FROM THE CHAIR ***continued***

Programs we are planning for this fiscal year include greater participation with the University of Maryland Francis King Carey School of Law and the University of Baltimore School of Law to foster the interest of law students in our area of practice, our biennial employment law institute in the spring, brown bag luncheons, a spring dinner program, and not to be missed, our as yet unplanned and unnamed program that will be presented at the MSBA Annual Meeting in Ocean City. If you have suggestions for future programs, please send me an email at zimmerman@kahnsmith.com.

ARTICLES

FOURTH CIRCUIT ISSUES PAIR OF CASES ADDRESSING JOINT EMPLOYMENT UNDER THE FLSA

By Peter D. Guattery, Esq.

This past January, the U.S. Circuit Court for the Fourth Circuit issued two decisions which significantly reworked the analysis used in determining joint employer status under the FLSA. The leading case, *Salinas, et. al. v. Commercial Interiors, Inc.*, Case No. 15-1915, (4th Cir. January 25, 2017), involved a class based claim by the employees of J.J. General Contractors, Inc. seeking to recover unpaid overtime wages. The claim was brought not only against their de facto employer, but also against Commercial Contractors, Inc., a general contractor, which routinely contracted with the plaintiff's employer, to perform drywall installation on construction projects.

The district court, had previously granted summary judgment to Commercial Interiors, after assessing the "legitimacy" of the relationship between the two companies utilizing a novel test which focused on the arm's length character of business relationship. The Court of Appeals rejected this "novel multifactor test," instead embarking on analysis of the scope of the FLSA's broad definition of "employee" to the inadequacy of current tests to fully capture the intent of the FLSA.

At issue in the case was the payment of unpaid overtime for work weeks in which the plaintiffs may have worked forty or fewer hours for J.J. General Contractors and Commercial Interiors considered separately, but more than forty hours for both companies in the aggregate. In fact, the plaintiffs had already prevailed on their claims against J.J. General Contractors, and the

judgment paid. Although Commercial Interiors sought to defeat the appeal based on mootness, the court nevertheless concluded that a question of whether the plaintiff's work for Commercial Interiors was "joint employment" remained viable, as both companies could be joint and severally liable for overtime due on aggregated work hours.

In reaching its conclusion, the Court first noted the breadth of the definition of "employee" under the FLSA; a definition that found its origin in child labor laws, which sought to impose liability on not only direct employers of children, but those that used middlemen to accomplish the same result. Although the FLSA did not specifically define "joint employment," the regulations did delineate between separate employment and joint employment, noting that the former involved two or more employers "acting entirely independent of each other," and "completely disassociated" with respect to the individual employee's employment.

The Court criticized the Ninth Circuit's decision in *Bonnette v. California Health and Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983) as the source of the currently confused state of the law. The *Bonnette* case identified four factors relevant to the joint employer analysis, each one of which focused on the nature of control exercised by each employer. These factors were derived from case law relating to the distinction between independent contractor and employee, however, and were not entirely consistent with the broad definition of employee in the FLSA.

The efforts by later courts to graft additional factors onto this test, including s focus on "economic reality" were, in the Fourth Circuit's view, equally misguided. The flaw in Bonnette and subsequent cases, the Court noted, was an improper focus on the relationship between the employee and the putative employer, rather than the relationship between the putative joint employers, and the fact that the cases incorrectly framed the joint employment inquiry as a question of the employee's economic dependence on the putative joint employer. These tests, the Court noted, do not answer the question as to whether the two entities are "entirely independent" or "not entirely disassociated."

To answer that question, the Court devised a new six factor test, which is intended to first analyze whether the two employers should be treated as joint employers. The factors the Court identified are:

- Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to direct, control, or supervise the worker, whether by direct or indirect means;

- Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate the power to—directly or indirectly—hire or fire the worker or modify the terms or conditions of the worker's employment;

- The degree of permanency and duration of the relationship between the putative joint employers;

- Whether, through shared management or a direct or indirect ownership interest, one putative joint employer controls, is controlled by, or is under common control with the other putative joint employer;

- Whether the work is performed on premises owned or controlled by one or more of the putative joint employers, independently or in connection with one another; and

- Whether, formally or as a matter of practice, the putative joint employers jointly determine, share, or allocate responsibility over functions ordinarily carried out by an employer, such as handling payroll; providing workers' compensation insurance; paying payroll taxes; or providing the facilities, equipment tools, or materials necessary to complete the work.

Signaling that even these factors may be insufficient to resolve the primary issue, the Court added: "To the extent that facts not captured by these factors speak to the fundamental threshold question that must be resolved in every joint employment case—whether a purported joint employer shares or codetermines the essential terms and conditions of a worker's employment—

courts must consider those facts as well." It is the "circumstances of the whole activity" which matter.

In applying these factors, the Court singled out the following facts which supported a finding that the two employers were "joint employers" within the meaning of the FLSA:

- Plaintiffs performed nearly all of their work on Commercial jobsites and for Commercial's benefit;
- Commercial provided the tools, materials, and equipment necessary for Plaintiffs' work, with Plaintiffs providing only small, handheld tools;
- On at least one occasion, Commercial rented a house near the jobsite for J.I. employees to stay in during a project;
- Commercial actively supervised Plaintiffs' work on a daily basis by having foremen walk the jobsite and check Plaintiffs' progress;
- Commercial required Plaintiffs to attend frequent meetings regarding their assigned tasks and safety protocols;
- Commercial required Plaintiffs to sign in and out with Commercial foremen upon reporting to and leaving the jobsite each day;
- Commercial foremen frequently directed Plaintiffs to redo deficient work, communicating problems to J.I. supervisors who translated the information to Plaintiffs;
- Commercial foremen told certain Plaintiffs to work additional hours or additional days;
- Commercial communicated its staffing needs to J.I., and J.I. based Plaintiffs' jobsite assignments on Commercial's needs;
- When J.I. performed certain "time and materials" work for Commercial and was paid on an hourly, rather than lump-sum, basis, Commercial told J.I. how many of its employees to send to the project and how many hours those employees were permitted to work;
- Commercial provided Plaintiffs with stickers bearing the Commercial logo to wear on their hardhats and vests bearing Commercial logos to don while working on Commercial jobsites;
- J.I. supervisors instructed Plaintiffs to tell anyone who asked that they worked for Commercial;
- Commercial provided J.I. supervisors with Commercial-branded sweatshirts to wear while working on Commercial projects;
- On at least one occasion, Commercial required J.I. employees to apply for employment with Commercial and directly hired those employees.

Commenting on these specific factors, the Court emphasized that Commercial continually supervised plaintiffs, providing feedback and direction, through frequent meetings, and one-on-one instruction. Not only did Commercial Interiors supervise the work, they required the plaintiffs to hold themselves out as company employees. Moreover, Commercial not only set work hours, but also the plaintiffs' work was almost exclusively with Commercial and on premises Commercial controlled. Finally, Commercial not only recorded plaintiffs' hours and maintained timesheets, it also provided plaintiffs with a place to live while on job sites.

Responding to Commercial's argument that the supervisory work performed by their foremen was only normal oversight necessary to ensure the work met standards of quality and timeliness, the Court said the oversight went beyond that necessary to assure that the task was done properly. The oversight included regular feedback and instruction, as well as meetings. As to the assertion that Commercial's foremen usually spoke only to J.J. supervisors and not the employees, the Court reemphasized that indirect control is sufficient to render an entity and employer under the statute.

The Court then gave short shrift to the argument that the plaintiffs themselves were independent contractors,

applying an economic realities test which looked at the workers' economic dependence on the employer. Finding the workers economically dependent on J.J. General Contractors, it was a short step to conclude that they were also employees of Commercial given their "one employment" with both entities.

Salinas was issued together with a companion decision, *Hall, et al. v. DirecTV, LLC, et al.*, Case No. 15-1857 (4th Cir. January 25, 2017). In Hall, the plaintiffs, who sought unpaid wages and overtime, were cable technicians engaged to provide installation and repair services for DIRECTV through a "provider network." This provider network, as explained by the Court, is a pyramid shaped network where DIRECTV contracts with intermediaries known and "Home Service Providers" and "Secondary Service Providers," who, in turn, contract with captive subcontractors and ultimately individual technicians. DirectSat, one of three independent Home Service Providers, was a co-defendant with DIRECT V, and served as a middle manager between DIRECTV and the individual technicians bringing suit.

In overturning dismissal of the claims against the defendants, the Hall Court criticized the overly strict standard applied by the district court, and noted: "As we explained previously, to determine whether "separate" or "joint" employment exists, courts must focus on whether putative joint employers "*share, agree to allocate responsibility for, or otherwise codetermine*" the essential terms and conditions of a workers' employment. Nothing in the FLSA required that an employer have "unchecked – or even primary – authority over all – or even most aspects of a worker's employment in order to qualify as a joint employer."

The court dismissed again attempts to focus on the legal relationship between the employing entities and whether the contract was arm's length and in good faith. None of those factors were primarily relevant, and the starting point for any analysis was the six factor test put forth in *Salinas*. In applying these factors to the allegations in the case at hand, the Court focused on the provider agreements, which, as alleged in the Complaint, served to dictate the plaintiffs' day to day job duties.

The complaint also alleged that the defendants shared authority over hiring and termination, with DIRECTV setting hiring criteria, and setting compensation rates. Plaintiffs also wore DIRECTV uniforms and name badges, and utilized equipment belonging to DIRECTV. DirectSat remained responsible for enforcing DIRECTV's mandates for technicians. After concluding that an issue of joint employer status was properly asserted and that defendant DirectSat was not "completely disassociated from" DIRECTV.

The facts in both the *Salinas* and *Hall* cases provided fertile factual ground for the Fourth Circuit to articulate and apply its new six factor test. The two cases come from very different working worlds – construction and technical service – yet presented similar efforts by the principal contractor to control service standards and brand quality. The plea of one defendant, that the *Salinas* standard would be the death knell of any distinction between general and sub-contractors, was promptly dismissed by the Court as an overreaction. But the unanswered question that remained in both cases was precisely where the line would be drawn.

DISPLACED SERVICE WORKERS PROTECTION ORDINANCE TOOK EFFECT JULY 12, 2017

By Kevin C. McCormick

With very little publicity and/or fanfare, the Baltimore City Council enacted an ordinance that will have a significant effect on Baltimore city contractors who provide security, janitorial, building maintenance or food preparation services in Baltimore City. In short, the new legislation requires that if a service contractor working in the City takes over another contract performed by another entity, the new service contractor must offer to hire for at least 90 days the employees of the predecessor contractor. At the end of the 90 day transition period, the successor entity must perform a written performance evaluation for each employee retained and may not terminate that employee without just cause.

The new legislation contains significant enforcement mechanisms including the creation of a special wage commission to investigate any complaints under this new ordinance as well as awarding the traditional remedy of reinstatement and back pay to any employee who was improperly terminated and/or not hired as well as specific monetary fines.

Let's take a much closer look at this significant legislation.

WHO IS COVERED

Council Bill 17-0048 applies to any contractor that enters into a service contract to perform work in Baltimore City and employs 20 or more employees.

A **service contract** is any contract between an awarding authority and a contractor to provide security, janitorial, building maintenance or food preparation in a facility located in the City that is used as a

- private, elementary or secondary school,
- public or private college or university,
- convention, sports or entertainment institution such as a museum, casino, convention center, arena, stadium or
- a multi-family residential building or complex with more than 30 units,
- commercial building or office building occupying more than 50,000 square feet, industrial facility such as a pharmaceutical laboratory research and development facility or
- product fabrication facility or distribution center.

A **service employee** is any individual employed on a full or part-time basis as a building service employee, including a janitor, security officer, groundskeeper, concierge, door staffer, maintenance technician, handyman, superintendent, elevator operator, window cleaner or building engineer or, food service worker including a cafeteria attendant, line attendant, cook, butcher, baker, server, cashier, catering worker, dining attendant, dishwasher, or merchandise vendor.

Service employees do not include a managerial or confidential employee or an employee who works in an executive administrative or professional capacity.

A **successor entity** under the new legislation is an entity that is awarded a service contract to provide in whole or in part services that are substantially similar to those provided to the awarding authority at any time during the previous 90 days, or, who has purchased or acquired control of a property locate in the City where service employees were employed at any time during the previous 90 days or, terminates a service contract and, within 90 days of the termination, hires service employees as its direct employees to perform services that are substantially similar to those performed under the terminated service contract.

WHAT IS REQUIRED

During the transition employment period, the **awarding authority** (which is not limited to a governmental authority like the City of Baltimore but includes **any person or private entity** that enters into a service contract or subcontract with a contractor to be performed

in the City) must, at least 15 days before a service contract is terminated, do the following:

1) request that the terminated contractor provide the awarding authority a complete list of the name, date of hire and job classification of each affected employee;
2) give the successor entity a complete list of the name, date of hire, and job classification of each affected employee; and
3) except in the case of a service contract at a facility used as a private university, ensure that a written notice to all affected employees describing the pending termination of the service contract and the employee rights provided by this legislation must be conspicuously posted at any affected worksite.

The **successor entity** has the following responsibilities:

1) it must offer to retain and if the offer is accepted, actually retain each affected employee at an affected site for 90 days or until the successor entity no longer provides services at the covered location, whichever is earlier;
2) no less than 10 days before it commences work at an affected site, the successor entity must give each affected employee a written offer of employment for the 90 day transition period and
3) send a copy to the employee's collective bargaining representative, if any.

Each offer must allow the employee at least 10 days after receiving the notice to accept the offer and state the date by which the affected employee must accept the offer.

A **successor entity** may retain less than all of the affected employees during the 90 day transition period. If the successor entity

1) finds that fewer service employees are required to perform the work then the terminated contractor had employed;
2) retains service employees by seniority within each job classification;
3) maintains a preferential hiring list of those employees not retained; and
4) hires any additional service employees from the list in order of seniority until all affected service employees have been offered employment.

At the end of the 90 day transition employment period, the successor entity must perform a written performance evaluation for each employee retained pursuant to the new legislation. If the employee's performance during the 90 day transition employment period is satisfactory, the successor entity must offer the employee continued employment under the terms and conditions established by the successor entity.

During the 90 day transition employment period, the successor entity may not discharge a service employee retained under this legislation without just cause.

ENFORMENT PROCEDURES

The new legislation creates a new City agency, or Wage Commission, to investigate any complaints filed within one year of the allegation or by the Commission acting on its own initiative and without any complaint from an employee whenever the commission has reasonable cause to believe that the employer is or has been in violation of the legislation.

In the event that the Wage Commission determines probable cause to believe a violation of the new legislation has occurred, it first must attempt conciliation with the contractor to persuade it to cease and desist in its legal actions and reinstate any affected employees to their former positions and pay any and all back wages that might be due. Ultimately, the wage commission has the authority to issue a final order which may require the reinstatement of the service employee wrongfully terminated under the legislation, require the respondent to pay each service employee wrongfully terminated lost wages and other compensation and order the contractor to cease any and all practices that may be in violation of this legislation.

The contractor may appeal a final order from the wage commission to the Circuit Court for Baltimore City and thereafter, appeal the Circuit Court Decision to the Maryland Court of Special Appeals.

In addition to the traditional remedies of reinstatement and back pay, the new legislation also contains specific penalties and fines.

In particular, the commission may order any contractor or successor entity who commits a violation of the new legislation to pay the employee or employees' impacted the wages and other compensation lost as a result of the violations with interest computed at 10% per annum on wages and on the monetary compensation due and order reinstatement to an employee under the conditions required by the new legislation.

In addition, the new legislation also authorizes the assessment of certain fines for any violations:

1) for first offense, $250 for each violation;

2) for a second offense, $500 for each violation; and

3) for each subsequent offense, $1,000 for each violation.

Each day that a violation continues constitutes a separate offense.

BOTTOM LINE

For any service contractors working in Baltimore City, this new ordinance is a "game changer" for how business is done. The fact that the legislation was quickly passed by the Baltimore City Council with only one public hearing and no publicity, raises the question as to why this legislation was "fast-tracked". The legislation was introduced on April 3, 2017, approved by the City Council on June 12, 2017 with only one public hearing. The Mayor then signed the legislation the very next day on June 13, 2017, without any press notification.

While the motivation for the swiftness in passing this dramatic legislation is not stated, it appears as if it was enacted to appease the Baltimore City unions who were upset with the Mayor's veto of the $15 minimum hour wage bill. In essence, this legislation makes it much more difficult for service contractors working in Baltimore City to bid on new contracts and staff that work with its own employees. Under the ordinance, a successful successor contractor is in almost all cases required to hire all of the incumbent contractor's employees.

Moreover, while the new legislation makes it very difficult for successor contractors, it does make it much easier for incumbent unions to remain organized. Think about it, if the successor contractor has to hire all of the incumbent contractor's employees (who are unionized) and perform the same services in a like manner, then under existing bargaining rules, the successor contractor would have a duty to bargain with the incumbent contractor's union over the terms and conditions of employment. There would be no need for the union to actually organize the successor contractor's employees because they were the same who worked for the predecessor contractor.

Aside from labor relation issues, the new legislation has the potential to create some significant problems for a successor contractor in Baltimore City. Assume that the prior contractor lost the work on a particular contract because of poor service. Under this legislation, the successor contractor is obligated to hire the entirety of the predecessor's employees, at least for 90 days. To the extent that poor service was the result of poor employee job performance, how would the successor contractor be able to fix that problem with the same staff that may have caused the problem in the first place?

At a minimum, for any service contactors who do business in Baltimore City, it would be prudent for them to review this new ordinance with their counsel to make sure that they understand their new obligations and make whatever operational changes that may be necessary to comply. Your failure to do so, could result in significant damages and fines.

Employment Law Proliferation
Reason for Professional Concern

by Steven E. Bers, Esq.
Chair, Employment Law Group
Whiteford Taylor Preston, LLP

Advising clients, especially multi-locational clients, is becoming a near impossible task given the proliferation of complex and focused employment laws being issued not only by the individual states, but also by local counties and municipalities. It has been challenge enough over the years to advise multistate employers concerning compliance with at least fifty-one jurisdictional state employment law enactments ranging from laws concerning mandatory leave, protected classes, minimum wage, credit report review, and newer initiatives such as "block the box," to ordinances prohibiting inquiry into past wage history.

There are multiple state-level "traps" for attorneys who do not have a reliable and current state level advisory mechanism to identify the state-unique employment laws, such as Pennsylvania's failure to recognize the federal FLSA computer exemption or to locations such as the District of Columbia with an FMLA law more employee-generous than that found in Maryland.

In the past ten years, especially due to the failure to increase the Federal minimum wage, localities became more proactive to pass localized wage/hour laws, using the FLSA's reverse pre-emption grant, 29 USC 218(a). That trend appears to have led the pattern of localized employment legislation, ignoring, or possibly not recognizing, concern for employment law proliferation. Indeed, "death by a thousand cuts" would seem to become the fate for any voice advocating the benefit of standardized employment laws. As further observation, local employment enactments are tending to occur with less lead notice and often less organizational dialogue with employer or business groups than occurs before enactment of State and Federal employment laws.

According to the 2010 census, Maryland is comprised of 23 counties and contains 157 incorporated municipalities consisting of cities, towns, or villages; all 180 jurisdictions with the potential to pass their own employment laws. Already, within Maryland, counties and cities have started down the path of creating individualized employment laws ranging from differences in the definition of "protected class," differences in leave pay requirements, differences in minimum wages, and even very recently, concerning employee mandated retention in the event of contract expirations. Will the proliferation grow and present even greater advisory and compliance challenges?

Many states have already recognized the proliferation issue, and have enacted some manner of proliferation-responsive laws. According to the Maryland Department of Legislative Services for the General Assembly, in 2017 at least 24 states have laws that prevent local governments from enacting a higher minimum wage than the state statute requires: Alabama, Colorado, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Michigan, Mississippi, Missouri, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Wisconsin. Interestingly, the list includes both red states and blue states, signaling that these anti-proliferation enactments might be based upon good commercial policy, and not mere party lines. At least fourteen states have laws that prevent local governments from regulating employment benefits, in addition to regulating minimum wages laws.

Of course there are worthy and honorable proponents of localized employment law enactment who would assert the right of each county, town and village to mandate the conditions upon which employment can occur within their local borders, but do these localized assertions withstand the test of over-all commercial advisability for Maryland? Are there truly manifest societal and fairness differences between the employment contexts of, by example, an employee living in Catonsville, with one living 5 miles away in Ellicott City? Is the State really willing to create a system of intra-state employment term competition among 180 possible jurisdictions, or to establish a framework possibly lead-

ing to employment forum-shopping as employers will inevitably avoid employment-law proactive local jurisdictions, just as employers now avoid states deemed unfriendly to business?

Last year the Maryland General Assembly had before it House Bill 317, a bill with the stated purpose to prohibit counties and municipalities from enacting laws that regulate wages or benefits provided by an employer, other than for employees of the county or municipality. The proposed bill stated, "A county or municipality may not enact a law that regulates the wages or benefits provided by an employer other than the county or municipality." Most likely, the bill was seen as a strategy to prohibit what appeared in 2017 to be a strong initiative in Baltimore City to raise the local minimum wage, and not as a bill intended to counter the general negatives of localized employment law proliferation. Reviewed by the Economics Matters Committee, the bill was unfavorably reported early in the session, and never reached the House floor for broader debate.

No doubt, the omnibus and global prohibition of 2017 House Bill 317 upon local prerogative was a giant step unlikely to survive, especially upon initial introduction, the many, inevitable and fairly posed "what if's" surrounding such a bill. No indiviudal delegate was likely to quickly cede away local prerogative, but perhaps the opportunity was lost to at least address some parameters or guidelines limiting the current wide-open landscape of local employment enactments. There is no way to predict whether the 2018 General Assembly will again see an anti-proliferation bill similar to the 2017 House Bill 317, but if it is introduced, hopefully the members of the Maryland State Bar Association, Employment Law Section, will proactively share their opinions concerning this genre of legislation.

THE INTERSECTION OF MEDICAL MARIJUANA AND DISABILITY LAWS

By
Jeff Seaman, Esq. and Tiffany Releford, Esq.

In 2014, Governor O'Malley signed into law Senate Bill 923, which laid the foundation for the legal distribution of "medical marijuana" in Maryland. The statutory framework permits distribution of marijuana by licensed dispensaries for certain medical purposes as prescribed by "certifying providers" to "qualifying patients." Legislation enacted in the previous session had established the Natalie M. LaPrade Maryland Medical Marijuana Commission,[1] whose purpose was to establish and oversee the "investigational" use of marijuana for medical purposes by academic medical centers. The 2014 law expanded the medical marijuana program beyond the investigational stage, and permitted the use of marijuana for the treatment of certain medical conditions.[2] Consistent with that expansion, the 2014 law broadened the Commission's duties to include the licensure of medical marijuana growers and dispensaries.

As of this writing, the Commission's preparatory work is, reportedly, nearly complete. The Commission licensed the first dispensary in June 2017, patients have been qualified, and the Commission anticipates that legal dispensation of medical marijuana will begin within the next few months. That means that some portion of the Maryland work force will be using marijuana in a manner that is authorized under Maryland law -- and submitting positive urine samples as a result.

1 The name of the Commission was changed to the Natalie M. LaPrade Maryland Medical Cannabis Commission during the 2015 legislative session.

2 According to the Department of Legislative Services' Fiscal and Policy Note concerning HB 490, by which the medical marijuana law was amended in 2015, the 2014 expansion was due to lack of interest from academic medical facilities and pressure from medical marijuana advocates.

Many employers currently maintain policies that prohibit the use of marijuana altogether, such that a positive urine sample would constitute grounds for termination or some other adverse action. The focus of this article is to examine the employer's rights and obligations under Maryland's employment discrimination statute (MD. CODE. STATE GOVT. §20-606), arising from an employee's legal use of marijuana under Maryland's medical marijuana program.

MARYLAND'S MEDICAL MARIJUANA LAW

Maryland's medical marijuana law provides for use of marijuana by a "qualifying patient" prescribed by a "certifying provider." MD. CODE HEALTH GEN. ART. §13-3301(c),(m). The law requires physicians who seek registration as "certifying providers" to submit to the Commission a proposal that includes the reasons for prescribing marijuana to a particular patient, including the patient's "qualifying medical conditions." HEATH GEN. §13-3304. This term ("qualifying medical conditions") is nowhere defined in the statute or the corresponding regulations. However, the statute "encourages" the Commission to approve provider applications for chronic or debilitating disease(s) or medical condition(s) that result in a patient being admitted into hospice or receiving palliative care, or for a chronic or debilitating disease or medical condition (or the treatment of such disease or condition) that produces cachexia, anorexia, wasting syndrome, severe or chronic pain, severe nausea, seizures, and/or severe or persistent muscle spasms. HEALTH GEN. §13-3304(d). The preceding list of conditions is not exclusive; according to the statute, "[t]he Commission may approve applications that include any other condition that is severe and for which other medical treatments have been ineffective if the symptoms reasonably can be expected to be relieved by the medical use of cannabis." HEALTH GEN. §13-3304(e). The Commission's regulations are reflective of the language of the statute in this regard, and encourage would-be certifying physicians to apply to the Commission for registration to treat patients with the same diseases and conditions set forth in the statute, adding to the list glaucoma and post-traumatic stress disorder. COMAR 10.62.03.01 (B).

A "qualifying patient" is one who has been provided with a written certification by a certifying provider "in accordance with a bona fide provider-patient relationship." §13-3301 (m).[3] A written certification shall include:

> (1) Physician's name, Maryland Board of Physicians license number, and office telephone number;
>
> (2) Qualifying patient's name, date of birth, address, and county of residence;
>
> (3) Medical condition requiring medical cannabis; and
>
> (4) The date of qualification as a qualifying patient.

COMAR 10.62.05.01 (C). Qualifying patients must apply to the Commission for an identification card identifying them as such. COMAR 10.62.06.01.[4]

---

3 Patients under the age of 18 must have a "caregiver," which is defined as a person who has agreed to assist with a qualifying patient's use of medical cannabis and, a parent or legal guardian. §13-3301(b),(m).

4 The regulation provides inter alia, that

> A. A qualifying patient may apply to the Commission for an identification card as part of the qualifying process by logging onto the Commission website and submitting:
>
> (1) The completed application form as provided by the Commission;
>
> (2) A current, clear photograph of the applicant's face taken within 6 months of application;
> (3) A copy of the qualifying patient's government identification card or other proof of identity; and
>
> (4) The required fee as specified in COMAR 10.62.35.
> . . .
> C. A qualifying patient in hospice care is exempt from obtaining an identification card.

The law exempts qualifying patients, licensed growers, certifying providers, caregivers and dispensaries and their agents from "arrest, prosecution, or any civil or administrative penalty, including a civil penalty or disciplinary action by a professional licensing board" for the use of cannabis as permitted by the statute and regulations. § 13-3313(a). Moreover, the statute instructs that such persons "may not be . . . denied any right or privilege [] for the medical use of cannabis." HEALTH GEN. § 13-3313(a).

MARYLAND DISABILITY DISCRIMINATION LAW

The Maryland Fair Employment Practices Act (FEPA), which covers employers with fifteen or more employees, prohibits discrimination in employment based on a physical or mental disability, as long as the individual can perform the job (or a reassignment position)[5] with or without an accommodation. MD. CODE STATE GOV. ART. §20-602, et seq. Under the law, an employer may not discriminate based on any term or condition of employment against an individual with a "disability unrelated in nature and extent so as to reasonable preclude the performance of the employment . . ." STATE GOV. §20-606.

The Maryland statute defines a disability broadly:

1. A physical disability, infirmity, malformation, or disfigurement that is caused by bodily injury, birth defect, or illness, including epilepsy; or

2. A mental impairment or deficiency.

STATE GOV. §20-601. The Code of Maryland Regulations defines "disability" as "a physical or mental impairment, . . . that is caused by bodily injury, birth defect, or illness, which substantially limits one or more of an individual's major life activities." COMAR 14.03.02.02 (B)(6).[6] "Major life activities" include, but are not limited to functions such as caring for oneself, performing manual tasks, . . ., learning, working, driving a vehicle, socializing, and engaging in procreation and recreation." COMAR 14.03.02.02 (7). A "physical or mental impairment" under the FEPA is defined at COMAR 14.03.02.02 (9) to include

> (a) A physiological disorder or condition, cosmetic disfigurement, or anatomical loss, affecting one or more of the following bodily systems: (i) neurological; (ii) musculoskeletal; . . . (vii) digestive; (viii) genitourinary; (ix) hemic and lymphatic; or (x) skin and endrocrine; or
>
> (b) A mental or psychological disorder such as . . . organic brain syndrome, emotional or mental illness, . . .
>
> An employer is required to make a reasonable accommodation for a known disability of an otherwise qualified individual, if doing so would not cause an undue hardship on the employer's business. HEALTH GEN. §20-606, 603. Determining the appropriate reasonable accommodation requires the employer to perform an "individualized assessment" of the employee and her disability. Peninsula Regional Med. Ctr. v. Adkins, 448 Md. 197, 212 (2016).

MEDICAL MARIJUANA AS AN ACCOMMODATION FOR A "DISABILITY"

There is little question that the types of diseases and conditions for which medical marijuana is authorized as treatment could fall within the preceding defini-

HEALTH GEN. §13-3302(d) requires the Commission to develop identification cards for qualifying patients and caregivers. Thus, although the regulation uses the permissive "may," it is clear from the context that the identification card is required, and that the use of the word "may" references the availability of the Commission's website as an optional method of obtaining the card.

5 *Peninsula Regional Med. Ctr. v. Adkins*, 448 Md. 197, 217 (2016).

6 The Court of Appeals in *Adkins* relied in part upon the Commission on Human Relations' anti-disability-discrimination regulations in an action brought under the FEPA.

tions of "disability." What then is an employer with an anti-marijuana use policy to do if an employee, who is a "qualifying patient" using marijuana in a manner consistent with the statutory and regulatory framework to treat a "disability," admits to or provides other evidence of marijuana use (e.g., through submission of a positive urine sample)? Should the fact that the employee's use of marijuana is sanctioned by state law give the employer pause before disciplining or firing that employee? Is not the legal, off-duty use of marijuana a reasonable accommodation that the employer can make, any anti-marijuana policy notwithstanding? Neither the legislature nor the courts of Maryland have directly addressed this question.

A VARIED APPROACH BY OTHER STATES

Although many states have enacted medical marijuana laws, they have not been uniform in their views on this discrete issue. Some state legislatures have addressed the disability discrimination issue explicitly, by enacting statutory provisions specifically prohibiting employers from discriminating against medical marijuana users on the basis of their legal use. See, e.g., Delaware Code §4905A (a)(3);[7] New York Consolidated Laws, Public Health §3369 (2);[8] Pennsylvania, 35 P.S. §10231.2103 (b).[9]

In situations where the state statutes do not contain such specific provisions, and where courts have had to make the determination, they have been less accommodating. Of the thirty states that have instituted medical marijuana programs, at five have judicially rejected disability discrimination claims arising from discipline or termination of employees using state-sanctioned medical marijuana.[10] The courts' rejections have largely been based upon the fact that use of marijuana is still illegal under federal law. For example, in one of the most recent decisions, the appellate court in Colorado reasoned that a marijuana smoking employee was not protected by the Colorado statute, which protected against discrimi-

7 "Unless a failure to do so would cause the employer to lose a monetary or licensing-related benefit under federal law or federal regulations, an employer may not discriminate against a person in hiring, termination, or any term or condition of employment, or otherwise penalize a person, if the discrimination is based upon either of the following:

a. The person's status as a cardholder; or

b. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed, or was impaired by marijuana on the premises of the place of employment or during the hours of employment."

8 "Non-discrimination. Being a certified patient shall be deemed to be having a "disability" under article fifteen of the executive law (human rights law), section forty-c of the civil rights law, sections 240.00, 485.00, and 485.05 of the penal law, and section 200.50 of the criminal procedure law. This subdivision shall not bar the enforcement of a policy prohibiting an employee from performing his or her employment duties while impaired by a controlled substance. This subdivision shall not require any person or entity to do any act that would put the person or entity in violation of federal law or cause it to lose a federal contract or funding."

9 "**(b)** Employment. --

(1) No employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana.

(2) Nothing in this act shall require an employer to make any accommodation of the use of medical marijuana on the property or premises of any place of employment. This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position.

(3) Nothing in this act shall require an employer to commit any act that would put the employer or any person acting on its behalf in violation of Federal law."

10 California [*Ross v. RagingWire Telecommunications*, 174 P.3d 200 (Cal. 2008)]; Oregon [*Emerald Steel Fabricators v. Bureau of Labor & Industry*, 230 P.3d 518 (Oregon 2010)]; Colorado [*Coats v. Dish Network*, 303 P.3d 147 (Colo. App. 2013), *affd* 2015 Co. 44 (2015)]; Washington State [*Roe v. TeleTech*, 257 P.3d 586 (Wash. 2011)].

nation against employees for "engaging in any lawful activity off the premises of the employer during non-working hours." It was pivotal to the court that use of marijuana was prohibited under federal law:

> . . . because activities conducted in Colorado, including medical marijuana use, are subject to both state and federal law, see, e.g., Raich, 545 U.S. at 29 (federal Controlled Substances Act applies to state activities including marijuana use), for an activity to be "lawful" in Colorado, it must be permitted by, and not contrary to, both state and federal law. Conversely, an activity that violates federal law but complies with state law cannot be "lawful" under the ordinary meaning of that term.

Coats v. Dish Network, 303 P.3d 147, 150-151 (Colo. App. 2013) (citing Gonzales v. Raich, 545 U.S. 1 (2005)), affd 2015 Co. 44 (Colo. 2015). The statue contained no exception for the use of medical marijuana, and thus, the court wrote:

> . . . forbidding a Colorado employer from terminating an employee for federally prohibited off-the-job activity is of sufficient policy import that we cannot infer, from plain statutory language to the contrary and silence in the legislative discussions, the legislative intent to do just that.

Coats, 303 P.3d at 151. The Supreme Court of California, seven years prior, offered a similar approach to the absence of specific statutory language concerning employment:

> Plaintiff's position might have merit if the Compassionate Use Act gave marijuana the same status as any legal prescription drug. But the act's effect is not so broad. No state law could completely legalize marijuana for medical purposes because the drug remains illegal under federal law (21 U.S.C. §§ 812, 844(a)), even for medical users [California citations omitted]. Instead of attempting the impossible, . . . , California's voters merely exempted medical users and their primary caregivers from criminal liability under two specifically designated state statutes. Nothing in the text or history of the Compassionate Use Act suggests the voters intended the measure to address the respective rights and obligations of employers and employees.

Ross v. RagingWire Telecommunications, 174 P.3d 200, 204 (Cal. 2008). See also Emerald Steel Fabricators v. Bureau of Labor & Industry, 230 P.3d 518 (Oregon 2010); Roe v. TeleTech, 257 P.3d 586 (Wash. 2011).

Not all courts share this view. Recently, the Supreme Court of Massachusetts, interpreting statutory language very similar to the Maryland statue's, took a very different approach. In Barbuto v. Advantage Sales and Marketing, LLC, 78 N.E. 3d 37, 477 Mass. 456 (Mass. 2017), the employer argued that, because marijuana use was a federal offense, allowing an administrative employee's use of medical marijuana was per se unreasonable as an accommodation (defendant cited the Ross decision in support of this argument). It further argued that, because marijuana use was facially unreasonable as an accommodation, the employer had no obligation to engage in the "interactive process" to identify some reasonable accommodation before terminating her employment.

Reversing the lower court's dismissal of the handicap discrimination claim, the court rejected these arguments, explaining that the passage of the Massachusetts medical marijuana law made use and possession of medically prescribed marijuana "as lawful as the use and possession of any other prescribed medication." That possession of medical marijuana was in violation of federal law did not make it per se unreasonable as an accommodation, because, the court reasoned, the only person at risk of federal prosecution for that use was the plaintiff / employee herself. In that regard, the court discussed the overarching policy differences between the states' and the federal government's approaches to marijuana:

> To declare an accommodation for medical

> marijuana to be per se unreasonable out of respect for Federal law would not be respectful of the recognition of Massachusetts voters, shared by the legislatures or voters in the vast majority of States, that marijuana has an accepted medical use for some patients suffering from debilitating medical conditions.

The Barbuto court's decision was also based in part upon language in the Massachusetts statute that reflects that of the Maryland statute: "any person meeting the requirements under this law shall not be penalized under Massachusetts law in any manner, or denied any right or privilege, for such actions." MASS GEN. LAWS Ch. 94C, Appx. 4. In somewhat circular fashion, the court explained that a handicapped employee in Massachusetts has a statutory right or privilege to reasonable accommodation, and "if an employer's tolerance of an employee's use of marijuana were a facially unreasonable accommodation," the employee would be effectively denied that right or privilege. Barbuto, 477 Mass. at 464. Moreover, even if the use of medical marijuana had been per se unreasonable, the employer owed the plaintiff an obligation under the disability discrimination laws to participate in the interactive process "to explore with her whether there was an alternative, equally effective medication she could use that was not prohibited by the employer's drug policy." Barbuto, 477 Mass. at 466.

The court in Barbuto was careful to note that, in reversing the trial court, it was not foreclosing the employer's ability to defend on the basis that the accommodation constituted an undue hardship. By way of example, the court recognized situations in which an employee's marijuana use would "violate an employer's contractual or statutory obligation . . . jeopardiz[ing] its ability to perform its business," or where the employer was under a federal contract subject to the Drug Free Workplace Act. Barbuto, 477 Mass. 467 – 68. [11]

11 Interestingly, the *Barbuto* court compared the language of the Massachusetts statute with that of several other states, whose laws include the sorts of specific anti-discrimination provisions discussed above. Noting that it the Massachusetts medical marijuana law was silent in this regard, it concluded that the medical marijuana statute did not create a private right of action.

ANALYSIS

The absence of a clear statutory directive on this issue in the Maryland medical marijuana law will likely be considered by the courts to be an indicator that Maryland did not intend to extend disability discrimination protection to medical marijuana users. There have been medical marijuana laws on the books of many states for several years – some with and some without specific anti-discrimination provisions. There has been ample time to consider the ramifications of the omission of such provisions. And although Maryland voters may have concluded that the medical therapeutic use of marijuana is acceptable, the federal government has not done so. Maryland's proximity, geographically and economically, to the federal government, would place a large number of Maryland private employers in a difficult position if they were to permit the use of marijuana by employees. But the matter will at some point be litigated in Maryland courts, which will have to weigh the federal prohibition of marijuana use against the recognition by the voters of Maryland that marijuana can be a valuable therapy for suffering people.

COSA Addresses Impact of Qualified Privilege on Tort Claims Beyond Defamation

By David M. Stevens

Workplace communications frequently involve sensitive issues ranging from suspicions of theft to investigations of sexual harassment. Such communications give rise to questions as to whether communications concerning an employee will expose supervisors or co-workers to liability. Faced with this issue, Maryland courts have held that the qualified privilege recognized in defamation case law will apply to protect certain employment-related communications.[1]

In the case of communications regarding the job performance or reason for termination of an employee made to a prospective employer or in response to a governmental inquiry, the qualified privilege is statutory in nature.[2] The Court of Appeals has also recognized a common law qualified privilege in the employer-employee context, in keeping with its recognition that communications are subject to a qualified privilege where the publisher "shares a common interest" with person receiving the communication.[3] The privilege, however, "is lost if it is abused by malice or excessive publication."[4]

The nature of the qualified privilege was the subject of further analysis in the Court of Special Appeals' recent decision in *Lindenmuth v. McCreer*.[5] The Court's decision is particularly noteworthy in that the Court had occasion to address the impact of the privilege question on causes of action other than defamation.

George Lindenmuth, the plaintiff in the case, was employed by Coca-Cola Enterprises as a mechanic. The defendant, Michael McCreer, was the plaintiff's supervisor. In April of 2014, Lindenmuth left work early, and was subsequently advised by a manager to take time off from work due to his level of stress. During Lindenmuth's leave of absence, rumors began to circulate that Lindenmuth would soon be returning to work and that he had a permit to carry a concealed firearm. An employee shared these rumors with McCreer, and expressed concern that Lindenmuth would commit violence upon his return. The employee who approached McCreer related his own experience of having witnessed a workplace shooting while working for a previous employer, and asked McCreer to convey his concerns to management.

The following day, McCreer met with a manager and relayed his co-worker's concerns that Lindenmuth (1) was returning to work, (2) owned guns, (3) had a concealed carry permit, and (4) was going to shoot someone at work. Management subsequently contacted the police, and an officer came to the facility to interview Lindenmuth's coworkers, who described alleged comments by Lindenmuth about wanting to commit violent acts. When Lindenmuth ultimately returned to work, he learned that his photo had been placed in the facility's guard shack with a note indicating that Lindenmuth was not allowed in the facility.

Lindenmuth filed an action against McCreer in which he alleged four causes of action: defamation, invasion of privacy – unreasonable publicity given to private life, invasion of privacy – false light, and intentional infliction of emotional distress. Summary judgment was granted in favor of McCreer on all counts, and Lindenmuth subsequently filed an appeal.

In addressing Lindenmuth's defamation claim, the Court of Special Appeals noted that four common law qualified privileges have been recognized by the Court of Appeals, including "the privilege to publish to someone who shares a common interest, or, relatedly, to publish in defense of oneself or in the

1 *Gohari v. Darvish*, 363 Md. 42 (2001).

2 Md. Code Ann., Courts & Judicial Proceedings § 5-423.

3 *Gohari*, 363 Md. at 57.

4 *Id.* at 58.

5 2017 Md. App. LEXIS 750 (Md. App. July 26, 2017).

interest of others."[6] The Court explained that the basis for recognizing that privilege was "to promote the free exchange of relevant information among those engaged in a common enterprise or activity and to permit them to make appropriate internal communications and share consultations without fear of suit."[7]

The Court went on to note that the qualified privilege, where it exists, may be forfeited where (1) the speaker acts with malice, i.e. knowledge of falsity or reckless disregard for truth, (2) the statement was not made in furtherance of the interest for which the privilege exists, (3) the statement is made to a third person other than one who would reasonably be believed to be necessary to the protection of the common interest, or (4) the statement includes defamatory matter not reasonably believed to be in line with the purpose for which the privilege was granted.

Applying these principals, the Court of Special Appeals concluded that McCreer had established that his communications were protected by the qualified privilege.[8] The Court noted specifically that an employee, particularly one in a supervisory position, "has an interest in the safety of other employees as well as himself," and that this interest was shared by the party to whom McCreer had made the statements at issue.[9] The Court went on to conclude that Lindenmuth had failed to produce evidence raising a triable issue as to whether McCreer had acted with malice so as to have forfeited the privilege. The Court rejected Lindenmuth's argument that evidence of past acrimony between the parties was sufficient to raise a jury question as to malice, instead noting that the required evidence must relate to the speaker's "good faith belief in the accuracy of his statements."[10]

The Court next resolved Lindenmuth's claim for invasion of privacy – unreasonable publicity given to private life, on grounds unrelated to the qualified privilege. In turning to the count for invasion of privacy – false light, however, the Court held that "a qualified privilege that would shield a defendant from liability for defamation applies equally to a claim of false light invasion of privacy."[11]

Finally, the Court considered Lindenmuth's claim for intentional infliction of emotional distress. The Court focused its analysis on the element of the tort which requires the defendant's conduct to have been extreme and outrageous. The Court noted that "there is no Maryland case that is specific to whether a qualified privilege applies equally to shield a defendant from liability for both defamation and IIED claims," but after observing that Lindenmuth's claims for defamation and intentional infliction were based on the same set of facts, concluded that "the fact that McCreer's statements were protected by a qualified privilege in this case indicates that his actions were not 'extreme and outrageous.'"[12]

The Court of Special Appeals' analysis of the intersection between the qualified privilege and the intentional infliction tort provides a useful aid in assessing the viability of such a claim, even where it has not been pled in connection with a claim for defamation. Where an intentional infliction claim is based upon statements made a defendant in the workplace, assessing whether those statements are within the scope of the common interest privilege (and whether that privilege has potentially been abused based on the surrounding circumstances), may prove to be a necessary step in determining whether such a claim can withstand a motion for summary judgment.

---

6 *Id.* at *13.

7 *Id.* at *14.

8 The Court had concluded earlier in its opinion that Lindenmuth had not presented a prima facie case of defamation.

9 *Id.* at *19.

10 *Id.* at *21.

11 *Id.* at *26-*27.

12 *Id.* at *32.

Severance Agreements: Not One Size Fits All

By: Jennifer S. Jackman, Esq.

Frequently, clients ask counsel for a "sample" severance agreement. Be wary of such requests and avoid the temptation to do a client a quick favor as you may actually be doing a major disservice to the client. Severance agreements are definitely not a one-size-fits-all agreement and need to be carefully drafted with consideration of multiple factors.

There are certainly provisions every severance agreement must have in order to be enforceable. The most obvious provisions are consideration and the release. But, before sending a severance agreement to a client, there are many other issues that should be considered. For example, is the employee subject to an employment agreement? Is there a non-compete agreement or any other restrictive covenant the employee is subject to? Have you reviewed the handbook regarding severance provisions? How many employees does the employer have? Is the employee over 40? Is anyone else being terminated at the same or around the same time?

What are the "Standard" Provisions?

There are certain provisions that must be included in every severance agreement in order for it to be valid. These include adequate consideration and release provisions.

The adequacy of consideration can be affected by prior agreements and handbook provisions. If the employee has an employment agreement, it may already contain severance obligations. Further, although infrequent, some companies have policies in their handbooks that provide for certain severance payments, regardless of whether a release is obtained. To be considered valid consideration, the severance offered in exchange for the release must exceed the amount of any other severance that the employer previously agreed to pay. If there is a pre-existing obligation to pay severance, make sure the agreement provides for severance above that amount or the release may be invalid.

What about the release? The Equal Employment Opportunity Commission ("E.E.O.C.") requires certain provisions to be included in a release in order for the release to be valid and binding. As a threshold matter, the release must be knowing and voluntary. To that end, the E.E.O.C considers whether the release was written in a manner that was clear and specific enough for the employee to understand. This will vary based on the education and experience level of the employee. A release prepared for a sophisticated executive may not be appropriate for a lesser educated employee or an employee for who English is a second language.

In addition, the E.E.O.C. also considers whether the release was induced by fraud, duress, undue influence or other improper conduct by the employer. Further, the E.E.O.C. considers whether the employee had time to read and consider the pros and cons of entering into the agreement before signing it and whether the employee had the opportunity to consult with counsel and was encouraged to do so. This means the employee must not only be given time to review, but encouraged, in writing and unambiguously, to consult with counsel. The employer should never pressure an employee to sign the agreement the same day it is provided or tell the employee that the agreement will be withdrawn if not signed in an unreasonable period of time. Finally, the E.E.O.C. considers whether the employee was involved in negotiating the terms of the agreement – hence the reason that no agreement is one size fits all.

What are Non-Standard Provisions?

In addition to the provisions that are required in all severance agreements in order to be valid, there are other provisions that may be required, depending on the circumstances. For example, if the employer

has 20 or more employees and the employee being terminated is 40 or older, the release must comply with the Older Workers Benefit Protection Act ("OWBPA"), which is part of the Age Discrimination in Employment Act ("ADEA"). Pursuant to that statute, the employee must be provided 21 days to consider the agreement and 7 days to revoke their consent. These terms must be expressly set forth in the agreement with an explanation that, while the 21 day consideration period can be waived, the 7 day period may not.

But what if the client is terminating two employees at or around the same time? Depending on the circumstances, this could be considered a reduction in force under the OWBPA. In that case, the agreement must provide the employees with 45 days to review the agreement, in addition to the 7 day revocation period. In addition, there are certain disclosures that must be provided to the employees in order for that release to be valid. These disclosures include: (1) the class, unit or group of employees covered by the exit program; (2) the eligibility factors for the exit program; (3) the job titles and ages of all employees eligible for or selected for the program; and (4) the ages of all employees in the same class who were not eligible or selected for the program. (If your client is considering a true reduction in force, before doing so, make sure other options were considered and a demographic analysis was performed.)

What if the employee is already subject to an employment agreement, non-compete agreement or other agreement with restrictive covenants? In addition to ensuring that there is adequate consideration if severance is already required, these agreements can affect the terms and timing of the severance agreement. For example, if the employment agreement requires specific notice of termination, the employer needs to ensure it complied with such notice and factor that into the timing of the presentation of the severance agreement. If the employment agreement requires six weeks' notice, ensure the employer provides that notice, or provides for severance in excess of six weeks in order for the consideration to be valid. Beyond consideration, however, there are other considerations. For example, if the employee has a non-compete agreement or other agreement with restrictive covenants, the severance agreement should reference and attach that prior agreement and ensure that the integration clause, if any, does not supersede, or void those prior obligations.

Finally, many employers now have remote employees working in different jurisdictions. Before finalizing the severance agreement, confirm where the employee is working. If the employee works remotely, and in a jurisdiction other than where the employer is located, compare the law of the jurisdictions before automatically picking the site of the employer as the controlling law. If the law of the location of the employee is more employer-friendly, consider that jurisdiction when determining the choice of law for the agreement.

Severance agreements are by no means uniform and require consideration of multiple factors. Prior to drafting such agreements, be sure to consider the surrounding facts and include both the standard and relevant non-standard provisions to ensure enforceability.