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit programs regardless of whether the employee participates in such plans or programs.” The Nebraska Supreme Court held in *Roseland* that the “payment of vacation pay was an ‘agreed to’ benefit between Strategic and its employees . . . and Strategic could not circumvent the payment of wages that had accrued by refusing to disburse accrued vacation pay because employment had been terminated.” *Roseland*, at 440. As a result, the Nebraska Supreme Court reinstated the trial court’s order granting judgment in favor of the former employees for the unpaid vacation.

LESSON: The *Roseland* decision makes it clear that Nebraska employers must pay accrued unused vacation or paid time off to departing employees. While it is useful to have this question definitively answered, the *Roseland* decision left several related questions unanswered. For example:

- ***Does the Roseland decision apply to sick leave too?*** The likely answer is “yes,” given that the Act expressly includes “sick leave” in the definition of “wages.”
- ***Are “use it or lose it” PTO policies now invalid?*** Probably. Employers should consider putting definitive caps on the amount of vacation, paid time off and sick leave that an employee may accumulate, and policies in place which require employees to use the leave that they accumulate.
- ***Before something becomes “wages” under the Act, doesn’t the employee have to meet all “conditions stipulated”?*** Yes. While employer’s long contended that one of those conditions could be that the employee be employed by the employer at the time the vacation was to be paid, the *Roseland* court completely ignored this requirement. Whether this requirement has now been rendered meaningless is unknown.
- ***When does the Roseland decision become effective?*** Because *Roseland* merely interpreted an existing statute, it is applicable

retroactively, possibly giving rise to claims as long as four (4) years ago.

- ***Can the Roseland decision be repealed?*** Yes. The Roseland decision represents an interpretation of Nebraska statutory law. It is likely that the Nebraska Legislature will consider legislation amending the Act to address the unanswered questions left by Roseland, as well as issues relating to the payment of commissions to departed employees.
- ***What should employers do?*** At a minimum, employers should review their policies and employee handbooks to consider whether changes should be made and implemented effective January 1, 2007, to bring their policies into compliance with the Act and the *Roseland* decision. In addition, given that some Nebraska plaintiff attorneys have begun exploring possible class action lawsuits against employers based upon the *Roseland* decision (and the availability of attorneys' fees for prevailing former employees under the Act), employers must be vigilant about remedying faulty policies and moving swiftly to snuff out possible claims.

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