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Salinger v. Random House, Inc. Whose Letters Are They, Anyway?

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Revitalizing The Maryland Wage Compensation Law

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Introduction

The Maryland Wage Payment and Collection Law, Md. Ann. Code, art. 100, §94 (1985), provides persons employed within the state of Maryland certain rights and remedies with respect to the payment and collection of wages, fringe benefits and other types of employee compensation. The principal purpose of the statute is to provide assistance to employees seeking to recover compensation unlawfully withheld. The statute also attempts to ensure the prompt payment of wages by establishing regular pay periods and imposing time limitations for payments due. Moreover, the broader policy goal served by these functions is the maintenance of economic stability and industrial peace.

The wage payment and collection law is important because a person who renders services in exchange for a promise of wages or other compensation is entitled to be assured that such payment will be made. Otherwise, significant social and economic problems would result from inadequate protection of such a basic right. In order for this right to be sufficiently protected, it is necessary that effective legal mechanisms exist which guarantee the prompt and timely payment of wages, or in the alternative, provide efficient and reliable means for the collection of wages unlawfully withheld.

For these reasons, most states have enacted wage payment and collection laws designed to address these problems and needs. Such laws provide various legal remedies, including liquidated or treble damages, criminal penalties and attorney's fees, which ensure the protection of employee rights and deter employer misconduct. Additionally, the statutory schemes created by these laws often provide for both private and governmental enforcement.

The objective of this article is to provide a critical, yet constructive, analysis and evaluation of the Maryland Wage Payment and Collection Law, with an eye toward amending the law to make it more effective in accomplishing its intended purpose. In pursuit of this objective, the Maryland law will be compared and contrasted to similar wage collection statutes enacted by other states. The effectiveness of a wage collection law can best be evaluated by a review of the judicial decisions arising under the statute which interpret the law and seek to carry out its intent. Accordingly, the case law which has arisen under these statutes will be reviewed in order to examine how such laws operate in practice. Upon such a review, it will become clear that the success of any wage collection law depends, to a significant extent, upon the particular mix of rights, remedies and enforcement mechanisms provided for in the statutory scheme selected.

When the Maryland statute is compared with other wage collection laws, it becomes clear that the Maryland law contains a number of critical shortcomings and deficiencies which seriously limit and impair its effectiveness. In order to rectify what appear to be the most significant of these problems, it is submitted that three specific admendments to the Maryland statute should be adopted:

(1) the statute should expressly provide employees with a private right of action to enforce the provisions of the statute;

(2) the statute should permit any employee who prevails in a private action the right to recover reasonable attorney's fees and costs; and

(3) the statute should provide that where the employer is a corporation, corporate officers should be subject to personal liability for violations of the law committed in the corporate name.

It is further submitted that enactment of these amendments will help ensure that the underlying goals and policies of the statute are better served. Without such revisions, the rights of employees, as set forth in the statute, are not likely to be forcefully and adequately protected. Without effective enforcement, the rights and guarantees the statute purports to hold out become no more than empty "paper" promises.

Analysis

A. The Mechanics of the Maryland Act

The Maryland Wage Payment and Collection Law, Md. Ann. Code, art. 100, §94 (1985), defines the rights of employees and the duties and responsibilities of employers with respect to the payment and collection of wages. Subsection (a)(3) of the statute defines wages as "any remuneration, compensation, bonus, commission, and/or fringe benefit promised in return for services by an employee." The statute further provides that such "wages" shall be paid by the employer, with some exceptions, "at least once every two weeks" and imposes certain time limits as to when payment must be made "upon [an employee's] termination of employment." §94(b) and

(e).[1] Additionally, the law obligates the employer to meet certain notice requirements with respect to changes in rates of pay and it restricts the employer's ability to effect deductions from an employee's wages. §94(c) and (d).

In the event an employer fails to comply with these provisions, an injured employee may seek redress by filing a complaint with the Commissioner of Labor and Industry. If it is determined that the complaint has merit, the commissioner may attempt to resolve it through informal means, such as mediation, or may request civil prosecution from the Attorney General. §94(g)(1) and (2). Where a civil action is brought on behalf of an employee, the statute provides that the court may "award an employee up to [three] times the amount of wages unlawfully withheld." §94(g)(2).[2] Additionally, §94(f)(1) of the statute provides that criminal penalties may be imposed against an employer who "willfully violates the provisions" of the statute.[3] Thus, on its face, the statute appears to provide the type of enforcement mechanisms and sanctions necessary to compel compliance. It is questionable, however, whether in reality the Act has been successful in accomplishing its goal. Since the original passage of the Wage Payment and Collection Law in 1966, there has not been a civil or criminal lawsuit brought under it. It is possible that the reason this law has never been utilized is due to some super-effective deterrent capability. It is also possible that all Maryland employers are simply law-abiding citizens who always pay all their employees on time and in full. In reality, however, it is highly unlikely that either of these explanations is true.

While the argument that the law may have a significant deterrent effect is not without merit, it is still not plausible that this possibility alone explains why, for over twenty years, the statute has been a stranger to the judicial arena. Regardless of the severity of the sanctions, there will always be those who risk penalty for profit. Moreover, assuming *arguendo*, that the Commissioner of Labor and Industry has been highly successful in settling wage disputes through informal processes, it is extremely unlikely that *every* valid wage claim has been disposed of in this manner. More realistically, it appears that Maryland's Wage Payment and Collection Law has simply been ineffective in assisting injured workers to recover compensation unlawfully withheld.[4] Thus, in light of the above facts, it would not be unfounded or illogical to conclude that a subtantial number of injuries of the type intended to be prevented by the Act are not being redressed.[5]

B. The Maryland Act in Perspective

The persuasiveness of the above argument is further strengthened when the Maryland statute is compared with the wage collection statutes of other states. A vast majority of the states in this country have some type of wage payment and collection law. Moreover, many of these statutes provide for civil and criminal penalties which are as severe, if not more so, than those afforded by the Maryland statute. Additionally, most statutory schemes created by such laws provide for state enforcement, as well as various alternatives for the informal resolution of wage claims. Notwithstanding such similarities, however, a significant amount of case law exists under virtually every other state statute.[6]

"Since the . . . passage of the Wage Payment and Collection Law . . . there has not been not a single lawsuit. . . ."

With these factors in mind, why has the Maryland law never been litigated? The argument set forth above suggests that the very non-existence of case law under the Maryland statute provides sufficient grounds to question the law's effectiveness. The non-existence of litigation involving the Maryland statute becomes even more troublesome, however, in light of the fact that other state laws, which afford similar remedies and penalties, have given rise to a significant amount of litigation.

If the non-use of the Maryland law is due to some deterrent effect, why have other state statutes (some of which provide for even more severe sanctions) not produced such results? If the non-use of the Maryland law is due to an unusually high degree of succcess achieved by the Commissioner of Labor and Industry, why have other state enforcement agencies not been so effective?

The answer to these questions is not that the Maryland statute possesses some unique formula or magic not contained in other state statutes. Rather, the reason the Maryland law has been such a stranger to the courts is due to the manner in which it is *dissimilar* to the statutory schemes created by other wage collection laws. The Maryland law does not contain a number of key provisions included in most other state wage laws, provisions which make legal action both a more realistic alternative and a more effective weapon.

The key ingredients missing in the enforcement scheme created by the Maryland law are: (1) the right of an employee to bring a private cause of action; (2) the right of an employee to recover attorney's fees in such an action; and (3) the right to obtain recovery against corporate officers for willful violations of the law. Most other state wage collection laws include such provisions. Morerover, these rights and remedies are usually made available *in addition* to other enforcement provisions, such as those provided in the Maryland statute, i.e. treble or liquidated damages, criminal penalties, informal dispute resolution and state enforcement.

C. The Maryland Statute v. Wage Collection Laws of Other States

While similar to the Maryland law in many respects, the Pennsylvania Wage Payment and Collection Law, Pa. Stat. Ann., tit. 43, §260.1-11a (Purden 1964 & Supp. 1988), also includes provisions which allow for both a private right of action and the recovery of attorney's fees. Section 260.9a(a) of the Act provides that "[a]ny employee or group of employees, labor organization or party to whom any type of wages is payable may institute actions under this act." Furthermore, §260.9a(f) mandates that in such private civil actions, "the court... shall in addition to any judgment awarded to the plaintiff or plaintiffs, allow costs for reasonable attorney's fees of any nature to be paid by the defendant."

Although the Pennsylvania law does not expressly state that corporate officers are liable for violations committed in the name of the corporation, the law has been interpreted to allow for such personal liability. The basis relied upon by the courts for imposing liability upon corporate officers has been the statute's definition of "employer", which, for purposes of the act, "[i]ncludes every person, firm, partnership, association, corporation, or... any agent or officer of any of the above mentioned classes employing any person in the [state]." §260.2a. *See Amalgamated Cotton Garment and Allied Indus. Fund v. Dion*, 341 Pa. Super. 12, 491 A.2d 123 (1985).[7]

It is significant that the Pennsylvania statute provides for these rights and remedies *in addition* to: (1) state enforcement (including informal dispute resolution), (§255.2), liquidated damages (§260.10) and criminal penalites (§260.11a). It is thus apparent that the Pennsylvania legislature believes that a more comprehensive statutory scheme is necessary to ensure the full

and adequate protection of employee rights. Pennsylvania is not the only state which has taken a more comprehensive approach to the vigorous enforcement of wage payment and collection laws.

Indeed, by way of example, it is interesting to note that the District of Columbia's Payment and Collection of Wages Act, D.C. Code Ann., §§36-101-110 (1988), closely parallels the statutory scheme created by the Pennsylvania law. Thus, in addition to providing for liquidated damages, criminal penalties and governmental enforcement, the District of Columbia act gives emplyees the right to bring private civil actions under the statute (D.C. Code Ann. §38-108 (a)), and allows for attorney's fees in such actions (D.C. Code Ann. §38-108(b)). It also defines "employer" to include both corporations *and* individuals (D.C. Code Ann. §36-101(1)) (emphasis added).

In addition to the wage payment and collection laws for Pennsylvania and the District of Columbia, numerous other state wage statutes contain provisions which allow for private civil actions, attorney's fees and personal liability of corporate officers. *See e.g.*, N.Y. Lab. Law, §§190-199 (McKinney 1986 & Supp. 1988); Cal. Lab. Code, §§203-270 (West 1971 & Supp. 1988); Iowa Code Ann. §91a. 1-13 (1984 & Supp. 1988); N.H. Rev. Stat. Ann., §275.42-56 (1986); and Haw. Rev. Stat., §388-1-13 (1985).

Upon reviewing these and other similar wage collection statutes and the body of case law which has emerged from such statutes, it becomes evident that certain provisions such as a private cause of action, the right to attorney's fees, and personal liability of corporate officers are key ingredients to a successful wage collection scheme. It is significant that a large percentage of the cases arising under such statutes have been brought by private parties, rather than by state agencies. Moreover, plaintiffs in such cases have been highly successful in recovering not only compensation unlawfully withheld, but also attorney's fees and liquidated damages as well. Additionally, in a substantial number of cases, employees have succeeded in utilizing these laws to impose personal liability upon corporate officers who might have otherwise escaped liability if the plaintiff/employee had been strictly confined to common law remedies.[8]

In view of these facts, it seems clear that the right to bring a private civil action, recover attorney's fees and obtain personal liability against corporate officers are all essential ingredients for an efficient and effective wage collection law. The sections which follow examine each of these principles in light of statutory provisions which embody them and judicial decisions which interpret their meaning and give them effect.

D. The Case for Allowing a Private Cause of Action

1. Basic Facts and Principles

The argument set forth above contends that the Maryland Wage Payment and Collection Statute would be more effective if it was amended to provide for a private cause of action.[9] The arguments in support of such an amendment are based upon sound logic and plain common sense. Moreover, because this type of provision is a common feature and central ingredient in the wage collection schemes for a significant number of other states, it is clear that the practical wisdom of this approach is well recognized.

"Allowing private enforcement... guarantees that the state will accomplish more for less."

Allowing for private enforcement of wage collection laws virtually guarantees that the state will accomplish more for less. Less state resources would be needed because private actions would supplement state enforcement efforts. Additionally, more widespread and comprehensive enforcement would be assured because *any* employee could invoke the protection of the law, without depending upon the approval and support of the Commissioner of Labor and Industry.

Even assuming that the Division of Labor and Industry was willing to pursue and litigate every legitimate wage claim, such a task would be impossible. Under the present statutory scheme, the Commissioner has the responsibility for providing investigative and enforcement services for the entire state. Thus, at least in theory, this responsibility extends to thousands upon thousands of employment relationships. Such a scheme is clearly unworkable and, therefore, it is not surprising that the wage collection laws of many states expressly authorize enforcement through private civil actions.[10]

In considering whether a private cause of action should exist under a statute, it is helpful to focus on the underlying purpose of the law and the policies it is intended to serve. By this approach, it may be determined whether private enforcement would better effectuate the purposes of the statute, or conversely, whether it would cause undue interference with administration of the law by the state. Because no case law exists under the Maryland statute, it is necessary to look to judicial interpretations of other state statutes to attempt to ascertain the legislative purpose of the Maryland law.[11]

2. Private Enforcement v. Employer Economic Superiority

In *Ressler v. Jones Motor Co.*, 337 Pa. Super. 602, 487 A.2d 424 (1985), the legislative purpose of the Pennsylvania Wage Payment and Collection Law was explained in terms of both the employee rights to be protected and the employer conduct to be discouraged. The court held that the central aim of the statute was to "aid an employee in the prompt collection of compensation due him and to discourage an employer from using a position of economic superiority as a lever to dissuade an employee from promptly collecting his agreed compensation." *Id.* at 610, 487 A.2d at 429, (quoting, *State ex rel. Nilson v. Oregon State Motor Ass'n.*, 248 Or. 133, 138, 432 P.2d 512, 515 (1967)). Borrowing from an interpretation of New York's wage collection law, the *Ressler* court further stated that "the purpose of statutes of this nature is to effect a quick payment of wages of compensation due in order to undercut any position of economic superiority possessed by the employer." *Id.* at 611, 487 A.2d at 429, (citing, *Weingrad v. Fischer & Porter Co.*, 47 D & C.2d 244, 251 (C.C.P. Bucks Co. 1968).

Likewise, it may be concluded that one of the primary goals of the Maryland act is to "equalize" the superior economic position of employers vis-a-vis their employees. It is clearly evident that this purpose would be better served by allowing for the private enforcement of wage claims. By giving employees the right to take independent legal action and recover not only compensation due, but liquidated damages and attorney's fees, the employee is placed upon a more equal footing with his employer.

If a party does not have the right to bring a private enforcement action and is unable to obtain the support of the state, he remains essentially at the mercy of the employer.[12] In order to effectively equalize the economic superiority of the employer, it is necessary for the employee to have the right to bring a private cause of action. Only in this way can the rights of the employee be forcefully protected and the intent of the statute be fully carried out.

3. Private Enforcement to Augment the Law's Deterrent Effect

Where a wage collection statute authorizes private enforcement, such suits are usually encouraged to a great extent by the availability of liquidated damages or other

similar remedies. The intended purpose of allowing such remedies is to deter violations of the law. It is hoped that the deterrent effect will compel compliance with the law and thereby avoid the need for the use of any types of enforcement actions.

In discussing the legislative intent of a provision permitting treble damages under California's wage collection law (Cal. Lab. Code, §206(b)(West 1971 & Supp. 1988), the court stated that "[t]he intention of the penalty imposed by the act in question is to make it in the interest of the employer to keep faith with his employees and thus avoid injury to them and possible injury to the public at large." *Triad Data Services v. Jackson*, 153 Cal. App. 3d Supp. 1,10, 200 Cal. Rptr. 418, 422 (1984) (quoting *Moore v. Indiana Spring Channel Gold Mining Co.*, 37 Cal. App. 370, 380, 174 P. 378 (1918)). Similarly, the purpose of a provision in Hawaii's wage law (Haw. Rev. Stat. §388-10 (1985) which mandates that certain civil penalties be awarded to the employee was found to have been intended to "encourage employers to pay wage promptly, reduce employee's economic losses, and strengthen the law." *Arimizu v. Financial Sec. Ins. Co.*, 5 Haw. App. 106, 679 P.2d 627, 631 (1984).

These types of remedies provide a significant deterrent effect against noncompliance. The benefit of this approach has been recognized by the Maryland legislature because section 94(g)(2) of the statute allows an injured employee the right to recover up to three times the amount of compensation owed. Under the Maryland law, however, the right to bring a private action to enforce a wage claim does not exist. Thus, a treble damage award would only be available in a civil action brought by the State.

While it must be conceded that the very existence of these types of penalty provisions do serve to deter unlawful conduct to some degree, the effectiveness of such a deterrent is substantially undermined when the ability to enforce the law and impose penalties rests entirely with the state. The success of any penalty, in terms of its deterrent effect, cannot depend solely upon its mere existence; the effectiveness of a sanction is also determined by its availability and use. If a penalty of this sort if not readily available or is rarely invoked, its credibility is significantly weakened. This is especially true where, as is the case with the Maryland law, the statute and its penalties have *never* been tested or proven.

In view of the above, it is submitted that in order for the treble damages provision of the Maryland statute to have any real force, private enforcement of the statute must be permitted. Greater availability of this sanction would surely bolster the credibility of the law and thereby enhance its deterrent effect. Additionally, in terms of both safeguarding employee rights and deterring employer misconduct, the right to bring a private action under the statute would make the law more effective because it would allow for more widespread and comprehensive enforcement. In sum, it seems clear that it would be consistent with the purposes of the Maryland statute to allow for private enforcement because it would unquestionably serve to better protect employee rights and more effectively deter unlawful conduct.

E. The Case for Awarding Attorney's Fees

In order for a private right of action to exist as a viable option, it is essential that the prevailing party be entitled to recover reasonable attorney's fees and any incidental costs of litigation. Otherwise, injured employees would be deterred from pursuing valid wage claims because of the often high, and in many cases prohibitive, costs of litigation.

Although it could be argued that civil remedies, such as liquidated or treble damages, would alone be sufficient to compensate injured employees, the better view is that allowing both attorney's fees and penalties provides for a more effective and forceful wage collection law. Moreover, such provisions are intended to serve different purposes. Punitive or liquidated damages are meant to deter future violations of the law, while an award of attorney's fees is intended to reimburse an injured employee for costs expended in litigation. *Ives v. Manchester Subaru, Inc.*, 126 N.H. 796, 498 A.2d 297, 303 (1985); *see also Mayday v. Elview-Stewart Sys. Co.*, 324 N.W. 2d 467 (Iowa, 1962). It is not surprising that most wage collection laws which authorize private enforcement allow for the recovery of attorney's fees *in addition* to compensatory and punitive damages.[13]

"for private. . . action to exist. . . it is essential that the prevailing party. . . recover attorney's fees. . . ."

Where wage collection laws provide for attorney's fees, it is usuall stipulated that the award of fees is mandatory, rather than discretionary. Thus, because of the importance of such rights, many state legislatures have determined that where an employee is forced to litigate in order to recover wages unlawfully withheld, an award of attorney's fees is unquestionably appropriate and, therefore, is not a matter for judicial discretion.[14]

Moreover, as a general point, courts have interpreted attorney's fees provisions in wage collection laws as essential for protecting employee rights and deterring employer misconduct. *See e.g., Curry v. Sutherland*, 111 W.L.R. 1613 (D.C. Super. Ct. 1983); *Garvin v. Timber Cutters, Inc.*, 61 Or. App. 497, 658 P.2d 1164 (1983). It is clear that the right to recover attorney's fees is a fundamental prerequisite to an effective and efficient wage collection scheme.

F. The Case for Personal Liability of Corporate Officers

1. Underlying Principles and Theories of Liabilities

The third major significant difference between the Maryland statute and wage collection laws of other states is that the Maryland law does not provide for the imposition of personal liability against corporate officers or agents. Because the officers of a corporation are not, as a matter of general corporate law, usually liable for the debts or obligations of a corporation, this issue presents perhaps the most sensitive and difficult question of all. The successful collection or enforcement of a wage claim can often depend upon the availability of such liability and therefore, this issue may also be the most important.

Despite the well-recognized virtues and benefits of the normally all powerful corporate shield, many wage collection schemes allow for the imposition of individual liability against corporate officers. The reason for this noted exception in the area of wage payment and collection may be attributed to the fact that these statutes, like the doctrine of limited corporate liability, are also based upon important public policy considerations. Thus, the particular design of a wage collection law with respect to such liability provisions inevitably requires a delicate legislative act of balancing conflicting and competing rights and needs.

There are essentially two versions of provisions allowing for the personal liability of corporate officers in the area of wage payment and collection. The first involves a more demanding standard because it requires the plaintiff to show that the corporate officer acted knowingly and in wilful violation of the law. The second, and more liberal, version, imposes a type of strict liability upon corporate officials and holds them responsible for unpaid

wages regardless of fault or intent. Although the wage collection statutes of most states allow for personal liability to some extent, it seems that the dominant trend is to use the higher standard and require conduct of an intentional or willful nature.

Regardless of the standard for such liability, the intended purpose of these types of provisions remains the same—to ensure that workers receive their due compensation. More specifically, it has been held that the legislative purpose of such provisions was to make those responsible for the expenditure of corporate funds personally liable for the payment of wages. *Laborers Combined Funds v. Mattei*, 359 Pa. Super. 399, 518 A.2d 1296 (1986). Moreover, liability provisions of this sort may be viewed as creating a type of insurance to employees, wherein "the officers of the corporation are in effect guarantors of [wage] payment." *Sasso v. Millbrook Enters.*, 108 Misc.2d 562, 438 N.Y.2d 59, 62 (1981).

2. Strict Liability for Corporate Officers

The Pennsylvania Wage Payment and Collection Act includes a provision which imposes a type of strict liability against corporate officers solely because of their position in the corporation. The basis for imposing personal liability against corporate officers under the Pennsylvania act lies in the statute's definition of employer which states that an "employer" shall include "every person, firm, partnership association, corporation... and any agent or officer of any of the above-mentioned classes employing any person in this Commonwealth." Pa. Stat. Ann., tit. 43, §260.2a (Purdon 1964 & Supp. 1988).

In applying this section, the Pennsylvania courts have held that the statute does not require a finding of intent, i.e., that the violation of the law was due to wilful conduct. *Amalgamated Cotton Garment & Allied Indus. Fund v. Dion*, 341 Pa. Super. 12, 491 A.2d 123, 124-125 (1985). Rather, this provision has been viewed as imposing a type of strict liability because personal liability attaches against corporate officers immediately upon non-payment, regardless of whether such non-payment was an intentional or willful violation of the law. *See, Laborers Combined Funds*, 359 Pa. Super. at 407, 518 A.2d at 1299-1301. This liability has also been described as a type of contract liability where the intent of a party is irrelevant to the existence of a contractual breach. *Id.* at 409 n.5, 518 A.2d at 1301 n.5.

It is clear that the Pennsylvania legislature, and other states (e.g. Vermont and the District of Columbia) which have taken this approach, made a deliberate choice to provide substantial protection for the wage rights of employees, at the expense of a significant exception to the doctrine of limited corporate liability. Unquestionably, the sanction of strict liability gives the law powerful force and effect. The benefit is that employees do not have to demonstrate that the employer's conduct was intentional in nature, only that wages were not paid. Additionally, the severity of this sanction is likely to compel corporate officers to take wage payment responsibilities seriously and avoid violations of the law at all costs. For these reasons, this version of the personal liability of corporate officers should be incorporated into the Maryland statute. Because the dominant trend among most states, however, is to opt for the more limited version of personal liability, the requirement of willfulness or intent should also be examined in order that a balanced perspective be presented.

3. Liability for Willful of Intentional Violations

Most states which permit personal liability to be imposed against corporate officers for wage violations require the employee to show that the alleged conduct was of a willful or intentional nature. For example, New Jersey act provides for such liability where the employer/officer "knowingly and willfully fails or refuses to make [wage] payments." N.J. Stat. Ann. §2a:170-90.2 (West 1985 & Supp. 1988). Such requirements have been interpreted to mean conduct which is "purposeful and knowledgeable." *State v. Wein*, 80 N.J. 491, 404 A.2d 302 (1979). This requirement is met when a showing is made that "[a]n employer...having the financial ability to pay wages which he knows he owes, fails to pay them." *Hekker v. Sabre Constr. Co.*, 265 Or. 552, 510 P.2d 347, 351 (1971) (quoting *State ex. rel. Nilson v. Lee*, 251 Or. 284, 293, 444 P.2d 548, 553 (1968)). It has also been held that such liability should not attach where the non-payment is "based upon bona fide" dispute as to the validity of a wage claim. *Id.* In this context, "willful" does not require any type of malice, but only requires that "the thing done or omitted to be done was done or omitted intentionally." *Weinzirl v. Wells Group, Inc.*, 234 Kan. 1016, 677 P.2d 1004, 1010 (1984) (quoting *State ex. rel. Nilson v. Johnston, 233 Or. 103, 108, 377, P.2d 331 (1962)).*

"the dominant trend ...is ...for the more limited version of personal liability"

The essence of this standard has been interpreted to mean that personal liability can be imposed against corporate officers when such individuals "knowingly permit the corporation to violate [the law]." *Ives* at 796, 498 A.2d at 303. Neither mistake or inadvertence will suffice. Rather, an affirmative showing is required that demonstrates that the officers of the corporation, having the ability to pay, knowingly and intentionally refused or failed to do so. *Id.*

Although this version of a personal liability provision imposes a substantial burden upon the injured employee, it can still be a fairly effective mechanism for collecting unpaid wages and deterring employer misconduct. Moreover, because this version represents the more dominant trend, its popularity is likely to be somewhat persuasive. Regardless of which standard is applied, it is clear that the effective enforcement of wage claims often depends upon the availability of this type of remedy. The right to impose personal liability against corporate officers in the area of wage collection is of critical importance because a significant number of legitimate wage claims arise in situations where the corporate entity is experiencing financial difficulties. Still, corporate officers are nevertheless able to reap profits or convert assets for their own benefit. For these reasons it is clear that such a provision represents a key ingredient in a successful wage collection scheme.

G. Federal Preemption Issues

A significant problem involving the use and effectiveness of state wage collection laws not discussed above concerns the broad preemptive powers of federal labor and employment law. Specifically, the Labor Management Relations Act of 1947, 29 U.S.C. §8141-187 (1982 & Supp. 1986) ("LMRA") and the Employee Retirement Income Security Act of 1974, 29 U.S.C. §81001-1461 (1982 & Supp. 1986) ("ERISA") provide that state law in the areas covered by these respective statutes is preempted.

ERISA[15] was enacted by Congress to protect employees from "abuses in the administration and investment of private retirement plans and employee welfare plans." *Donovan v. Dillingham*, 688 F.2d 1367, 1370 (11th Cir. 1982). Thus, where an employer fails to make fringe benefit contributions pursuant to a benefit plan covered by ERISA, employees may bring an action under the statute and are entitled to the rights and remedies provided therein.[16] In addition, state law may provide remedies in such cases in that many state wage collection acts also extend to fringe benefit contributions.[17]

With respect to benefit contributions covered by ERISA, reliance on state law is expressly foreclosed. The relevant preemption clause, 29 U.S.C. §1144(a), states that

the provisions of the statute "*shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan*" covered by the Act. (emphasis added). Accordingly, where state collection laws have been relied upon to recover benefit contributions, such claims will be preempted where federal law (of which ERISA is a part) is shown to be applicable. *See e.g. Nat'l Metalcrafters v. McNeil*, 784 F.2d 817 (7th Cir. 1986).

The Labor Management Relations Act has also been found to have a preemptive effect upon state law. Preemption in this context, has been the result of judicial interpretation, rather than express legislative mandate. Section 301 of the LMRA, 29 U.S.C. §185, gives the parties to collective bargaining agreements the right to sue in federal court to enforce the terms of such contracts.[18] The federal remedy created by Section 301 is exclusive.[19] Thus, actions to enforce collective bargaining agreements must be based on federal law, not state law. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957).[20] Accordingly, where an employer fails to pay wages due under a collective bargaining agreement, a right exists to seek payment through a Section 301 enforcement action, and remedies provided by state wage collection laws are foreclosed.[21]

It seems clear that an action brought under a state wage collection law for failure to make wage payments or fringe benefits contributions may be effectively precluded by an argument based on federal preemption. While it is fair to say that the majority view favors preemption, some courts have nevertheless held that the scope and reach of the federal law is not so pervasive as to preclude *all* state actions. According to this view, it is possible for a state wage collection mechanism to co-exist with the federal remedies created by ERISA and the LMRA without undue interference with exclusive federal jurisdiction. Thus, the effect of federal preemption in this area is not entirely clear and some dissension exists among authorities who have addressed the issue.

With respect to the minority view, most of the cases have confronted issues involving the effect of ERISA rather than the LMRA. These decisions hold that ERISA does not necessarily always preempt state wage and benefit claims and that, despite the existence of federal preemption in this area, it is possible for federal and state remedies to co-exist. The basis for such holdings is an exception to ERISA's preemption clause, which provides that the preemption clause "*shall not apply to any generally applicable criminal law of a state.*" 29 U.S.C. §1144(b)(4) (emphasis added).

Whether the exception provided by §1144(b)(4) can be relied upon in order to uphold a state action for criminal penalties ultimately depends on how a court interprets the meaning of the phrase "any generally applicable criminal law." Most courts which have addressed the issue have found that wage and/or benefit collection laws, such as the type which exist in Maryland, are *not* "generally applicable criminal laws," because such statutes pertain *only* to wages and benefits. It is reasoned, therefore, that they cannot be the type which Congress intended to include within the exemption. Accordingly, under the majority view, such laws are preempted by ERISA, notwithstanding the fact that they provide for criminal sanctions.[22]

"state collection laws...will be preempted where federal law is ...applicable."

A minority view exists which holds that ERISA does not preempt state wage and benefit statutes when such laws give rise to criminal penalties. According to this view, any state law which sanctions criminal prosecution is a "generally applicable criminal law" under §1144(b)(4) of ERISA and consequently is not preempted. Such holdings persist, despite the fact that the state laws are specifically designed to cover *only* the nonpayment of wages and benefits. *See Upholsterers Intern. Union v. Pontiac Furniture*, 647 F.Supp 1053 (C.D. Ill. 1986); *Sasso v. Vochris*, 116 Misc.2d 797, 456 N.Y.S.2d 629 (1982).

Another view attempts to strike somewhat of a middle ground on the issue. In *Nat'l Metalcrafters v. McNeil*, 784 F.2d at 828-29 (7th Cir. 1986), the court noted in dicta that while ERISA and the LMRA would usually preclude enforcement of state wage payment acts when collective bargaining agreements are involved, preemption may not exist where nonpayment "is in such patent bad faith as to partake of the wrongfulness associated with some of the traditional common law intentional torts...." The suggestion seems to be that such circumstances might put the wrongful act outside the scope of federal labor law. This logic has a certain appeal, and given the appropriate facts, it could conceivably be sufficient to persuade a court from foreclosing a state action on preemption grounds.

In sum, while authority exists to support both viewpoints, the majority position is likely to continue to dominate. Due to the broad preemptive force of federal law in this area, state wage collection actions are likely to be preempted where ERISA or the LMRA is found to apply. Regardless of the final outcome of the preemption issue, however, state wage collection laws will continue to play a vital and significant role in those areas of labor relations when federal law is not applicable. Where benefits owed to an employee are not covered by ERISA, or wages due are not pursuant to a collective bargaining agreement governed by the LMRA, state wage collection actions will continue to provide effective remedies. Indeed, for such employees, state wage laws may provide the only available relief.

Conclusion

In light of the foregoing analysis and arguments it is submitted that the Maryland Wage Payment and Collection should be revised to incorporate the amendments proposed herein. Such revision would unquestionably enhance the effectiveness of the law and serve to protect and promote the rights and policies embodied in the Act.

FOOTNOTES

[1]While Subsection (b) appears to emphasize the requirement of timeliness, it seems obvious from the entire text of the statute that the Act attempts to prohibit the more serious harm of *non-payment*, rather than just late payments.

[2]In order for treble damages to be appropriate under the law, the "non-payment" cannot be the "result of a bona fide dispute." §94(g)(2).

[3]In full §94(F)(1) states: "Any employer who wilfully violates the provisions of this subtitle is guilty of a misdemeanor, and upon conviction thereof, may be fined an amount not to exceed $1,000."

[4]It is not suggested that the successful resolution of wage claims by the Commissioner should be slighted, but only that a 100 percent success rate is a virtual impossibility. Consequently, the dearth of case law must be attributable to other reasons.

[5]The most serious types of claims which typically arise under wage collection laws usually involve disputes over the *non-payment* of wages, as opposed to untimely payment, unauthorized deductions, irregular pay periods, etc. Moreover, claims for non-payment often occur in situations where the employer is experiencing some type of financial difficulty, e.g. bankruptcy, insolvency, business closing, etc. Under such circumstances, an employee who is owed several paychecks can indeed be left in dire straits and may be critically dependent upon an effective wage collection law.

[6]Case law arising under state wage collec-

tion laws can be easily located within the annotations to these statutes or by researching a law under the appropriate state or regional digest. Additionally, these statutes have given rise to a multitude of lawsuits and judicial opinions. *See e.g.*, The California's Wage Collection Statute, Cal. Lab. Code §200-270 (West 1971 & Supp. 1988); Illinois Wage Payment & Collection Act, Ill. Ann. Stat., ch. 48, para. 39 1-15 (Smith-Hurd 1986); and Pennsylvania Wage Payment and Collection Law, Pa. Stat. Ann., tit. 43, §260.1-110 (Purdon 1964 & Supp. 1988). Further discussion of such laws and specific cases arising under them is provided below.

[7]*See also Ward v. Whalen*, 18 Pa. D&C.3d 710 (1981) (corporate officer constitutes employer under the act and therefore is personally liable); *In Re Johnston*, 24 Bankr. 685 (W.D. Pa. 1982) (corporate officer personally liable for financial obligations of corporation).

[8]Examples of cases involving each of the statutory provisions in question are provided below.

[9]While it is recommended here that the Maryland statute be amended to expressly allow for private enforcement, it is clearly conceivable that an *implied* right of action could be argued to exist under the law. *See e.g.*, *Vassallo v. Haber Elec. Co.*,, 435 A.2d 1046 (Del.Super. 1981) (private cause of action exists under Delaware's wage collection law, Del. Code Ann. tit. 29 §912(1983 & Supp. 1988). Notwithstanding this possibility, it would nevertheless be more appropriate for the General Assembly to amend the Maryland statute to expressly authorize private enforcement. The chief benefit of this strategy is that a clear and unambiguous message would be sent to employers and employees alike.

[10]The right to bring a private suit on such claims despite the state's refusal to pursue the matter may be important for a number of reasons. For example, the strength of a particular claim could be fatally underestimated by the Commissioner. Additionally, civil discovery may allow an employee to obtain the documentation necessary to substantiate his claim.

[11]Because all wage collection laws seek to achieve basically the same objective, i.e. the prompt and certain payment of wages, case law from other jurisdictions regarding the legislative intent of such statutes provides strongly persuasive authority. Indeed, as will be shown, it is not uncommon for courts of one state to look to the decisions of another state in this context.

[12]While an injured employee would always have the right to sue in contract, in many instances such an action would not be pursued due to the often prohibitive costs of litigation. Indeed, in many wage cases, it would not be worthwhile for an employee to incur the costs of a lawsuit, unless attorney's fees and/or some type of liquidated damages were available.

[13]*See e.g.*, the wage collection laws referred to above for the states of Pennsylvania, the District of Columbia, California, New Hampshire, Iowa and Hawaii.

[14]*See e.g.*, the wage collection statutes for California Cal.Lab. Code, §98.2(b)(West 1971 & Supp. 1988); District of Columbia, D.C. Code Ann. §36-108(b)(1988), and Pennsylvania, Pa. Stat. Ann., tit. 43, §260.9a(f)(Purdon 1964 & Supp. 1988); where the operative language in such provisions states that the court *shall* award attorney's fees, rather than may award such fees.

[15]ERISA applies to employee benefit plans (pension and welfare) which are established and maintained:

> (1) by any employer engaged in commerce or in any industry or activity affecting commerce;
>
> (2) by any employee organization or organization representing employees engaged in commerce or in any industry or activity affecting commerce or both.

[16]*See* 29 U.S.C. §§1131-1145.

[17]*See e.g.* Md. Ann. Code, art. 100, §94(a)(3) (1983).

[18]Section 301, 29 U.S.C. §185(a) provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act]... may be brought in any district court of the United States having jurisdiction of the parties...."

[19]*Nat'l. Metalcrafters* 784 F.2d at 823.

[20]*See also Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) ("when resolution of state law claim is substantially dependent upon analysis of the terms of [a collective bargaining agreement], that claim must either be treated as a §301 claim or dismissed as preempted by federal labor contract laws").

[21]*See e.g. Nat'l Metalcrafters*, 784 F.2d at 823.

[22]*See Sforza v. Kenco Constr. Inc.*, 7 E.B.C. 1181 (D. Conn. 1986); *Sheet Metal Workers v. Aberdeen BSM Wkrs.*, 559 F.Supp. 561 (E.D.N.Y. 1983); *Calhoon v. Bonnabel*, 560 F.Supp. 101 (S.D.N.Y. 1982); *Commonwealth v. Federico*, 383 Mass. 485, 419 N.E.2d 1374 (1981). *See also National Carriers Conf. Comm. v. Hefferman*, 454 F.Supp. 914 (D. Conn. 1978).

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