

State Law Developments

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STATE LAW DEVELOPMENTS

by Robert B. Fitzpatrick, Esq.

1. **Historic Domestic Worker “Bill of Rights” About to Pass in New York**

- a. New York is on the threshold of being the first state to ever enact employment legislation designed to provide wage and hour and anti-discrimination protections to domestic workers. On June 8, 2010, the New York State Senate passed by a party-line vote of 33-28 with one Republican voting for passage, the so-called Domestic Workers Bill of Rights, S. 2311 (*available at* http://assembly.state.ny.us/leg/?default_fld=&bn=S02311&Summary=Y&Text=Y), which provides certain employment rights and protections to so-called “domestic workers.” The State Assembly passed a less comprehensive bill, A. 1470 (*available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A01470&Summary=Y&Action=s&Text=Y) in 2009. The two bills now must be reconciled.
- b. The statute defines a “domestic worker” as “a person employed in a home or residence for the purpose of caring for a child, serving as a companion to a sick, convalescing, or elderly person, housekeeping, or for any other domestic service purpose.” Thus, most nannies would be covered, as well as most maids.
- c. Excluded from the definition of “domestic worker” are individuals who are engaged in providing “companionship services,” as defined in Section 213(a)(15) of the FLSA, as well as any individual who is employed by an employer or agency other than the family or household using his or her services. *See Long Island Care at Home, Ltd. v. Coke*, 127 S. Ct. 2339 (U.S. 2007) (holding that home health workers who provide companionship services to the elderly and infirm are not protected by federal minimum wage and overtime pay laws). The federal DOL in its Spring 2010 Regulatory Agenda ([LINK](#) <http://www.dol.gov/regulations/factsheets/whd-fs-flsa-companionship.htm#>) indicates that it intends to consider whether the scope of the companionship exemption as currently defined in the regulations continues to be appropriate in light of substantial changes in the home care industry over the last 35 years.
- d. In New York, in the case of home care companions, the state follows the FLSA overtime exemptions, but overtime hours must be paid at no less than one and a half times the New York state minimum wage, and overtime hours do not have to be paid at the usual one and a half times the employee’s regular hourly wage if that rate is higher than the minimum wage. *See New York Minimum Wage Order for Miscellaneous Industries and Occupations*, DOL § 142-2.2 (July 2005), *available at* <http://www.labor.state.ny.us/formsdocs/wp/PART142s.pdf>. Thus, in the case of companies, large and small, that employ maids, and then retail their services to households, those domestic workers / maids get no protection under this proposed legislation. Additionally, “domestic worker” does not include “au

pairs” as defined in 22 C.F.R. § 62.31, *available at* http://edocket.access.gpo.gov/cfr_2002/aprqtr/pdf/22cfr62.31.pdf.

- e. Among the rights and protections for covered “domestic workers” are the following:
 - i. The individual is entitled to at least 24 consecutive hours of rest in each calendar week, and shall not be required to work on the day of rest, and if the individual agrees to work on said day of rest, the individual shall be paid at an overtime rate.
 - ii. Any such individual who regularly works for at least 20 hours per week for the employer is entitled to paid time off for six designated holidays, e.g., Christmas Day.
 - iii. Any such worker whose regular schedule is at least 40 hours per week for the employer shall be entitled to seven days of paid time off for sick leave each year. Any such worker whose schedule is at least 20 hours per week but less than 40 is entitled to four days of paid time off for sick leave.
 - iv. Any such worker who works at least 40 hours per week is entitled to five days paid time off for vacation and those who work at least 20 hours but less than 40 are entitled to three days paid time off for vacation. A vacation shall be agreed upon with the employer at least 30 days in advance of the first vacation day.
 - v. Such workers are entitled to written notice of termination 14 days before their final day of employment, and in the event an employer fails to give such notice, the worker is entitled to backpay for the notice period and the value of the cost of any benefits to which the worker would have been entitled during the notice period. The notice requirement does not apply to employees who are convicted of committing an unlawful act of theft or destruction of property or when the employer has a reasonable good faith belief that the employee has committed assault, neglect, or abuse in the workplace with the burden of proof of such reasonable belief on the employer.
 - vi. The proposed legislation provides for criminal penalties, as well as a civil action which may be commenced within six years by either the Labor Commissioner or the Attorney General.
 - vii. The proposed legislation provides protections under the anti-discrimination laws.
 - viii. The proposed legislation provides for eligibility for unemployment compensation.
 - ix. The proposed legislation provides for eligibility for workers’ compensation.
- f. The National Labor Relations Act excludes domestic workers from its protections. The FLSA does not cover domestic workers. And, the New York State Human Rights Law currently does not protect domestic workers against invidious discrimination.

2. **Employers Held Not to Have Faragher-Ellerth Affirmative Defense Under New York City Human Rights Law**

- a. In *Zakrzewska v. The New School*, 2010 N.Y. LEXIS 632 (N.Y. May 6, 2010), the New York Court of Appeals, answering a question certified to it by the Second Circuit, held that the plain language of the New York City Human Rights Law (NYCHRL) precludes the *Faragher-Ellerth* defense, finding that the language of Section 8-107(13)(b) is inconsistent with that defense. Specifically, the court found that that provision creates vicarious liability for the acts of managerial and supervisory employees even where the employer has exercised reasonable care to prevent and correct any discriminatory actions and even where the aggrieved employee unreasonably has failed to take advantage of employer-offered corrective opportunities.
- b. In light of this holding, practitioners should look to their state and local anti-discrimination statutes to see whether or not the language is similar to that of the NYCHRL. The specific statutory language at issue in *Zakrzewska* reads as follows:
- c. “[a]n employer shall be liable for an unlawful discriminatory practice based upon the conduct of an employee or agent which is in violation of subdivision one or two of this section only where: (1) the employee or agent *exercised managerial or supervisory responsibility*; or (2) the employer knew of the employee's or agent's discriminatory conduct, and acquiesced in such conduct or failed to take immediate and appropriate corrective action; an employer shall be deemed to have knowledge of an employee's or agent's discriminatory conduct where that conduct was known by another employee or agent who exercised managerial or supervisory responsibility; or (3) the employer should have known of the employee's or agent's discriminatory conduct and failed to exercise reasonable diligence to prevent such discriminatory conduct.”

3. **Covenant of Good Faith and Fair Dealing**

- a. Delaware continues to generate opinions on the implied duty of good faith and fair dealing. The latest is *Nemech v. Schrader*, 2010 Del. LEXIS 150 (Del. Sup. Ct. Apr. 6, 2010). Note that there is a vigorous dissent in the case by Justice Jacobs, joined by Justice Berger. There is much to be found in the opinion to assist counsel and other courts in applying the implied covenant. Here, quickly, is one statement taken from an earlier Delaware Chancery Court opinion, *Amirsaleh v. Bd. of Trade of the City of New York*, 2008 Del. Ch. LEXIS 131 (Del. Ch. Sept. 11, 2008):

“[T]he law presumes that parties never accept the risk that their counterparties will exercise their contractual discretion in bad faith.”

4. **Telecommuting**

- a. Employers were urged recently by not only the President’s Council of Economic Advisers to embrace workplace flexibility, including telecommuting, the First Lady and the President himself showed up at the workplace flexibility forum to deliver remarks (*available at* <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/31/AR2010033103642.html>) endorsing such ideas. But, wait a minute—what about the tax implications? The South Florida Business Journal, last Friday, has a fascinating article (*available at* <http://southflorida.bizjournals.com/southflorida/stories/2010/04/12/focus5.html>) that is just the tip of the iceberg in terms of some tax issues that employers considering telecommuting, ought to consider. The article points out that, in a recent tax ruling, Colorado imposed on a Miami-based company with one telecommuter in Colorado, income tax obligations and sales tax obligations. The article indicates that state income tax authorities, in this dismal economy, are increasingly aggressive and creative in finding ways to generate revenue, and imposing tax obligations on companies located elsewhere with a single employee in the state who telecommutes may be enough to permit significant taxes being imposed.

5. **A New Twist on “Non-Competes”**

- a. Rob Radcliff’s “Smooth Transitions” blog (*available at* <http://www.smoothtransitionslawblog.com/2010/04/articles/noncompete-agreements/how-to-enforce-a-noncompete-without-a-noncompete/>) reported on the anti-trust investigation of technology companies (e.g., Google, IBM) that allegedly have agreed that there will not be mobility of certain “geek” employees from one tech company to another. In other words, allegedly these companies have agreed that if you will stay away from my talent, I will stay away from yours. The Justice Department is investigating. Rob, with tongue-in-cheek, styled the blog about this as “how to enforce a non-compete without a non-compete.”

6. **Ethics – Ex Parte Contact Rule Prohibits Email Transmitted to Both Counsel for a Represented Party and the Represented Party**

- a. The New York City Bar Association Committee on Professional and Judicial Ethics in Formal Opinion 2009-1 (*available at* <http://www.abcnyc.org/Ethics/eth2009-1.htm>) held that an attorney would violate the ex parte contacts rule of DR 7-104(A)(1) by sending a copy of an email or letter simultaneously to the represented person as well as that person’s lawyer. The Committee opined that sending a copy to the addressee’s lawyer does not satisfy the duty to obtain prior consent from a represented person’s counsel before contacting the person directly. The Committee further advised that, in the context of an email chain among attorneys and their clients, a lawyer’s prior consent for a “reply to all” communication may sometimes be inferred from the lawyer’s

conduct or acquiescence. Having said that, the committee stated that best practice is to obtain express consent either orally or in writing from counsel.

7. **Collateral Source Rule**

- a. Many have struggled with the application of the collateral source rule where the plaintiff has received LTD benefits. A 2007 opinion by Judge Keeley of the Northern District of West Virginia sets forth a detailed analysis of the problem and the case law, and is well worth reading when this issue arises in your next case. *See Calef v. FedEx Ground Package Sys., Ltd.*, 2007 U.S. Dist. LEXIS 64853 (N.D. W. Va. 2009).

8. **Preemption of State Rest Break Law**

- a. In *520 South Michigan Avenue Associates, Ltd. v. Shannon*, 549 F.3d 1119 (7th Cir. 2008), *cert. denied*, 2009 U.S. LEXIS 7144 (Oct. 5, 2009), the Seventh Circuit held that a state rest break statute was preempted by the NLRA's *Machinists* preemption doctrine. *See Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132 (1976). The statute at issue, the Illinois Hotel Room Attendant Amendment to the One Day Rest in Seven Act, required that hotel room attendants be given two rest breaks and a meal during workdays as well as shifting the burden of proof to the employer in retaliation actions under the statute. Judge Manion, writing for the panel, stated that the Amendment was preempted under *Machinists* preemption doctrine as the Amendment was not a minimum labor standard; it did not have general applicability, but instead applied to only one occupation in one industry in a single county.

9. **State and Local Pension Funds: \$2 Trillion Deficit**

- a. The March 15 *Barron's* features an interesting, albeit frightening, article detailing the developing state and local, public employee pension deficiencies. The article notes that, according to a recent study conducted by the Pew Center, eight states (Connecticut, Illinois, Kansas, Kentucky, Massachusetts, Oklahoma, Rhode Island, and West Virginia) lack funding for more than a third of their pension liabilities, and 13 others are less than 80% funded. While the Pew report estimates that the states are currently in the hole \$452 billion, other industry observers place that number closer to \$2 – \$3 trillion. *See* Robert Novy-Marx and Joshua D. Rauh, *The Intergeneration Transfer of Public Pension Promises*, Chicago GSB Research Paper No. 08-13, Sept. 2, 2008, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1156477. The full *Barron's* article, entitled “The \$2 Trillion Hole,” is *available at* http://online.barrons.com/article/SB126843815871861303.html#articleTabs_panel_article%3D1.

10. **Employees' Right to Review and Copy Items in Their Personnel Files**

- a. Alan Sklover over at the Sklover Working Wisdom blog recently posted an entry on employees' legal right to "review and copy items in their HR files," which is *available at* <http://skloverworkingwisdom.com/blog/index.php/want-to-see-your-hr-file-heres-how>. Of special note, Mr. Sklover provides an up-to-date, state-by-state list of laws governing employees' rights to review their files.

11. **Brokerage Firm Allows Brokers to Take Book of Business With Them When They Depart**

- a. Virginia Non-Compete Law Blog reports about one small brokerage house, Huntington Investment Co., that allows employees/brokers to keep their book of business if and when they leave the company, *available at* <http://virginianoncompete.blogspot.com/2010/03/new-trend-in-stock-broker-non-competes.html>.

12. **Imbroglia in Virginia over Gay Rights for State Employees**

- a. The Commonwealth's Attorney General and Governor have taken us on a rollercoaster ride over the past week or so over the question whether gay employees of the state have effective protections against sexual orientation discrimination. Here is how the story unfolded.
- b. The new Attorney General, Kenneth T. Cuccinelli, II (R), on March 4th issued an opinion letter (*available at* <http://www.washingtonpost.com/wp-srv/metro/Cuccinelli.pdf>), stating that a state college or university could not include "sexual orientation", "gender identity", "gender expression", or "like classification" as a protected class in its non-discrimination policy, absent specific authorization from the General Assembly. And, the Attorney General opined that, given that fact that the Virginia General Assembly has not included any of these categories in the Virginia Human Rights Act which applies specifically to "educational institutions" he found that the universities lacked authority to enact such policies. He went on to state that no state agency can reach beyond the boundaries established by the General Assembly. The Attorney General noted that, since 1997, the General Assembly has on more than 25 occasions considered and rejected bills adding "sexual orientation" to various non-discrimination statutes.
- c. This controversy has a long provenance. In 2006, when the current governor was Attorney General, he issued Opinion No. 05-094 (*available at* <http://www.oag.state.va.us/OPINIONS/2006opns/05-094w.pdf>) which held that Executive Order No. 1 (2005) issued by then Governor Mark R. Warner (D), an executive order which added "sexual orientation" to the list of protected classes under the Commonwealth's non-discrimination policy, was beyond the scope of executive authority and, therefore, unconstitutional. That opinion stated, among other things, the following: "Changing public policy of the Commonwealth is within the purview of the General Assembly and, therefore, beyond the scope of

executive authority and is unconstitutional.” Ignoring that opinion, then governor Timothy Kaine (D), issued Executive Order No. 1 (2006) (*available at* <http://www.lva.virginia.gov/public/EO/eo1%282006%29.pdf>), prohibiting discrimination in state government based on, among other things, “sexual orientation.”

- d. When former Attorney General McDonnell (R) was elected governor, he revised and reissued the executive order on non-discrimination, and deleted “sexual orientation” from the order, consistent with his opinion as Attorney General. Executive Order No. 6 (January 14, 2010) (*available at* http://www.governor.virginia.gov/Issues/ExecutiveOrders/pdf/EO_6.pdf).
- e. On March 10th, in response to the hue and cry over Attorney General Cuccinelli’s opinion letter, Governor McDonnell issued Executive Directive No. 1 (2010) (*available at* <http://www.governor.virginia.gov/Issues/ExecutiveDirectives/pdf/Directive-1.pdf>), in which he orders that the Executive Branch shall not discriminate in the “hiring, promotion, compensation, treatment, discipline, and termination of state employees” with regard to sexual orientation. However, the Directive does not specifically provide protection from retaliation against employees who make claims of sexual orientation discrimination, which now go to the Commonwealth Director of Human Resource Management. In Virginia, I am told, an Executive Order carries the force of law; whereas an Executive Directive is a statement of policy which is not legally binding (*see, e.g.*, http://voices.washingtonpost.com/virginiapolitics/2010/03/mcdonnells_nondiscrimination_d.html).
- f. So, at a practical level, what does all of this mean for gay state employees, including faculty at state colleges and universities? Before the new Governor’s new Executive Order, replacing the Executive Order of Governor Kaine, employees had grievance rights (*available at* http://www.dhrm.virginia.gov/hrpolicy/web/pol2_05.html) to the office of Equal Employment Services of the Department of Human Resources Management for employment decisions based on sexual orientation, and retaliation against employees pursuing those rights was prohibited. The new Governor’s new Executive Order, despite the Executive Directive of Wednesday, means that employee’s may no longer use the grievance procedure and the remedial provisions of Va. Code §§ 2.2-3000, et seq. (2.2-3004(A)). So, the real action, in a sense, was when the new Governor issued the new Executive Order. The Attorney General’s opinion letter, frankly, seems consistent with the new Executive Order and the prior opinion of the now-Governor when he was Attorney General.
- g. So, we shall see if the General Assembly continues to reject attempts to include “sexual orientation” among protected categories, or whether this brouhaha results in passage the proposed legislation (*available at* <http://www.richmondsunlight.com/bill/2010/sb66/fulltext/>). And, remember,

regardless of what may go on in the Virginia General Assembly, the Congress, in all likelihood, will be passing ENDA soon, and that will, except for small employers, effect the same result – a prohibition on employment discrimination in both the public and private sector.

Beneath the sturm und drang of politicians and interest groups positioning for advantage, no one seems to be discussing what, at least to this commentator, seems to be serious questions of law.

- h. First, I sure would like to see someone responsibly address, not with rhetoric but with law, the authority of Governor Kaine (D) and his predecessor Governor Warner (D) for the issuance of an Executive Order prohibiting a form of discrimination that the General Assembly had not prohibited. On its face, it would seem to be almost a legislative act, and thus a usurpation of the power of the legislature. But, then I vaguely recall that President Harry Truman, long before the Congress passed any of the modern Civil Rights laws, had the courage to issue Executive Orders to desegregate the military. But then, there are those who believe that executives often exceed their constitutional powers through the use of executive orders. *See, e.g.,* <http://www.heritage.org/research/legalissues/lm2es.cfm>. Having said that, it would be worthwhile if someone in this fight addressed those questions of the powers of an executive.
- i. Second, does anyone know of other instances in the history of the Commonwealth of Virginia where the Governor has refused to follow the advice of his lawyer, the Attorney General. After all, that, as I understand it, is what Governor Kaine did. He didn't like, presumably for political reasons, the opinion of his Attorney General, so, he just ignored it. In other contexts, to ignore the advice of your lawyer is tantamount to willful indifference to the law and could subject one to severe punitive damages. So, we have a sitting Governor, Governor Kaine, who by the way happens to be a lawyer, ignoring the advice of his lawyer. Pretty interesting what politics will get one to do. I would be interested to see if Governor Kaine ever articulated the legal basis for his defiance of the advice of his lawyer, the Attorney General.
- j. Third, it seems a bit over the top to figuratively place Governor McDonnell in the stock because he, once he became Governor, did precisely what, as Attorney General, he said a Governor of Virginia should do and got elected overwhelmingly with the voters full well knowing what his position was. Wouldn't it have been extraordinarily hypocritical if he had issued an Executive Order which did not conform with his opinion issued as Attorney General. And, absent some legal articulation as to why his legal opinion as Attorney General is wrong as a matter of Virginia law, it seems pretty hypocritical for the other side in this battle to be criticizing him.

- k. Fourth, now let's turn to the current Attorney General who has taken nothing but grief for some days. Given the fact that his predecessor had opined that "sexual orientation" is not a proper subject for an Executive Order, and given the fact that there now is no Executive Order prohibiting "sexual orientation" discrimination in state employment in Virginia, how can you fault the Attorney General, as a matter of law, for advising educational institutions that they could not prohibit "sexual orientation" discrimination in the manner they heretofore had? Unless I am missing something (and I am sure someone will let me know if I am), it seems ineluctable that, in those circumstances, the educational institutions should not have been doing what they were doing.
- l. Fifth, it seems that, under Virginia law, the new Governor, in the issuance of his Executive Directive, has done as much as the Governor is empowered to do with the possible exception of his failure to include in the Executive Directive some statement about retaliation.
- m. I am sure that it is fanciful for me to assume that the responses to my questions will be something other than personal attacks, but I have real thick skin, and am used to the personal slurs. I hope that I also get some responsible dialogue about the law.

13. **Violence in the Workplace**

- a. There is a terrific three part blog in the Alabama Employment Law Reporter (*available at* <http://www.alabamaemploymentlawblog.com/2010/01/articles/events/violence-in-the-workplace-hits-the-nbaagain/>) on guns and violence in the workplace. In part 3, they report that the Alabama Senate has passed a bill by a vote of 26-2, that would permit employees to keep legal firearms in their vehicles on company premises so long as they are locked out of sight, such as in the glove compartment or trunk. For some reason, electric utilities are exempted.

14. **Coworker Gives Employee a Bottle of Mountain Dew; Employee, While Intoxicated, Drinks the Contents which is Toxic; Workers' Compensation Claim?**

- a. As reported in Lynch Ryan's blog (*available at* <http://www.lynchryan.com/mtos/2010/03/annals-of-compe-1.html>), the Vermont Supreme Court in *Cyr v. McDermott's, Inc.*, 2010 VT 19 (2010) held that the Workers' Comp claim might be compensable, remanding for a determination on whether it occurred in the course of employment.
- b. If drinking, at home, a bottle of what an employee thought to be Mountain Dew given to the employee by a non-supervisory co-worker, gives rise to a legitimate Workers' Compensation claim, I have to wonder whether a layoff (or even "persistent perceived job insecurity") which adversely affects the employee's health and life expectancy, gives rise to a Workers' Compensation claim. A recent

New York Times article (*available at* <http://www.nytimes.com/2010/02/25/us/25stress.html>) discusses the physical and emotional impact on employees of job insecurity.

15. **Maryland and Connecticut Issue Opinions under Their Respective State Wage Statutes Defining the Term “Wages”**

- a. Whether or not a particular form of compensation constitutes “wages” within the meaning of the applicable state wage collection statute can be critical in terms of the amount that the employer eventually may have to pay the former employee. Many state wage statutes, Maryland’s and Connecticut’s being apt examples, provide that, in certain circumstances, “wages” within the meaning of the state statute that the employer has not paid to the employee can be doubled (Connecticut) or even trebled (Maryland). Additionally, the statutes, Maryland and Connecticut again being apt examples, provide for an award of attorneys’ fees under certain circumstances to a prevailing plaintiff. Thus, even though the employer may have breached a contractual obligation to provide the former employee with the particular form of compensation, the state’s statutory definition of “wages” could result in that contractual breach resulting in an award of two or three times the amount due plus attorneys’ fees.

- b. In *Catalyst Health Solutions, Inc. v. Magill*, No. 80, Sept. Term, 2009 (Md. Ct. App. June 2, 2010), *available at* <http://www.jud.ct.gov/external/supapp/Cases/AROCr/CR296/296CR64.pdf>, Judge Battaglia, writing for all of the judges on the Maryland Court of Appeals with the exception of Judge Murphy, held that unvested incentive stock options are not “wages” under the Maryland Wage Payment and Collection Law. In *Catalyst*, at issue were 60,000 conditionally granted unvested incentive stock options, awarded under grant agreements by his employer to Mr. Magill. The vesting schedule under the incentive stock option award agreement provided that 25% of the award vested 12 months after the grant date and the remaining 75% vested in 3 equal annual installments beginning on the first anniversary of the initial vesting date. Shortly after his termination, Mr. Magill attempted to exercise these options even though they had not vested before his termination. As the stock option plan provided that the exercise of the options was conditioned upon Mr. Magill’s employment for a specific time period, a time period that he did not meet, the employer declined to allow him to exercise the options. Mr. Magill argued that the options grant had been awarded to him for his prior job performance and for meeting a specific performance sales goal. The Circuit Court granted partial summary judgment to Mr. Magill on his Wage Payment and Collection Law claim, and entered final judgment against his former employer Catalyst in the amount of \$849,262.50. The Court of Appeals reversed. While the Court of Appeals agreed that the stock option award was for prior job performance, it nonetheless held that they were not “wages” under the Act because he had not satisfied all of the conditions for exercise of the options. The court, in explaining its rationale for reversal, stated as follows:

Importantly, for our determination regarding the unvested stock options in the instant case, we turn to our bright-line test, as devised in *Whiting-Turner*, which provides that only when wages have been promised as part of the compensation for the employment arrangement and *all conditions agreed to in advance* for earning those wages have been satisfied, will Section 3-505 requiring payment of wages due apply. *Whiting-Turner Contracting Co. v. Fitzpatrick*, 366 Md. 295 at 305, 783 A.2d [667] at 672-73 (emphasis in original).

- c. In *Ziotas v. The Reardon Law Firm, P.C.*, SC 18292 (Conn. June 8, 2010), available at <http://www.jud.ct.gov/external/supapp/Cases/AROCr/CR296/296CR64.pdf>, the Connecticut Supreme Court, in an opinion to be officially released on June 8th, held that a year-end bonus, the amount of which is discretionary, did not constitute “wages” within the meaning of the Connecticut statute.
- d. Chief Judge Rogers, writing for the court, found that the bonus did not constitute “wages” under the statute when the amount of the bonus is discretionary and is not ascertainable by applying a formula. Two years ago in *Weems v. Citigroup, Inc.*, 961 A.2d 349 (Conn. 2008), the Connecticut Supreme Court had considered whether bonuses that were discretionary and based upon performance and profitability of the employer’s business constituted “wages” within the meaning of the statute, and determined that they were not. In *Weems*, the court found that the language of the state statute was ambiguous and subject to two different reasonable readings, thus permitting the court to look at legislative history. Finding that the legislative history was of no assistance, the *Weems* court looked at the decisions of other courts and agreed with their determinations that “bonuses that are awarded solely on a discretionary basis, and are not linked solely to the ascertainable efforts of the particular employee, are not wages under [the statute].”
- e. In *Ziotas*, while the defense relied upon the holding in *Weems*, plaintiff argued that the *Weems* decision only barred claims when the bonus itself was discretionary, not when the bonus was contractually required and only the amount was discretionary. As stated, the *Ziotas* court rejected plaintiff’s attempt to distinguish *Weems*. Illustrative of the significant difference in an employer’s exposure depending upon how the particular court interprets the term “wages,” here the lower court had entered judgment for the plaintiff on a breach of contract claim, finding that the plaintiff was entitled to a bonus.
- f. In *Ziotas*, the plaintiff is a lawyer who had worked as an associate for the defendant law firm. Plaintiff and defendant had a written agreement which provided that plaintiff would receive a bonus but said bonus would *not* be calculated on the basis of any particular percentage of the defendant’s income.

Bonuses were to be paid only in December of each year. Plaintiff's employment terminated in mid-October of 1998, and plaintiff did not receive a bonus in December of that year. Plaintiff filed suit seeking damages for the law firm's failure to pay him a bonus in 1998, alleging breach of contract and a violation of the state wage statute. The trial court struck the statutory claim while acknowledging that under certain circumstances a bonus may be considered "wages" under the state statute. The trial court emphasized that a bonus may be considered "wages" when a bonus is based on individual performance; when a connection existed between the additional work performed and a promise of a bonus; and when the bonus was promised if the plaintiff accomplished certain objectives of the employers, relying upon earlier Connecticut decisions. The trial judge held that the bonus in the *Ziotas* case was not "wages" because the bonus was an arbitrary figure determined by the success or lack of success of *all* members of the law firm, with no relationship to any actual services performed by the plaintiff. Thereafter, plaintiff amended his complaint, reasserting the statutory wage claim, and the court again struck the claim, finding that the bonus did not accrue as a result of the plaintiff's personal efforts *alone*. Thereafter, the contract claim went to trial, and the trial court rendered judgment in plaintiff's favor.

- g. On appeal, plaintiff contended that the trial court improperly struck the wage claim, and the Appellate Court reversed the trial court. On appeal, the defendant law firm contended that, when the amount of a bonus is discretionary and is not ascertainable by applying a formula, the bonus does not constitute "wages" under the state statute. In reversing the Appellate Court and reinstating the trial court's decision, the Supreme Court held as follows:

"Although the plaintiff is correct that neither *Weems* nor the cases that we cited in that decision address the situation in which the payment of a bonus was contractually required and only the amount of the bonus was discretionary, we conclude for the following reasons that such a bonus does not constitute wages under § 31-71a (3). First, our reasoning in *Weems* also applies when an employee is contractually entitled to a bonus, but the amount is indeterminate and discretionary. We stated in that case that 'the wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplates a more direct relationship between an employee's own performance and the compensation to which that employee is entitled. Discretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship, falls outside the protection of the statute.'"

16. Internal Corporate Complaint Sufficient for Wrongful Termination Claim

- a. The Maryland Court of Appeals in *Lark v. Montgomery Hospice, Inc.*, 2010 Md. LEXIS 192 (Md. May 13, 2010), an action under the Maryland Health Care Worker Whistleblower Protection Act (Health OCC. §§ 1-501 – 1-506), held that an employee who complained internally about misconduct but was terminated

prior to reporting the alleged wrongdoing to the appropriate state agency, could pursue a claim under that statute as it expressly protects an employee who “threatens to disclose” as well as an employee who actually discloses. § 1-502(1).

- b. After stating that conclusion, the Court (Judge Murphy writing for Chief Judge Bell and Judges Harrell, Battaglia, Greene, Raker, and Cathell) goes on for numerous pages, citing case after case after case from other state and federal courts recognizing as cognizable whistleblower claims based on internal corporate complaints. *Id.* at *25-43 (citing *Fox v. Dist. of Columbia*, 83 F.3d 1491 (D.C. Cir. 1996); *Marques v. Fitzgerald*, 99 F.3d 1 (1st Cir. 1996); *Sullivan v. Massachusetts Mut. Life Ins. Co.*, 802 F. Supp. 716, 723 (D. Conn. 1992); *Murcott v. Best Western Int’l, Inc.*, 9 P.3d 1088, 1098 (Ariz. Ct. App. 2000); *Collier v. Superior Court*, 228 Cal. App. 3d 1117 (Cal. Ct. App. 1991); *Carty v. Suter Co.*, 863 N.E.2d 771 (Ill. App. Ct. 2007); *Shea v. Emmanuel Coll.*, 682 N.E.2d 1348 (Mass. 1997); *Appeal of Bio Energy Corp.*, 607 A.2d 606 (N.H. 1992); *Barker v. State Ins. Fund*, 40 P.3d 463 (Okla. 2001); *Babick v. Oregon Arena Corp.*, 40 P.3d 1059, 1061-62 (Or. 2002); *Love v. Polk County Fire Dist.*, 149 P.3d 199 (Or. Ct. App. 2006)).
- c. Nowhere does the court discuss its opinion in *Wholey v. Sears Roebuck and Co.*, 370 Md. 38, 803 A.2d 482 (2002), *aff’ing* 139 Md. App. 642, 779 A.2d 408 (2001), holding that an internal complaint of suspected criminal activity was insufficient to support a claim for wrongful discharge in violation of public policy, seemingly conflicting with the holding of many of the cases cited by the Court. In the *Wholey* opinion, Judge Battaglia, writing for herself and Judges Cathell and Harrell, with Judge Raker writing a concurrence joined by Judge Wilner, and with Judge Eldridge filing a dissent in which Chief Judge Bell joined, stated as follows:

“To qualify for the public policy exception to at-will employment, the employee must report the suspected criminal activity to the appropriate law enforcement or judicial official, not merely investigate suspected wrong-doing and discuss that investigation with co-employees or supervisors. . . . In the limited times that the Legislature has enacted whistle-blower protection to protect private employees, the protection is only valid when the employee/whistle-blower reports the suspect activity externally. . . . We believe a corresponding common law cause of action must also require external reporting to the appropriate law enforcement authorities.”

- d. One must wonder whether the *Lark* string citations signals that the Court is prepared to backtrack from the broad language of *Wholey*

17. **Montana’s Disapproval of Employee Benefit Plans with a “Discretionary Clause” Upheld: Supreme Court Denies Cert**

- a. In *Standard Ins. Co. v. Morrison*, 584 F.3d 837 (9th Cir. 2009), *cert. denied sub nom. Standard Ins. Co. v. Lindeen*, 2010 U.S. LEXIS 4079 (May 17, 2010), a panel of the Ninth Circuit unanimously affirmed the decision of Judge Molloy of the District of Montana, which rejected Standard Insurance Company's ("Standard") challenge to the Montana Insurance Commissioner's disapproval of any employee benefit plan that contains a "discretionary clause" (537 F. Supp. 2d 1142 (D. Mont. 2008)). Judge O'Scannlain, writing for the Ninth Circuit panel, affirmed, finding that although the Commissioner's practice relates to a covered employee benefit plan (29 U.S.C. §1144(a)), it was not preempted on account of ERISA's clause that expressly saves from preemption any state law that "regulates insurance, banking, or securities" (29 U.S.C. § 1144(b)(2)(A) (the so-called "savings clause)). Applying the two-part test set forth in *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 342 (2003), the court found that the Montana practice was specifically directed towards entities engaged in insurance (prong one of the two-part test) and substantially affected the risk-pooling arrangement between the insurer and the insured (the second prong).
- b. The federal courts review ERISA benefit determinations deferentially so long as the plan confers discretion upon the plan administrator to interpret its provisions in making benefit determinations. *Firestone & Rubber Co. v. Bruch*, 489 U.S. 101, 110 (1989). If the plan does not contain a discretionary clause, benefit determinations are then reviewed *de novo*. *Id.* at 115; *see also* Roy F. Harman III, *The Debate Over Deference in ERISA—Judicial Review of Decisions by Conflicted Fiduciaries*, 54 S.D. L. Rev. 1 (2009); Joshua Foster, *ERISA, Trust Law, and the Appropriate Standard of Review: A De Novo Review of Why the Elimination of Discretionary Clauses Would Be an Abuse of Discretion*, 82 St. John's L. Rev. 735, 739 (2008). As a result of the deferential review that pertains in most cases, many state insurance commissioners have campaigned to create a *de novo* review standard. The National Association of Insurance Commissioners ("NAIC") has adopted a model law prohibiting discretionary clauses in medical insurance contracts. *See* 1 Proceedings of the National Association of Insurance Commissioners 4, 12-13 (2002). Thereafter, NAIC also included disability insurance policies in its model act, *available at* http://www.naic.org/committees_index_model_description_d_h.htm. Numerous states have adopted bans on discretionary clauses. *See Texas Advocate Seeks Ban on Insurers' Blanket Clauses*, Dallas Morning News (Dec. 17, 2009) ("Twenty-two states have banned the practice, either through state law or new regulations."); *see also* Me. Rev. Stat. Ann. tit. 24-A § 4303; Ill. Admin. Code tit. 50, § 2001.3; Mich. Admin. Code § 500.2201-2202; N.J. Admin. Code § 11:4-58 (2007); Notice, Cal. Dep't of Ins., Notice to Withdraw Approval and Order for Information (Feb. 27, 2004), *available at* www.insurance.ca.gov/0250-insurers/0300-insurers/0200-bulletins/bulletin-notices-commissopinion/upload/Notice-February-27-2004.pdf; Commissioner's Memorandum 2004-13H from the Hawaii Dep't of Ins. On Discretionary Clauses in HMSA's Agreement for Group Health Plan and Guide to Benefits (Dec. 8, 2004), *available at* http://hawaii.gov/dcca/areas/ins/commissioners_memo;

Bulletin 103 - Full and Final Discretion Clauses in Group Health Contracts (Ind. Dep't of Ins. June 8, 2001), *available at* [http://www.in.gov/idoi/lookAtTheLaw/pdfs/Bulletin 103.pdf](http://www.in.gov/idoi/lookAtTheLaw/pdfs/Bulletin%20103.pdf); Circular Letter No. 14 (State of N.Y. Ins. Dep't June 29, 2006), *available at* www.ins.state.ny.us/cl06_14.htm; Idaho Dep't of Insurance Rule IDAPA 18.01.29; Wash. Admin. Code § 284-44-015; Wyo. Stat. § 26-13-301; S. Dak. Admin Code § 20:05:52:02.

- c. While the Supreme Court's denial of cert is silent as to the Justices' reasons for declining to review this case, it is noteworthy that there is no circuit split, the Sixth Circuit having determined that the states' power to regulate insurance authorizes the exclusion of policies containing discretionary clauses. *American Council of Life Insurers v. Ross*, 558 F.3d 600 (6th Cir. 2009); *see also Hancock v. Metropolitan Life Ins. Co.*, 590 F.3d 1141 (10th Cir. 2009) (Utah's prohibition on the use of discretionary clauses was approved; Utah's rule provided that plans governed by ERISA were exempt from the prohibition).