Effect of Laws and Decisions Concerning Vacation and Compensatory Time

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Vacation policies, like severance pay, bonuses, and certain other fringe benefit policies, may create enforceable contractual rights to these benefits for private sector employees in at-will employment relationships. Although, through written personnel policies or past practice, employers may establish the initial terms on which employees are entitled to receive vacation benefits, state wage payment laws may require the payment of accrued-but-unused vacation time to employees upon their termination of employment. The provisions of the Employee Retirement Income Security Act and the Fair Labor Standards Act may also have an impact on the establishment of vacation and compensatory time policies and may preempt state law in certain cases.

It is well-settled that employees have no "inherent right" to receive vacation benefits other than those rights established by company policy or employment agreements.[1] However, courts have generally agreed that personnel policies may create implied-in-fact contractual liability for fringe benefits such as vacations, provided that the applicable policy has been communicated to a company's employees.[2] Notice of vacation policies may be communicated to employees through personnel manuals, employee handbooks, other employees, or past practice. The principle of promissory estoppel may also entitle employees to receive fringe benefits.

As with other fringe benefits, employers may establish the terms and conditions on which employees are entitled to receive vacation benefits.[3] Similarly, employers may modify company benefit policies on notice to employees, provided the modification does not cause the forfeiture of accrued benefits. However, ambiguities concerning the eligibility of employees to receive vacation benefits may be resolved against the employer.

Courts have generally agreed that sufficient legal consideration for the offer of vacation benefits is provided by an employee's continued services to the company after having received notice of the applicable policy. Most jurisdictions agree that it is immaterial whether employees

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would have continued their employment even in the absence of a vacation policy in determining whether an enforceable contractual right to vacation benefits exists. So long as the vacation policy creates an offer capable of acceptance by continued employment, it will not be viewed as a mere gratuity payable at the discretion of the employer. Nevertheless, in certain jurisdictions the use of disclaimers in personnel manuals or other writings setting forth the applicable vacation policy may negate the intent of an employer to create a contractual offer capable of acceptance by continued services.

Once vacation benefits have been accrued, they generally may not be forfeited.[4] Moreover, state wage payment laws may protect the rights of employees to receive accrued vacation benefits in accordance with the provisions of company policy upon their termination of employment. However, there is no common law rule that requires employers to provide for the payment of accrued-but-unused vacation time upon the termination of an employee's employment, unless an employer's policy or past practice has created such an obligation.

STATE WAGE PAYMENT LAWS

Approximately forty-eight states and the District of Columbia have enacted wage payment statutes requiring employers to pay dismissed employees their full wages, including fringe benefits, on the date of their discharge or other applicable pay period. Over one-half of these jurisdictions include vacation pay within the meaning of the term "wages" or "wage supplements" that must be paid to employees upon their termination of employment, as in *Massachusetts v. Morash*, 490 U.S. 107, 109-10 (1989).

Under New York law, for example, it is clear that paid vacations are a "benefit or wage supplement" within the meaning of Section 198-c(2) of the New York Labor Law. That section places on employers certain time limits within which earned benefits or wage supplements must be paid to employees. Before the provisions of Section 198-c become applicable, however, it must be established that the employer is a party to an "agreement" to pay or provide such benefits, as in *Glenville Gage Co. v. Industrial Board of Appeals*, 70 A.D.2d 283, 421 N.Y.S.2d 408 (3d Dep't 1979). As with the common-law rule, such an agreement may exist when an employer either has adopted a personnel policy or has an established past practice of providing paid vacations to its workers based on, among other things, an employee's length of service with the company. In order to facilitate the resolution of fringe benefit claims, Section 195 of the New York Labor Law requires employers to notify all employees, either in writing or by

public posting, of "the employer's policy on sick leave, vacation, personal leave, holidays and hours."

Once it has been established that an "agreement" to provide vacation benefits exists within the meaning of Section 198-c, an employer may not postpone the payment or provision of such a benefit for more than thirty days after it becomes due. If an employer does not comply with the provisions of Section 198-c of the New York Labor Law, the employer may be found guilty of a misdemeanor. If the employer is a corporation, the president, secretary, treasurer, or other appropriate official may be subject to criminal sanctions. A civil penalty may also be assessed under Section 197 of the New York Labor Law against employers for violations of Section 198-c. Nevertheless, it must be emphasized that it is the terms of the vacation agreement and not statutory law that determines when a vacation benefit has been earned by an employee under New York law, as in *Ross v. Specialty Insulation Mfg. Co.*, 71 A.D.2d 766, 419 N.Y.S.2d 311 (3d Dep't 1979).

Under Connecticut law, accrued vacation pay is not included within the definition of "wages" set forth under the state wage payment statute. Nevertheless, Connecticut law requires employers to provide employees with information concerning any modifications in their employment policies, including vacation pay.

Other jurisdictions that consider an employer's vacation policy or past practice in determining whether there is a statutory duty to provide payment for accrued-but-unused vacation benefits upon an employee's dismissal include Iowa, Maine, North Carolina, and Oklahoma.[5] State wage payment laws that prohibit the forfeiture of accrued vacation include California, Illinois, and Louisiana.[6] Michigan prohibits the withholding of fringe benefits such as vacation pay upon an employee's dismissal, unless the employee has voluntarily agreed in writing to such a withholding.[7] Under West Virginia law, the West Virginia Court of Appeals has held that fringe benefits such as vacation pay constitute compensation for work performed.[8] The laws of New Hampshire, Ohio, Rhode Island, South Carolina, Tennessee, Vermont, and Wisconsin similarly consider vacation as earned compensation payable in the same fashion as wages upon an employee's termination.[9]

ACCRUAL OF VACATION BENEFITS

The issue of when vacation benefits vest or accrue was the subject of judicial scrutiny in the landmark of case of *Suastez v. Plastic Dress-Up Co.*, 31 Cal. 3d 774, 647 P.2d 122, 183 Cal. Rptr. 846 (1982), in which the plaintiff-employee was terminated prior to the anniversary date on which

his vacation benefits would have fully accrued under company policy. Plaintiff claimed that he had a vested right to a pro rata share of his vacation benefits for the amount of time that he had actually worked. The employer argued that the plaintiff-employee had failed to satisfy the condition precedent to the vesting of vacation rights under company policy and was therefore not entitled to receive any vacation pay.

The interpretation of Section 227.3 of the California Labor Code by the California Supreme Court was essential to the determination of the parties' rights. That section provides in relevant part:

> Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination.

In interpreting the phrase "vested vacation time" under Section 227.3, the *Suastez* court held that vacation benefits are a form of deferred compensation that, like wages, are earned on a pro rata basis as services are rendered. In rendering its holding, the court stated:

> Case law from this state and others, as well as principles of equity and justice, compel the conclusion that a proportionate right to paid vacation "vests" as the labor is rendered. Once vested, the right is protected from forfeiture by section 227.3. On termination of employment, therefore, the statute requires that an employee be paid in wages for a pro rata share of his vacation pay.

In *California Hospital Association v. Henning*, 770 F.2d 856 (9th Cir. 1985), modified, 783 F.2d 946 (9th Cir.), certiorari denied, 477 U.S. 904 (1986), the Ninth Circuit held that Section 227.3 of the California Labor Code was not preempted by ERISA. The implementation of the *Suastez* decision had been enjoined by a federal district court pending a determination about whether the California vacation pay statute was preempted by federal law.

FORFEITURE OF VACATION BENEFITS

The parameters of Section 227.3 of the California Labor Code have been examined in recent case law. For example, in *Henry v. Amrol,*

Inc., 222 Cal. App. 3d Supp. 1, 272 Cal. Rptr. 134 (A.D. 1990), a California appellate court considered the issue of whether an employee who voluntarily refrained from taking vacation time under a "use it or lose it" vacation policy had waived his right under Section 227.3 to be paid for accrued-but-unused vacation time upon his termination of employment. Citing *Suastez*, the *Henry* court stated that California law prohibits a "use it or lose it" vacation policy, and noted that *Suastez* had "equated a right to paid vacation with deferred wages for services rendered and held that a proportionate share vests as the labor is rendered." The *Henry* court therefore stated that "Section 227.3 requires that, upon termination, an employee be paid in wages for all vested vacation time." However, the appellate court did note that "[n]either *Suastez* nor Labor Code section 227.3 precludes an employer who provides a paid vacation from controlling either the scheduling of vacation time or the amount of vacation time that may be taken at a particular time."

In *Boothby v. Atlas Mechanical, Inc.*, 6 Cal. App. 4th 1595, 8 Cal. Rptr. 2d 600 (Ct. App. 1992), another California appellate court held that a "no additional accrual" vacation policy, unlike a "use it or lose it" policy, was permissible under Section 227.3 and the rationale of *Suastez*. In distinguishing *Henry*, the *Boothby* court stated:

> A "no additional accrual" policy simply provides for paid vacation as part of the compensation package until a maximum amount of vacation is accrued. The policy, however, does not provide for paid vacation as part of the compensation package while accrued, unused vacation remains at the maximum. Since no more vacation is earned, no more vests. A "no additional accrual" policy, therefore, does not attempt an illegal forfeiture of vested vacation.

Accordingly, the *Boothby* court concluded that the distinction between "use it or lose it" and "no additional accrual" vacation policies was consistent with *Suastez*, and it therefore reversed and remanded the case for further proceedings.

OTHER VACATION PAY LAWS

The North Carolina wage payment law[10] requires employers to notify employees of any policy or practice that requires or results in the loss of vacation time or pay. Although the North Carolina law does not require employers to provide vacation benefits to their employees, employers must pay all vacation pay or payment in lieu of time off in accordance with established company policy or past practice. An

employer must provide either oral or written notice of its vacation policy or practice at the time an employee is hired, and such notice must be made available to all employees in writing or through the posting of notices. Amendments to an employer's vacation policy or practice must also be communicated in writing or through posted notices before the amendments can become effective. In *Narron v. Hardee's Food Systems, Inc.*, 75 N.C. App. 579, 331 S.E.2d 205 (Ct. App.), petition denied, 314 N.C. 542, 335 S.E.2d 316 (1985), at least one North Carolina appellate court has stated that a forfeiture provision in an employer's vacation policy adopted shortly before an employee was allegedly dismissed for cause was ineffective to cause a forfeiture of vacation benefits accrued under the employer's previous vacation policy.

The Illinois wage payment statute[11] also provides that no employment contract or policy can provide for the forfeiture of earned vacation benefits upon termination of employment. As a result, an employee who resigns or is dismissed is entitled to receive payment for all earned but unused vacation time at the employee's final rate of pay.

In *Mueller Co. v. Department of Labor*, 187 Ill. App. 3d 519, 543 N.E.2d 518, 135 Ill. Dec. 135 (App. Ct. 1989), an Illinois appellate court interpreted the Illinois wage payment statute as requiring the payment of vacation benefits to dismissed employees on a pro rata basis, thereby superseding a company policy that provided vacation benefits only to employees who were employed at the end of the company's fiscal year. In *Golden Bear Family Restaurants, Inc. v. Murray*, 144 Ill. App. 3d 616, 494 N.E.2d 581, 98 Ill. Dec. 459 (App. Ct. 1986)(certiorari denied), another Illinois appellate court held that the Illinois statute's requirement of paying terminated employees a pro rata share of their earned but unused vacation time is not preempted by ERISA.

However, in *Lumet v. SMH (U.S.), Inc.*, No. 91-3369, 1992 U.S. Dist. LEXIS 18545 (S.D.N.Y. Dec. 4, 1992), in interpreting New York law, a federal district court upheld the terms of a vacation policy in an employee manual that expressly prohibited the payment of salary in lieu of vacation days or the carryover of vacation time from year to year.

ERISA WELFARE PLANS

According to *DeAngelis v. Warner Lambert Co.*, 641 F. Supp. 467, 469 (S.D.N.Y. 1986), ERISA is a comprehensive remedial statute designed "to improve the equitable character and soundness of private employee benefits plans and to establish minimum standards of fiduciary conduct for those who administer such plans." Employers

who have benefit plans that are subject to ERISA must comply with the reporting and disclosure requirements and the fiduciary responsibility standards of the statute. Unlike pension plans, employee welfare benefit plans are not subject to ERISA's minimum funding and vesting provisions. However, the federal statute does provide a private right of action to plan participants to enforce their rights under either a pension or a welfare benefit plan.

Section 3(1) of ERISA defines the terms "employee welfare benefit plan" and "welfare plan" to include

> any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, . . . or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

The Section 186(c) cited in subsection (B) of the foregoing definition refers to Section 302(c) of the Labor-Management Relations Act, which concerns, in relevant part, money paid to trust funds "for the purpose of pooled vacation, holiday, severance or similar benefits." According to the regulations promulgated by the Department of Labor pursuant to ERISA, the effect of citing Section 186(c) in the statutory definition of "employee welfare benefit plan" is "to include within [this] definition . . . those plans that provide holiday and severance benefits, and benefits which are similar." In order to have the "establishment" of a plan, fund or program within the meaning of ERISA, "the surrounding circumstances must be such that 'a reasonable person can ascertain the intended benefits, a class of beneficiaries, the source of financing, and procedures for receiving benefits.'"[12] The absence of a formal written policy is not, in itself, determinative of whether an ERISA plan exists.

ERISA PREEMPTION

Section 514(a) of ERISA contains an express preemption provision that provides, in pertinent part:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede

> any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

In *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97 (1983), the Supreme Court held that the preemption language of Section 514(a) must be broadly defined as follows: "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." The *Shaw* court rejected the view that state statutes or common-law claims are preempted only when they attempt to regulate matters such as reporting, disclosure, fiduciary responsibilities, or any other areas expressly covered by ERISA. In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987), the Supreme Court stated that an "employee benefit plan" is a "commitment systematically to pay certain benefits" to participants, and undertaking the ongoing administrative responsibility of "determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements." In addition, the Supreme Court made clear in *Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985), that "[t]he preemption provision was intended to displace all state laws that fall within its sphere, even including state laws that are consistent with ERISA's substantive requirements."

DEPARTMENT OF LABOR REGULATIONS

The Secretary of Labor has promulgated regulations that exclude from the statutory definition of "employee welfare benefit plan" certain enumerated "payroll practices," including wage payments out of the employer's general assets during vacation or holiday absences.[13] However, in an opinion letter, the Department of Labor has made clear that vacation benefits financed by employer contributions to a separate fund for subsequent distribution to employees would constitute an "employee welfare benefit plan" within the meaning of ERISA.[14]

The Department of Labor's regulation on vacation pay was given deference by the U.S. Supreme Court in *Massachusetts v. Morash*, in which the Court held that a bank's policy of paying dismissed employees for their accrued-but-unused vacation time did not constitute an "employee welfare benefit plan" within the meaning of Section 3(1) of ERISA. As a result, the Court held that a criminal action pursuant to the applicable Massachusetts wage payment statute requiring an employer to pay a discharged employee his full wages, including

vacation payments, on the date of his dismissal was not foreclosed by ERISA. In reaching its decision, the *Morash* Court reasoned, "It is unlikely that Congress intended to subject to ERISA's reporting and disclosure requirements those vacation benefits which by their nature are payable on a regular basis from the general assets of the employer and are accumulated over time only at the election of the employee."

The *Morash* Court also cited with approval the Ninth Circuit's decision in *Henning* that also had recognized the "reasonableness of the Secretary's interpretation of the statute" in classifying vacation payments from an employer's general assets as a "payroll practice" and not a "plan." In reaching its decision in *Henning*, the Ninth Circuit stated:

> Traditional vacations during which the employer continued to pay the employees' regular wages presented neither of the evils Congress intended to address. Wages are ordinarily paid in cash out of the resources of the business whether the employee is at work or on vacation. There is no fund to administer and no special risk of loss or nonpayment. Nothing in the legislative history suggests Congress intended to regulate such payments.

Accordingly, the *Henning* court had similarly held that a California statute prohibiting certain vacation pay forfeitures from unfunded policies was not preempted by ERISA.

In *Czechowski v. Tandy Corp.*, 731 F. Supp. 406 (N.D. Cal. 1990), a federal district court held that the defendant's voluntary employees' beneficiary trust was not an "employee welfare benefit plan" within the meaning of ERISA. The trust provided vacation benefits to defendant's employees in accordance with a vacation benefits plan that administered vacation benefits on a "use it or lose it" basis.

However, the trust only operated on an "advance and recapture" basis in that the defendant would disburse vacation payments to employees from its own general funds, the trust would then reimburse the defendant on a quarterly basis for its vacation pay disbursements, and the defendant would simultaneously give a check to the trust for the same amount of vacation benefits that it had received from the trust. Although the trust had disbursed over $1 million in vacation pay in this manner, it never held more than $1,000 at any one time.

Relying on *Morash*, the *Czechowski* court concluded that the trust was not an ERISA plan because no funds accumulated in it to raise concerns over their mismanagement. The court also noted that the trust created no additional risk to employees warranting the protection of

ERISA other than the ordinary risk that their employment would be terminated and that they would cease to receive wages and other compensation from their employer. The federal court also found *Henning* to be inapplicable to its decision, because the Ninth Circuit, in interpreting California law, had not specified the methods of funding that would create an "employee welfare benefit plan" within the meaning of ERISA.

In *Betz v. The Legal Aid Society*, No. 89-3401, 1992 U.S. Dist. LEXIS 17705 (S.D.N.Y. Nov. 20, 1992), the Southern District of New York held that an employee who had allegedly forfeited approximately 140 accrued and unused vacation and annual leave days did not state an ERISA claim "since the funds used by the Society for annual leave benefits are derived from the general assets of the Society and not from a separate fund, these funds are not part of an 'employee welfare benefit plan' within the meaning of ERISA."

In *Shea v. Wells Fargo Armored Service Corp.*, 810 F.2d 372 (2d Cir. 1987), the Second Circuit had reached the same conclusion in considering the ERISA claims of former employees for accrued-but-unused sick and vacation benefits.

GENERALLY APPLICABLE CRIMINAL LAW

Aside from cases not involving "employee welfare benefit plans," Section 514(b)(4) of ERISA provides that ERISA's preemption provision "shall not apply to any generally applicable criminal law of a State." In *Morash,* the Supreme Court did not address the issue of whether the Massachusetts wage payment statute containing criminal penalties was a "generally applicable criminal law of a State" within the meaning of Section 514(b)(4) of ERISA.

Most jurisdictions that have considered the issue, however, have held that wage payment and collection laws that impose criminal penalties for failure to make required wage payments, including vacation pay, are not "generally applicable criminal laws of a State" exempt from ERISA.[15] These courts have usually held that the scope of this phrase applies only to criminal conduct such as larceny and embezzlement. However, other courts have disagreed as to the scope of the "generally applicable criminal law" exemption.[16]

In a severance pay case, *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1988), affirmed sub nom., *Roberts v. Burlington Industries, Inc.*, 477 U.S. 901 (1986) (mem.), the Second Circuit considered, among other things, whether Section 198-c of the New York Labor Law was a "generally applicable criminal law" within the meaning of Section 514(b)(4) of ERISA. In *Gilbert,* plaintiffs brought

suit against their former employer for severance pay on the grounds that their employment was "involuntarily terminated" within the meaning of the defendant's severance pay policy when the operating division for which they had been working was sold as a going concern to another company. The record on appeal in *Gilbert* showed that the plaintiffs continued to do the same work for their new employer as they had done for the defendant prior to the sale.

Plaintiffs commenced suit against defendant alleging causes of action under state law or, in the alternative, under ERISA. The New York State commissioner of labor intervened, demanding that defendant pay severance benefits to plaintiffs in accordance with the provisions of Section 198-c of the New York Labor Law.

Citing the Supreme Court's decision in *Shaw*, the Second Circuit in *Gilbert* confirmed that the plaintiff's state law claims were preempted by ERISA. The Second Circuit rejected the plaintiffs' argument that "ERISA cannot be deemed to pre-empt state wage collection statutes because such legislation is a fundamental exercise of the states' police power." In addition to representing an exercise of a traditional policy power, the *Gilbert* court reasoned that, in order to avoid ERISA preemption, the statute "must also affect the plan in too tenuous, remote or peripheral a manner to warrant a finding that the law 'relates to' the plan." The Second Circuit concluded that, although Section 198-c of the New York Labor Law was an exercise of a traditional police power, "the state statute does not have such a remote and tenuous connection to Burlington's severance pay plan so as to allow us to conclude that it does not 'relate to' it."[17] In *State v. Art Steel Co.*, 133 Misc. 2d 1001, 509 N.Y.S.2d 715 (Crim. Ct. Bronx Co. 1986), one New York State court has applied the rationale of *Gilbert* to a vacation pay case involving the criminal sanctions of Section 198-c of the New York Labor Law.

COMPENSATORY TIME POLICIES

Section 7(a)(1) of the Fair Labor Standards Act (FLSA) requires employers of employees engaged in commerce for more than forty hours in any workweek to compensate these employees at rate of one and one-half times their regular rate of pay for all hours worked in excess of the forty-hour maximum limit. Section 13(a)(1) of FLSA exempts from the overtime coverage of Section 7(a), among others, "any employee employed in a bona fide executive, administrative, or professional capacity." The Department of Labor has promulgated regulations setting forth the tests pursuant to which an employee may be found to be exempt as an executive, administrative, or professional

employee. The burden is on the employer to demonstrate by a preponderance of the evidence that an employee is exempt from the overtime provisions of FLSA.

Subject to certain limitations, Section 7(o) of FLSA expressly authorizes public-sector employers to grant compensatory time off in lieu of overtime compensation "at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section." Section 7(o)(6)(B) defines the terms "compensatory time" and "compensatory time off" as "hours during which an employee is not working, which are not counted as hours worked during the applicable workweek or other work period for purposes of overtime compensation, and for which the employee is compensated at the employee's regular rate." However, the Department of Labor regulations, in 29 CFR Section 553.28, make clear that compensatory time for public-sector employees need be provided at the one and one-half hour rate only for hours worked in excess of the forty-hour workweek maximum.

FLSA does not make any provision for the granting of compensatory time in lieu of overtime payments for private-sector employees. Because the rights of employees under FLSA are public rather than private in nature, employees cannot effectively bargain away, release, or waive their overtime and other rights under FLSA unless the settlement of their rights has been supervised by the Secretary of Labor.[18] As a result, private-sector employers engaged in commerce within the meaning of FLSA may not provide compensatory time in lieu of overtime compensation to their nonexempt employees for hours worked in excess of the forty-hour workweek maximum.

Moreover, employers that violate the provisions of FLSA by granting compensatory time in lieu of overtime compensation may be subject to "liquidated damages" under Section 16(b) of FLSA unless the employer can show subjective good faith and objective reasonable grounds for believing that its actions were in compliance with FLSA. In cases of "willful" violations of the overtime provisions of FLSA, employers may be subject to three instead of two years of back pay liability.

In cases in which compensatory time off is permitted in the private sector, upon their termination of employment, employees may be entitled to receive a lump-sum payment for accrued-but-unused compensatory time absent an express agreement between the parties to the contrary. An Arizona appellate court reached this decision in *Acevedo v. Phoenix Opportunities Industrialization Center*, 27 Ariz. App. 156, 551 P.2d 1322 (Ct. App. 1976), holding that the employee had

rendered services for which he had a reasonable expectation of being compensated.

CONCLUSION

In most jurisdictions, private-sector employees are entitled to receive vacation benefits only in accordance with their employer's personnel policies or past practice. As a result, employers should be certain that their vacation policies clearly state the terms and conditions on which vacation benefits are to be earned and whether employees are entitled to receive cash payments for unused vacation time upon their termination of employment. In jurisdictions such as California, employers should determine whether a state wage payment law prohibits the forfeiture of accrued-but-unused vacation benefits upon an employee's termination of employment or other event.

The impact of federal law must also be considered in establishing a vacation policy. In cases in which vacation benefits will not be paid from an employer's general assets as a payroll practice, employers should consult with counsel to determine whether their policy constitutes an "employee welfare benefit plan" within the meaning of ERISA, therefore giving rise to certain reporting, disclosure, and fiduciary duties on the part of the employer. Clearly, the payment of vacation benefits from a fund may be considered to be evidence of an ERISA plan.

Finally, private-sector employers should review with counsel any compensatory time arrangements that they may have in order to ensure that the overtime provisions of FLSA have not been violated. In this regard, private-sector employers should be aware that a past practice of providing compensatory time in lieu of overtime compensation to nonexempt employees will not be deemed to be a waiver of these employees' rights to receive overtime compensation for all hours worked in excess of the forty-hour maximum during any given workweek.

Through careful planning and the adoption of well-written vacation policies, employers may be able to reduce the likelihood that their vacation policies will result in unanticipated liability to their employees.

NOTES

1. *Sweet v. Stormont Vail Regional Medical Center*, 231 Kan. 604, 647 P.2d 1274 (1982); *Wheeler v. Mission Elec. & Plumbing Supply, Inc.*, 267 Or. 209, 515 P.2d 1323 (1973).

2. For a general discussion of vacation polices and other fringe benefits, see DeGiuseppe, "The Recognition of Public Policy Exceptions to the Employment-at-Will

Rule: A Legislative Function?" 11 *Fordham Urb. L.J.* 721, 786-91 (1983).

3. *Shannon v. Huntley's Jiffy Stores, Inc.*, 174 Ga. App. 125, 329 S.E.2d 208 (Ct. App. 1985); *Mid America Aerospace, Inc. v. Department of Human Resources*, 10 Kan. App. 2d 144, 694 P.2d 1321 (Ct. App. 1985); *Rowell v. Jones & Vining, Inc.*, 524 A.2d 1208 (Me. 1987); *State ex. rel. Roberts v. Public Finance Co.*, 294 Or. 713, 662 P.2d 330 (1983); *Glenville Gage Co. v. Industrial Bd. of Appeals*, 70 A.D.2d 283, 421 N.Y.S.2d 408 (3d Dep't 1979), aff'd, 52 N.Y.2d 777, 417 N.E.2d 1009, 436 N.Y.S.2d 621 (1980).

4. *Suastez v. Plastic Dress-Up Co.* (cited on p. 85); *Die & Mold, Inc. v. Western*, 448 N.E.2d 44 (Ind. Ct. App. 1983); *Pohl v. Domesticom, Inc.*, 503 So. 2d 125 (La. Ct. App.), review denied, 505 So. 2d 1148 (La. 1987); *Narron v. Hardee's Food Systems, Inc.* (cited on p. 88)

5. For Connecticut, see Conn. Gen. Stat. §§31-71f, 31-76k (West 1987). For the others, see Iowa Code §91A.4 (1984); Me. Rev. Stat. Ann., title 26, §623 (West 1988); N.C. Gen. Stat. §95-25.12 (Michie 1991); Okla. Stat., title 40, §165.1(4) (West Supp. 1993).

6. Cal. Lab. Code. Ann. §227.3 (West 1989); Ill. Rev. Stat., ch. 48, §39m¶5 (Smith-Hurd 1986); La. Rev. Stat. Ann., title 23, §634 (West 1985).

7. Mich. Comp. Laws Ann. §408.474 (West 1985).

8. W. Va. Code §21-5-1(c) (Michie 1989); *Farley v. Zapata Coal Corp.*, 281 S.E.2d 238 (W. Va. 1981).

9. N.H. Rev. Stat. Ann. §275:43(III) (1987); Ohio Rev. Code Ann. §4113.15(D)(2) (Page 1991); R.I. Gen. Laws §28-14-4 (Michie Supp. 1992); S.C. Code §41-10-10(2) (Supp. 1991); Tex. Rev. Stat.

10. N.C. Gen. Stat. §95-25.12 (Michie 1991).

11. Ill. Rev. Stat., ch. 48, §39m¶5 (Smith-Hurd 1986).

12. *Molyneux v. Arthur Guinness & Sons, P.L.C.*, 616 F. Supp. 240, 243 (S.D.N.Y. 1985) (quoting *Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir. 1982)(en banc)).

13. 29 CFR §2510.3-1(b)(3).

14. U.S. Dep't of Labor, ERISA Opinion Letter No. 79-89A (1979) (cited in *Shea v. Wells Fargo Armored Service Corp.* (cited on p. 92).

15. E.g., *Baker v. Caravan Moving Corp.*, 561 F. Supp. 337 (N.D. Ill. 1983); *Trustees of Sheet Metal Workers' Welfare Fund v. Aberdeen Blower & Sheet Metal Workers, Inc.*, 559 F. Supp. 561 (E.D.N.Y. 1983).

16. E.g., *Upholsterers' Int'l Union Health & Welfare Fund Trustees v. Pontiac Furniture, Inc.*, 647 F. Supp. 1053 (C.D. Ill. 1986); *Goldstein v. Mangano*, 99 Misc. 2d 523, 417 N.Y.S.2d 368 (Civil Ct. Kings Co. 1978).

17. In a related case, the Fourth Circuit in *Holland v. Burlington Indus., Inc.*, 772 F.2d 1140 (4th Cir. 1985), aff'd sub nom., *Brooks v. Burlington Indus., Inc.*, 477 U.S. 901 (1986)(mem.), held that the North Carolina wage payment statute was preempted by ERISA.

18. 29 USC §253; *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, reh'g denied, 325 U.S. 893 (1945).