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Workplace Law Update

Mark A. Fahleson, Esq.
Rembolt Ludtke LLP

Nebraska Wage Payment Law Amended

By now most Nebraska human resource professionals have heard that the Nebraska Legislature adopted LB 255, legislation to address the confusion created by the Nebraska Supreme Court's opinion last year in *Roseland v. Strategic Staff Management, Inc*., 272 Neb. 434 (2006). The *Roseland* decision held that under the Nebraska Wage Payment & Collection Act ("Wage Act") Nebraska employers must pay accrued unused vacation to departing employees, regardless of what the employer and employee may have agreed to. The decision called into question how other paid leave, such as sick leave, should be treated under the Wage Act.

On April 2, Governor Dave Heineman signed LB 255 into law. The new law clarifies that paid leave other than unused earned vacation does not constitute "wages" that must be paid upon termination unless the employer and employee agree otherwise. The new law also clarifies how commissions are to be treated. "Unless the employer and employee have specifically agreed otherwise through a contract effective at the commencement of employment or at least ninety days prior to separation, whichever is later, wages includes commissions on all orders delivered and all orders on file with the employer at the time of separation . . . ." Also, the law amended the Wage Act to provide that upon an employee's separation from employment "the unpaid wages constituting commissions shall become due on the next regular payday following the employer's receipt of payment for the goods or services from the customer from which the commission was generated." Employers must now also "provide an employee with a periodic accounting of outstanding commissions until all commissions have been paid or the orders have been returned or cancelled by the customer."

The new law carried an emergency clause, meaning it became effective on April 2. At a minimum employers should review their current policies to ensure they are in compliance with the new law, and should consider adopting written agreements for those employees being paid on a commission basis.

Employment/Labor Law Practice Group

David J. A. Bargen
dbargen@remboltludtke.com

Britt J. Ehlers
behlers@remboltludtke.com

Mark A. Fahleson
mfahleson@remboltludtke.com

Sarah S. Pillen
spillen@remboltludtke.com

Rembolt Ludtke LLP

1201 Lincoln Mall, Suite 102
Lincoln, NE 68508
Fax: 402 / 475-5087
402 / 475-5100

125 South 6th Street
Seward, NE 68434
Fax: 402 / 643-3969
402 / 643-4770

www.remboltludtke.com

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Family Military Leave Act is Adopted

On April 4, Governor Heineman signed the Family Military Leave Act into law. The Act, which applies to public and private employers of at least 15 employees, requires the provision of unpaid leave to an employee who is the spouse or parent of a person called to military service lasting 179 days or longer. For employers with 15 to 50 employees, eligible employees are entitled to receive up to 15 days of unpaid family military leave during the time the military deployment orders are in effect. For employers with 51 or more employees, eligible employees are entitled to 30 days of unpaid family military leave. The Act carried an emergency clause, which meant it went into effect on April 4.

"Cat's Paw" Case Dismissed

We recently reported that the United States Supreme Court agreed to hear arguments in a case that would hopefully provide clarity on what's come to be called "cat's paw" liability for discrimination. The "cat's paw" theory of liability in a discrimination case derives its name from a fable in which a monkey convinces an unwitting cat to pull chestnuts from a hot fire. Thus, under this theory liability exists where a biased subordinate who lacks decision-making authority uses a neutral formal decision maker as a dupe to carry out a discriminatory employment action. Unfortunately, mere days before oral argument, the employer dismissed its appeal, in part because two other pending "cat's paw" cases purportedly provide a better set of facts for the court to consider this issue.

Creighton Loses H-1B Claim

On March 28, 2007, a Department of Labor administrative law judge ruled against Creighton University's claim that it was entitled to $115,092 in liquidated damages from a Nigerian national employed by the university. *U.S. Dept. Of Labor v. Creighton University*, No. 2006-LCA-25, Mar. 28, 2007). Dr. Ademola Abiose was permitted to work in the United States under the H-1B visa program, and signed a recruitment agreement with Creighton that contained a 4-year term, and subsequently signed a faculty agreement which contained a 3-year term through June 30, 2005. On June 30, 2005, Dr. Abiose quit his job at Creighton, and Creighton sought liquidated damages against Dr. Abiose for breach of contract. The administrative law judge concluded that Dr. Abiose did not violate the employment agreement because he worked for the full 3 year term, and that the recruitment agreement was a separate agreement not within the purview of the H-1B program. Creighton was ordered to cease its collection efforts on the employment agreement, although the administrative law judge acknowledged that any attempt by Creighton to recover under the recruitment agreement would not be prohibited.

Fahleson is a partner with the Lincoln-based law firm of Rembolt Ludtke LLP and may be reached at (402) 475-5100 or mfahleson@remboltludtke.com.