

HRAGC LEGAL UPDATE

MARCH 18, 2021

FEDERAL

United States Court of Appeals for the First Circuit

In January the First Circuit affirmed a dismissal of a former employee's claim that he was entitled to unused vacation time. The case applied Maine law which provides for paid vacation to be treated as wages if that is the employer's policy or practice. This is similar to New Hampshire (RSA 475:43, V provides: "Vacation pay, severance pay, personal days, holiday pay, sick pay, and payment of employee expenses, when such benefits are a matter of employment practice or policy, or both, shall be considered wages pursuant to RSA 275:42, III, when due."). The employer's policy clearly stated there was no carryover and no payout for unused vacation. The First Circuit rejected the claim that the statute required unused vacation to be paid at the termination of employment and held the employer's policy or established practice controlled. This is a reminder of the importance of a clear written policy or at least a consistent practice in handling unused vacation when employment ends. The case is *White v. Hewlett Packard*, No. 19-1696.

In February the First Circuit affirmed a decision granting summary judgment to an employer in a claim alleging FMLA retaliation and disability discrimination under the ADA and Rhode Island law. An employee took two approved FMLA leaves for major surgery (including after exhausting her FMLA leave rights) and over one year later her position was eliminated. A VP notified HR of his decision to eliminate the position. Two days later, before it was communicated to her, the employee notified the company she would be taking FMLA leave in the new year. After consulting with counsel, the company offered the employee a newly created lower-level position with a lower salary that she rejected. The company then went forward with the decision to terminate. The Court found the VP did not know about the employee's planned leave, he did not consider her impaired, and there was nothing to suggest his decision was related to her leave the prior year. The plaintiff claimed the decision of HR to consult counsel should be held against the company as evidence of retaliatory intent, but the Court rejected that, finding it was a prudent decision. This is a reminder of the importance of timing and clear documentation: the Court relied on the VP's email to show the absence of discriminatory intent, and the VP's communication of his decision was just before the employee's communication. With different timing or documentation, the outcome would likely have changed. The case is *O'Rourke v. Tiffany*, No. 20-1404.

NEW HAMPSHIRE

New Hampshire Legislature

Bills are now starting to work through committees, some have been deemed inexpedient to legislate (ending consideration of the bill), while others have passed one body and have moved to the other. Pending bills that may be of interest to private employers include the following:

- SB 69. This bill requires employers to provide a sufficient space and break time for nursing mothers to express milk. The bill passed 24-0. It is now pending in the House Consumer Affairs Committee.
- SB 61. This bill, named the Right to Work bill, prohibits a collective bargaining agreement from requiring an employee join or contribute to a labor union. The bill passed 13-11. It is now pending in the House Industrial and Rehabilitative Services Committee.
- SB 67. This bill requires the accrual of paid sick leave and regulates its use with a cap on how many hours may be used in a year. It is pending in the Senate Commerce Committee.
- HB 517. This bill requires payment for earned but unused vacation and personal time at the end of employment. It is pending in the House Industrial and Rehabilitative Services Committee.

- HB 258. This bill permits wage and hour records to be approved and retained electronically. It passed the House and is now pending in the Senate Commerce Committee.
- HB 165. This bill makes unenforceable non-compete agreements for certain mental health professionals. It is pending in the House Commerce and Consumer Affairs Committee.
- HB 408. This bill prohibits employers from hiring registered sex offenders if the job will involve contact with a minor. It is pending in the House Criminal Justice and Public Safety Committee.
- HB 303. This bill exempts ski and snowboard instructors at ski resorts from the required minimum pay law. It passed the House and is pending in the Senate Commerce Committee.
- HB 544. This bill prohibits the dissemination of “divisive concepts” related to race and gender in state contracts, grants and training programs. It is pending in the House Executive Departments and Administration Committee.

Best Practices for Addressing Performance and Discipline

After a year of the pandemic, employers who may have remained largely open and those who effectively closed the doors face the same challenge: taking action to address performance deficiencies or to impose discipline on employees who may have engaged in protected activity, are unable or unwilling to return to the workplace on a regular basis, or who have personal reasons why employer expectations cannot be met. Or employers may have found that certain functions are no longer needed or that it could do well without certain employees. Consider the following:

- Each adverse action could be considered a violation of the ADA, FMLA, whistleblower protection, and others. And there is a potential for discrimination on account of gender, race, age, religion and others, either directly or the impact of the decision is discriminatory.
- Before taking adverse action consider whether the employee will perceive it as discriminatory or retaliatory. Try to see it from the employee’s perspective and take steps to counter that perception.
- Examine whether the performance assessment or conclusion is based on objectively verifiable facts that are distinct from any protected activity (such as family or medical leave or opposition to employer practices or policies) and devoid of actual or unconscious bias. Evaluate the quality of the documentation and prior notice.
- Review what may be the cause of the problem and whether it is related to protected activity or an ongoing issue that has not been addressed (the employee’s medical issue, care of another, or something else).
- Take a broad view of whether the employee is entitled to a reasonable accommodation (even if not legally required) and take greater steps to engage in the interactive process with employees. Broadly determine if the person meets the requirements for a leave or accommodation. Creatively work through solutions and allow for more time to address a performance deficiency.
- But be careful not to obtain too much medical information and to protect it once received.
- Look for whether there are policy changes or training that could address the problem instead of adverse action.
- Take action only after exhausting all options and ensuring there is a legitimate non-discriminatory and non-retaliatory reason for the adverse action. Avoid inaction or delaying action without a strong reason.

Peter G. Callaghan, Esq.
Preti Flaherty PLLP
pcallaghan@preti.com
(603) 410-1500