July
2008
Volume 8
Issue 4

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# Business Law Newsletter

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## ADDITIONAL IMMIGRATION RELATED COMPLIANCE OBLIGATIONS IMPOSED ON FEDERAL CONTRACTORS

By: Philip M. Keating

Under the Immigration Reform and Control Act of 1986, all employers are obligated to verify the identity and eligibility for employment of all new employees hired. This verification is accomplished through the completion of the I-9 Form and the corresponding review of specified documents from the new employee. Violations of the I-9 requirements can result in penalties ranging from $200 to $10,000 per violation, and may result in criminal sanctions in particularly egregious cases.

For many years, the applicable federal government agencies did little if any enforcement of I-9 obligations and conducted very few work site enforcement actions ("raids"). That has changed now as immigration has become a major political issue.

On June 6, 2008, President Bush issued an Executive Order requiring all contractors who do business with the federal government to use an electronic employment eligibility verification system to verify the eligibility for employment of all individuals hired during the term of the federal contract, whether or not they will be working on the contract, and all individuals assigned to work on the federal contract. This second requirement is a major expansion of employer obligations as it requires employers to conduct a new verification process for existing employees, regardless of length of service.

Not surprisingly, the Department of Homeland Security ("DHS") started implementation of the Executive Order by stating that all federal contractors must enroll in their "E-Verify" system in order to be in compliance. E-Verify is an electronic system that purports to allow employers to confirm the Social Security numbers and immigration status of new hires. At present the E-Verify system does not allow employers to submit information on existing employees, which the Executive Order requires.

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2300 Wilson Boulevard, 7th Floor, Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

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## ADDITIONAL IMMIGRATION RELATED COMPLIANCE OBLIGATIONS IMPOSED ON FEDERAL CONTRACTORS

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Moreover, many employer groups find E-Verify to be inaccurate and inefficient, with the result that workers may be excluded from work due to outdated databases. The E-Verify system also imposes additional federal regulations on employers. For example, employers who register in E-Verify must agree to provide the government expansive access to company records, including I-9's.

The deadline for registering with E-Verify has not yet been set. DHS will be proposing complete implementing regulations and it is expected that they will become effective in the fall. In the meantime, it is important that employers review their I-9 procedures, the state of their records and make any needed improvements to those systems and records. I-9 and related immigration enforcement is back and is something employers must treat seriously.

## UPON TERMINATION EMPLOYMENT, ARE YOU REQUIRED TO PAY FOR ACCRUED, BUT UNUSED VACATION TIME?

By: Leo Fisher

You've just fired an employee for cause and he is demanding you pay him for his accrued but unused vacation leave. It might not seem fair to you, but, whether you're located in Virginia, Maryland or the District of Columbia, you will have to pay for accrued vacation unless you have a written policy or agreement to the contrary.

The Maryland legislature recently made a clear declaration of the state's guidelines on employers' compensation of accrued paid leave upon an employee's termination. If an employer wishes to limit payment of accrued leave, the employer must provide a written policy and the employee must be properly notified of the policy. If an employer does not provide such written policy, then upon termination, an employee is entitled to compensation for earned but unused leave. The new law rejects the Maryland Court of Special Appeals opinion in *Catapult v. Wolf,* which held that accrued but unused leave is a vested benefit under Maryland's Wage Payment and Collection Law. Maryland's new law reinstates the common law practice prior to the *Catapult* case, under which courts honored legitimate contractual arrangements made between an employer and employee with respect to accrued leave. However, if no policy or agreement was specified, an employee had to be compensated for all paid leave accumulated.

This practice is also well settled in the common law of the District of Columbia. *Jones v. District Parking Management Co.* announced the controlling rule stating "in the absence of an agreement to the contrary, the fact that an employee was discharged for cause cannot operate to deprive him of earned vacation pay rights." This rule was restated and somewhat broadened in 1981 in *National Rifle Assoc. v. Ailes*. The court stated "an employee who accrues but does not take vacation or other paid leave is entitled to monetary compensation for that leave upon discharge from employment, absent an agreement to the contrary."

Although Virginia law is not as clear, it can be inferred from the case law that agreements limiting the compensation for accrued, but unused vacation time will be respected.

In all three states, the best practice is to have a written policy stating whether your company will pay for accrued but unused vacation or other types of leave upon termination of employment. The policy should be provided to each employee at the start of employment. Employers commonly have a section or provision in their office or policy manual addressing accrued vacation leave. Every new employee should sign and date an acknowledgment of receipt of the manual and the acknowledgment should be placed in his or her personnel file. Without a written policy or agreement, the local courts will require you to pay for accrued but unused vacation leave, regardless of the circumstances under which employment was terminated.

## NON-COMPETITION AGREEMENT-DOCTORS

By: James V. Irving

On February 11, 2008, Judge John E. Wetsel, Jr. of the Winchester Circuit Court entered an order prohibiting a doctor from violating the terms of a non-competition agreement he had signed with a local medical practice. On March 11, the same judge vacated the February 11 Order after finding that the restrictive covenant at issue violated the Stark Law, a federal statute regulating health care practices that receive payments under Medicare or Medicaid. Judge Wetsel's ruling in *General Surgery Specialists v. Bowers* provides careful analysis of the underlying issue of the enforceability of non-competition agreements while also identifying a subtle external issue that could defeat other medical non-competes.

In January, 2006, Dr. Timothy K. Bowers, a general surgeon practicing in Martinsburg, West Virginia, accepted employment with General Surgery Specialists ("GSS") of Winchester, Virginia. The employment contract included a provision baring Dr. Bowers from engaging "in the practice of medicine specializing in General Surgery" in the City of Winchester or in Frederick County for a period of two years after leaving GSS.

On July 19, 2006, GSS terminated Bowers and later sought to enforce the non-competition agreement. Judge Wetsel found that a two-year term, limited to general surgery and to the city and county where GSS was located, was not overbroad. For example, there was nothing to prevent Dr. Bowers from returning to practice in Martinsburg, which is just 24 miles away. However, Wetsel then ruled the non-comp unenforceable under the Stark Law.

In essence, the Stark Law prohibits a doctor who has received payments from a hospital and a medical practice employing the doctor from referring patients to the hospital unless certain conditions are met. One of these is that the medical practice employing the doctor "may not impose additional practice restrictions on the recruited physician other than conditions related to quality of care."

The facts of the case demonstrated that Bowers and the local hospital, Winchester Medical Center ("WMC"), had entered into a Physician Recruitment Agreement by which WMC had agreed to pay Bowers up to $15,000 in relocation expenses, and a $25,000 signing bonus upon moving his practice to Winchester. Since Bowers had received payments from both GSS and WMC, the Stark limitation applied, barring GSS from restricting Bowers post-GSS employment.

Because federal money is often paid to physicians and physician groups (and for other reasons) the medical practice is heavily regulated. However, this result is not unfair as it may first appear. The court also concluded that GSS had actual knowledge of the terms of the recruitment agreement at the time they employed Bowers. This case does remind us that public policy is always an over-riding concern in judging the enforceability of non-competition agreements, and that public policy may be established in expected places.

## NOTARY LAW UPDATE

**EFFECTIVE: April 14, 2008, (with one provision effective July 1, 2008)**

Virginia Senate Bill 118 corrects a law enacted last year prohibiting a Notary from notarizing any signature that did not appear on the same page as the certificate of acknowledgment, jurat or other notarial form.

Contact Us
2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com

Notary Law Update
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In clean up legislation to last year's comprehensive Notary law reform, Senate Bill 118 corrects a provision that did not allow notarization on a "loose" certificate. A Notary was prohibited from notarizing any signature if the notarial certificate did not appear on the same page as the signature.

The amendment now permits a notarial certificate to appear on a page separate from the signature as long as the name of each signer is printed in the certificate. The following are acceptable and unacceptable examples: "This instrument was acknowledged before me on May 16, 2008, by John Jones and Mark Williams" (acceptable); "This instrument was acknowledged before me on May 16, 2008" (unacceptable).

Finally, in order to cure any defective prior notarizations that didn't include the notarial certificate on the same page as the signature, effective July 1, 2008, all such notarizations are declared valid if they otherwise appear on their face to be properly notarized.



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