Insight

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West Virginia Employment Update: The Mountain State is Becoming Much More Attractive to Employers

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For the past several decades, West Virginia has not fared particularly well when employers were faced with tough decisions regarding whether to close or open new facilities in the state. One of the factors that undoubtedly played a role in West Virginia faring so poorly was the state's legal climate. West Virginia employers faced a much higher litigation risk than employers in neighboring and other states.

Recognizing the disproportionate risk facing employers, the West Virginia Legislature and Governor took dramatic steps during the 2015 legislative session to improve the business climate and to correct some of the more glaring issues for employers. The significant legislative changes made during the 2015 regular session that impact West Virginia employers are detailed below.

Unmitigated Back and Front Pay—No Longer the Law

Until recently, a judicially-created loophole known as the "malice exception" allowed plaintiffs in West Virginia in almost all employment-related litigation to be awarded not only punitive damages, but **unmitigated** back and front pay damages as well. Practically speaking, this unusual West Virginia rule allowed plaintiffs asserting employment claims to in effect recover double punitive damages. An example readily illustrates the impact such a rule had on employment litigation in West Virginia. In the past, if a jury in West Virginia concluded an employer acted maliciously in firing a 20-year-old who made $10 an hour, it could award such individual not only hundreds of thousands of dollars in punitive damages, but could also award unmitigated back and front pay for **47 years**, which equates to more than an additional $900,000. The fact that plaintiffs in run-of-the-mill employment litigation could often readily blackboard damages exceeding a million dollars created an untenable dynamic that dramatically distorted the "value" of employment cases in West Virginia.

Fortunately for employers, as a result of legislation enacted as of June 8, 2015, the "malice exception" is no longer the law in West Virginia.[1] Indeed, when West Virginia Code §§ 55-7E-1, 2 and 3 went into effect, a plaintiff in West Virginia has, as do plaintiffs in all other jurisdictions

1 Unfortunately, the Legislature did not specify whether the new law will apply to cases that have already been filed, or only to those claims that arose or were filed after June 8, 2015.

in the United States, "an affirmative duty to mitigate past and future lost wages, regardless of whether the plaintiff can prove the defendant employer acted with malice or malicious intent, or in willful disregard of the plaintiff's rights." Succinctly, this new legislation codifies a plaintiff's duty to mitigate, and abolishes the previously recognized malice exception.

The new law requires that in the event front pay is sought as a remedy, the trial judge must make a preliminary finding as to whether front pay—versus reinstatement—is appropriate. If the trial judge concludes front pay is an appropriate remedy, it is for the trial judge, not the jury, to decide the amount of such award.

Legislature Adopts Punitive Damages Cap

Following years of West Virginia being ranked as one of the top three "judicial hellholes" in the United States, the West Virginia Legislature recently joined a growing number of states taking steps to rebalance the scales of justice by establishing limits on the punitive damages recoverable in civil litigation. With such statutory limits ranging from states abolishing punitive damages altogether (New Hampshire) to merely articulating the burden of proof that must be met by plaintiffs seeking punitive damages (e.g., Kentucky), West Virginia has codified the burden of proof to be met by plaintiffs seeking punitive damages. The West Virginia legislature also imposed limits on the amount of punitive damages that can be awarded in civil matters.

Specifically, the new West Virginia statute requires that plaintiffs establish by **clear and convincing evidence** that the damages allegedly suffered were the result of conduct carried out by the defendant with "actual malice" towards plaintiff, or a "conscious, reckless and outrageous indifference to the health, safety and welfare of others." W. Va. Code §55-7-27 (2015). In addition, the new statute provides defendants with the option of bifurcating the issue of punitive damages from that of liability. The statute also vests courts with the authority to determine whether the evidence presented in the first stage of the bifurcated trial is sufficient to warrant proceeding to a second stage that addresses the issue of punitive damages. Finally, the new statute caps the amount of punitive damages that may be awarded in civil cases to four times the amount of compensatory damages awarded or $500,000, whichever is greater, and mandates a judicial reduction in any punitive damages award exceeding such formula. The new statute was passed on February 24, 2015, and will apply to cases filed on or after June 8, 2015.

Wage Payment & Collection Act—Final Wages No Longer Must Be Paid in Hours

For years, employers in West Virginia dramatically altered their payroll practices in an effort to comply with the West Virginia Wage Payment and Collection Act ("WPCA") and its requirement that discharged employees be paid all wages owed within hours of their termination. After years of discussion and half-hearted efforts to address the issue, the West Virginia legislature in 2015 finally amended the WPCA to bring it in line with similar statutes in other states, allowing employers to pay discharged employees all wages owed on or before the next regular payday on which such wages would otherwise have been payable.

The WPCA, set out in W.Va. Code § 21-5-1 *et seq.*, is a broad statute that applies to any "person, firm or corporation" employing any employee in the state of West Virginia. While the WPCA regulates a wide variety of wage payment practices relevant to West Virginia employers, there were two key revisions made to the act during the Legislature's 2015 regular session, both designed to ease the administrative and legal burdens on employers.

As noted above, the first key revision to the WPCA modifies the time period in which an employer must pay an employee's final wages, including any accrued and calculable fringe benefits, when that employee is discharged by the company. For years, employers were required to pay discharged employees all amounts owed within 72 hours of termination. If such payment was not made within the statutory time frame, the employee was entitled to liquidated damages in an amount equal to **three times** the untimely paid wages. The statute also permitted the employee to recover his or her "reasonable" attorneys' fees. Not surprisingly, such statute led to a flood of individual and class-action lawsuits. In 2013, the Legislature made a half-hearted attempt to address the problem by amending the WPCA to allow employers to pay discharged employees within four business days of their separation, or the next regular payday (whichever came first). That amendment was problematic when an employee was discharged shortly before the next regular payday.

Finally, in the 2015 session, the Legislature more effectively addressed the issue, clarifying that employers need not pay employees all amounts owed within one or two days after an employee quits or is discharged, **but only on or before the next regular payday when such wages would otherwise have been payable** (in other words, the same date such amounts would have been due had the employee not quit or been discharged). In addition, the Legislature reduced the amount of liquidated damages recoverable by an employee who is not timely paid to two times the unpaid amount. These revisions are effective as of June 11, 2015, and should dramatically reduce the amount of litigation stemming from this statute.

The second revision to the WPCA modifies the frequency with which employers in West Virginia must pay their employees. Previously, employers were required to pay their employees at least every two weeks, which could only be modified by a "special agreement" approved by the Commissioner of Labor. The Legislature revised the act to require employers to pay their employees at least twice every month, and with no more than 19 days between payments. While a seemingly minor adjustment, this revision, effective June 12, 2015, brings West Virginia's wage payment frequency in line with the majority of states across the country.

Significant Amendments to Deliberate Intent Statute

For years, W. Va. Code § 23-4-2 (commonly known as "the deliberate intent statute") has provided workers with a potential avenue for circumventing the workers' compensation immunity afforded to West Virginia employers with respect to lawsuits based upon work-related injuries. Although W. Va. Code § 23-4-2 remains in effect, recent amendments to the statute—amendments that will apply to injuries occurring on or after July 1, 2015—have raised the bar that an injured worker must meet in order to prove a deliberate intent claim.

Two Types of Deliberate Intent Claims

The deliberate intent statute has provided, and continues to provide, injured workers with two ways of proving a deliberate intent claim against an employer or person: (1) by proving that the employer or person against whom liability is asserted acted with a consciously, subjectively, and deliberately formed intention to produce the specific injury or death to the employee (formerly W. Va. Code § 23-4-2(d)(2)(i), but now (as amended) W. Va. Code § 23-4-2(d)(2)(A)); or (2) by proving the existence of each of five factors (formerly W. Va. Code § 23-4-2(d)(2)(ii), but now (as amended) W. Va. Code § 23-4-2(d)(2)(B)). Claims brought pursuant to the five factors set forth in W. Va. Code § 23-4-2(d)(2)(B), sometimes referred to as the five-factor test, are the far more common of the two types of deliberate intent claims.

Amendments Impacting the Five-Factor Test

The amendments to the deliberate intent statute provide much-needed clarification regarding certain elements of the five-factor test, including clarification about what constitutes "actual knowledge," what constitutes an applicable state or federal safety statute, rule, or regulation or a commonly accepted and well-known safety standard within the industry or business of the employer, and what constitutes a "serious compensable injury."

In addition, a plaintiff bringing a deliberate intent claim under the five-factor test set forth in West Virginia Code § 23-4-2(d)(2)(B) must, at the time of filing the complaint, submit a verified statement by an expert in support of the deliberate intent claim. Provided that the plaintiff's complaint survives the initial pleadings phase, an employer may request, and the court shall give due consideration to, the bifurcation of discovery, such that discovery related to liability issues be completed before discovery related to damage issues.

Other Noteworthy Amendments to the Deliberate Intent Statute

In addition to clarifying certain elements and requirements with regard to claims brought under the five-factor test, the recent amendments to the deliberate intent statute also establish:

- specific circumstances in which an injured worker's intoxication will constitute the proximate cause of the injury;
- that, except for good cause shown, the filing of a workers' compensation claim for benefits will be a pre-requisite to recovery in connection with a deliberate intent claim; and
- the venues in which deliberate intent actions must be brought.

Revised Uniform Arbitration Act

After decades languishing as a less-favored method of resolving non-union disputes in West Virginia, arbitration, which allows parties to avoid the unpredictability of juries and can in many instances be more efficient and cost-effective than traditional court-based litigation, is gradually gaining wider acceptance in the state. Although of limited application in certain instances,[2] the adoption of the Revised Uniform Arbitration Act eliminates any question whether the West Virginia State Legislature has joined the West Virginia courts in explicitly expressing its support for resolving disputes by means of arbitration.

Although West Virginia's state courts have historically been hostile toward arbitration, recent decisions of the Supreme Court of Appeals of West Virginia have signaled a shift in that attitude. In the putative class action case *State of West Virginia ex rel. Ocwen Loan Servicing, LLC v. The Honorable Carrie Webster, Judge of the Circuit Court of Kanawha County*, and in *New v. Gamestop*, the Supreme Court of Appeals of West Virginia found in favor of arbitration agreements. In spite of such recent support from the courts, West Virginia's Arbitration Act, enacted in 1926, had not been amended since 1931. As a result, there was a lack of direction as to the logistics associated with pursuing arbitration in West Virginia. In particular, parties, arbitrators, and the courts lacked guidance regarding the method to select arbitrators, to compel witnesses to appear, and the manner in which the arbitration award was to be crafted.

The revised Act fills that void by incorporating amendments adopted more than a decade ago by the National Conference of Commissioners on Uniform State Laws. In so doing, West Virginia has joined 18 other states that have accepted the uniform act. Important guidance provided by the various provisions of the Act includes:

- §55-10-8(a)—submission to arbitration is irrevocable.
- §55-10-9(f)—if a proceeding involves a claim that can be referred to arbitration under an alleged agreement, the court must stay any judicial proceeding that involves the claim until the court renders a final decision regarding arbitrability. Interestingly, this provision, limits a court's ability to allow court-based litigation—and its related expenses—to proceed for an unlimited period of time while it decides whether to compel arbitration.
- §55-10-9(g)—if a court orders arbitration, the court must stay all proceedings involving that claim.
- §55-10-25—no award shall be set aside unless there are errors apparent upon its face or if it has been acquired by corruption or other undue means or mistake.
- §55-10-25(c)—allows for a rehearing by arbitrators at the discretion of a court.
- §55-10-26—provides the circumstances under which an arbitration award can be modified or corrected.
- §55-10-27 –any award of an arbitration panel is to be entered as a judgment or decree of the court unless good cause is shown as to why it should not be done.

This new Act will apply to all agreements to arbitrate made on or after July 1, 2015. Additionally, the new Act also governs agreements to arbitrate made before July 1, 2015, if all the parties to the agreement or to the arbitration proceeding so agree in a "record." Such a "record" must be in a tangible medium, and it may be made at any point. Finally, the Act applies to any agreement to arbitrate renewed or continued on or after July 1, 2015.

West Virginia Adopts Modified Comparative Fault

For causes of action arising on or after May 25, 2015, West Virginia courts will apply the standard of modified comparative fault, as a result of recently enacted legislation that reflects a departure (except in certain limited circumstances) from the previous standard of joint liability. In essence, the new approach will have the effect of requiring that damages recovered by a plaintiff be specifically allocated to each defendant

2 Numerous holdings of the U.S. Supreme Court make clear that, with regard to contracts affecting interstate commerce, any state statute that impedes arbitration or subjects an agreement to arbitrate to additional hurdles or restrictions that do not apply to other types of contracts is preempted by the Federal Arbitration Act ("FAA"). Indeed, the Supreme Court of Appeals of West Virginia, shortly after the Revised Uniform Arbitration Act was passed by the Legislature (and before it became effective) expressly recognized FAA preemption in *Schumacher Homes of Circleville, Inc. v. John Spencer and Carolyn Spencer*, 2015 WL 1880234 (W.Va. Apr. 24, 2015). The *Schumacher* court determined that when interstate commerce is involved the FAA preempts the Revised Uniform Arbitration Act provision allowing courts to decide whether an arbitration agreement is enforceable.

(and, in some instances, to non-parties) with the amount for which each person/entity is responsible being paid by that person/entity—a stark contrast to joint liability, which essentially allowed for the allocation of fault among parties but required that each defendant be individually responsible for the entire amount of damages awarded. The following is a brief summary of such statutory changes:

§55-7-13a: Modified Comparative Fault Standard Established

Under the previous statutes, liability for any award of damages was restricted to parties to a civil action. Following a favorable verdict, a plaintiff could seek to recover an entire judgment from any defendant found to be at least 30% liable for the harm sustained by the plaintiff, thereafter shifting the burden to the paying defendant to recover contributions from the other defendants. Under the new, "modified" standard, the liability of each person found to have contributed to a particular harm—including plaintiffs and non-parties—shall be allocated on a percentage basis, and any damages recovered by plaintiff shall be allocated to each person accordingly.

§55-7-13b: Definitions

No definitions were provided in the previous iteration of §55-7-1, *et seq.* For purposes of comparative fault and allocation of damages among multiple parties, the following definitions shall now apply:

> "Compensatory damages" means damages awarded to compensate a plaintiff for economic and noneconomic loss.
>
> "Defendant" means, for purposes of determining an obligation to pay damages to another under this chapter, any person against whom a claim is asserted including a counter-claim defendant, cross-claim defendant or third-party defendant.
>
> "Fault" means an act or omission of a person, which is a proximate cause of injury or death to another person or persons, damage to property, or economic injury, including, but not limited to, negligence, malpractice, strict product liability, absolute liability, liability under section two, article four, chapter twenty-three of this code or assumption of the risk.
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> "Plaintiff" means, for purposes of determining a right to recover under this chapter, any person asserting a claim.

§55-7-13c: Liability to be Several; Amount of Judgment; Allocation of Fault

This section expands on §55-7-13a and the switch from joint to several liability, reiterating that a defendant will only be held accountable for the amount of damages allocated to that defendant in direct proportion to his/her percentage of fault. The only exception to this rule is where two defendants are found to have deliberately worked in concert to contribute to plaintiff's harm, or where a defendant is found to have contributed to plaintiff's harm by operating a vehicle under the influence of alcohol or drugs, by engaging in criminal behavior, or by disposing of hazardous waste. In such circumstances, plaintiff may collect from one such defendant, who in turn may have a right of contribution from the other. This section also provides that any percentage of liability attributed to plaintiff shall be deducted from plaintiff's ultimate recovery, and a finding that plaintiff's percentage of fault was greater than 50% shall bar recovery entirely.

Absent the circumstances set forth above, a plaintiff may still seek to reallocate any amount of damages not able to be collected from a defendant, provided that a defendant whose percentage of fault does not exceed the percentage attributed to plaintiff will not be subject to such reallocation. This section also extends the time period for a plaintiff to move for reallocation of a defaulting defendant's share from six months to one year, and provides that plaintiff will be included in the reallocation of damages based on the remaining persons' proportion of fault.

§55-7-13d: Determination of Fault; Imputed Fault; Plaintiff's Involvement in Felony Criminal Act; Burden of Proof; Limitations; Applicability; and Severability

The last of the new subsections provides a catch-all that again articulates the fact that the liability of non-parties is to be considered when allocating percentages of fault, provided the plaintiff either settled with the non-party or a defendant gave notice within 180 days of it receiving service of process that a non-party was either wholly or partially at fault. In such circumstances, the ultimate recovery by plaintiff will be reduced by the percentage of fault attributed to non-parties. Specifically, juries are to be provided special interrogatories, the answers to which

establish the percentage of total fault attributed to plaintiff, defendants, and non-parties. For purposes of allocating fault, the actions of agents or servants of a defendant or non-party may be imputed to the person, as determined by the answers to additional special interrogatories provided to the jury.

This section explains that the burden of alleging and proving comparative fault lies with the proponent of the same, and relieves defendants of liability for the damages suffered by plaintiff where such damages were the result of plaintiff's committing or fleeing a criminal act for which plaintiff was convicted. This section also clarifies that it creates no individual cause of action, nor does it alter the immunities provided to various persons by operation of statute or common law, and provides severability in the event one provision is held void.

Prevailing Wage Law Modified

West Virginia's "prevailing wage" law, codified at W.Va. Code § 21-5A-1 *et seq*., requires any public authority authorized to enter into a contract for the construction of a public improvement project in West Virginia to pay its laborers a fair minimum rate of hourly wages. After extensive debate whether to repeal the prevailing wage act in its entirety, a compromise was reached that limits the number of projects to which the prevailing rate applies and revises how West Virginia's prevailing wage is to be calculated.

Previously, the prevailing wage rules applied to all public improvement projects and the applicable wage rates were determined by the West Virginia Division of Labor utilizing data from collective bargaining agreements and rates generally paid in the locality where the construction was being performed. Under the revised statute, Workforce West Virginia, in coordination with the West Virginia University Bureau of Business and Economic Research and the Center for Business and Economic Research at Marshall University, will determine the prevailing hourly rate of wages for various regions in the state. In addition, public improvement projects costing less than $500,000 are now exempt from the requirements of the prevailing wage act.

According to the revised statute, Workforce West Virginia must determine the methodology for annually calculating the prevailing hourly rate of wages on or before June 1, 2015. To ascertain the applicable prevailing rate, Workforce West Virginia is specifically instructed to consider the average rate of wages published by the U.S. Bureau of Labor Statistics and the actual rate of wages paid in the separate regions of West Virginia to workers in the same trade in the construction industry, "regardless of the wages listed in collective bargaining agreements." The prevailing wage rates for the remainder of 2015 must be determined on or before July 1, 2015, and subsequently each year by September 30. Lastly, the revised statute removes the ability of individuals affected by the determination of the prevailing wage rate to object to the determination by filing a written notice with the Department of Labor. Instead, under the revised statute, Workforce West Virginia is required to independently review the methodology for determining the prevailing wage every three years and to submit such review to the Joint Committee on Government and Finance.