Employment Law Alert

February 2011

Severance Claims Covered By Wage Act According To Superior Court

In a surprising ruling, a Superior Court justice has ruled that a former employee's claims to severance pay are covered by the Massachusetts Wage Payment Statute (the "Wage Act"). As a result, such claims could give rise to treble damages and an award of attorney's fees to the employee.

The plaintiff, Albert Juergens, became employed by the defendant, Microchip, in October 2008. At that time, the Microchip CEO agreed, in writing, to pay Juergens six months of salary as severance pay in the event that Juergens' employment was terminated by Microchip "without cause." In February 2010, Microchip informed Juergens that his position was eliminated and that he was laid off. Microchip did not make any severance payments to Juergens.

After getting approval from the Massachusetts Attorney General to make a claim under the Wage Act, Juergens brought a law suit against Microchip, under various legal theories. In ruling on Microchip's motion to dismiss Juergens' Wage Act claim, the Court opined that a 2005 Supreme Judicial Court decision, *Wiedmann v. Bradford Group*, Inc., 444 Mass. 698 (2005) authorized an "expansive interpretation" of the Wage Act than had prior cases. With no additional analysis, the Court ruled that claims for severance pay fell within the Wage Act, and denied the employer's motion to dismiss.

The ruling in *Juergens* is surprising because most employment law practitioners do not consider severance pay to be "earned" within the meaning of the Wage Act. However, the fact that Microchip had made an express, unconditional promise to pay severance pay might have led to the Court's ruling.

As a practical matter, employers can protect themselves against the ruling in *Juergens*. When crafting severance pay language, either in offer letters, severance pay plans or employment agreements, employers should include a requirement that the employee must execute a separation agreement and release in order to obtain any severance pay. By so doing, employers will greatly lessen the likelihood that severance will be considered "earned' upon termination of employment.

For more information on this topic, please contact Christopher J. Perry at *cperry@mbbp.com*.

Non-Competition Legislation Introduced Once Again

For the second time in the last two years, members of the Massachusetts House of Representatives have introduced legislation regarding non-competition agreements into the Legislature. If passed, the proposed bill would significantly curtail the ability of employers to enforce non-competition agreements in Massachusetts.

The bill is quite similar to the bill filed in 2010, with two exceptions. First, the requirement that, in order for a non-competition agreement to be binding on an employee he/she must earn at least $75,000 annually has been removed. In addition, employees who enter into non-competition agreements during employment must no longer be made a payment from their employer of at least ten percent of their then annual compensation for there to be adequate consideration for the agreements; however, the agreement must be supported by "fair and reasonable consideration."

Other than the foregoing two changes, the bill retains much of the substance of the 2010 bill. Non-solicitation agreements and non-competition agreements in connection with the sale of a business are exempted, as are other non-competition agreements unrelated to an employment relationship. "Garden leave" agreements, under which an employee agrees to forego competition in return for a series of payments from the former employer, are also valid if properly drafted and implemented.

In large part, the bill codifies current Massachusetts common law regarding the enforceability of non-competition agreements. For example, the bill requires that the agreements must a) be in writing, b) designed to protect trade secrets, confidential information or goodwill and c) be reasonable in duration and geographic scope. The bill states that six-month duration is "presumptively reasonable."

For employers, the provisions of the 2011 bill that may prove troublesome are those related to enforceability. The bill widely expands the rationales under which a court may decline to enforce a non-competition agreement. The bill also expressly dictates that a reviewing court must take into account "the economic circumstances of, and economic impact on, the restricted party."

In addition, the bill expressly grants to employees "reasonable attorneys' fees and costs" in a variety of situations where a court declines to enforce all or part of a non-competition agreement. As a result, an employer could find itself paying the attorneys' fees and costs of a former employee after a court found a non-competition agreement at least partially enforceable. In addition, the bill provides that the former employee also shall be awarded to reasonable attorney's fees and costs if the employee brings suit and successfully challenges the enforceability of a non-competition agreement. In contrast, employers are entitled to an award of attorneys' fees and costs only if the court a) enforces the non-competition agreement without substantial modification and b) finds the employee to have acted in bad faith.

The bill provides that its provisions may not be waived, and also contains language that choice of law provisions may not alter the bill's applicability so long as the employee has been a Massachusetts resident for at least thirty days at the time employment is terminated. Finally, the bill also states that the "inevitable disclosure" doctrine is not to be recognized by any Massachusetts court.

If signed into law, the 2011 bill will significantly hamper the ability of Massachusetts employers to protect their trade secrets, confidential information and goodwill. In addition, the attorneys' fees provisions of the bill will make it far more likely that employees will take presumptive legal action against former employers who may not be planning to seek enforcement of a non-competition agreement. While those advocating for the bill may claim that it "levels the playing field," a close examination of the bill reveals that claim is far from accurate.

For more information on this topic, please contact Christopher J. Perry at *cperry@mbbp.com*.

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