



Weekly Wright Report (10/16/17)

EMPLOYMENT LAW

Employers Beware of Making Automatic Deductions From Employees' Pay

Lawsuits for unpaid wages brought under the Fair Labor Standards Act continue to attack automatic deduction practices undertaken by employers where an employee is supposed to regularly take a daily break or lunch but does not. If nonexempt employees are not completely relieved of responsibility during the time they are punched out or “off of the clock,” deductions are not permitted and they must be paid for the time. Plaintiffs’ attorneys continue to aggressively pursue these types of unpaid wage or overtime claims. Employers are cautioned to carefully analyze break and timekeeping practices and policies to ensure they comply with the law and are being followed and consider other measures for accurately tracking actual work hours. Ask Laura lrubenstein@wcslaw.com

LITIGATION

What’s the Point of an Arbitration Clause?

In *Cain v. Midland Funding, LLC*, 2017 WL 1101804 (Md. 2017), the Court of Appeals held that when a lender chooses to pursue an action in small claims court it waives any later right to enforce its arbitration provision if the claims are related. In *Cain*, the lender pursued its collection action against the credit card holder in small claims court in 2009. It obtained a default judgment for \$4,520. In 2013, that same credit card holder filed a class action complaint against the lender, asserting that the lender had been an unlicensed collection agency. The lender moved to compel arbitration. Under Maryland case law, participating in a judicial proceeding can constitute a waiver of the right to arbitrate issues raised in that proceeding and with respect to related issues. Thus, the Court looked at whether the lender could have arbitrated its collection action, and if so, whether that was related to the licensing issue raised in 2013. The Court found that the language in the arbitration provision gave the lender the choice to litigate or arbitrate the collection issue. The Court also found the 2009 and 2013 claims were sufficiently related to apply the waiver doctrine. Finally, the Court refused to require a showing of prejudice for applying the waiver. Ask Mike mstover@wcslaw.com

When is a Law not “The Law?” An Examination of Maryland’s Statute of Repose

Statutes and regulations are often difficult to interpret and understand, even for practicing lawyers and judges. That was evident in a wrongful death case decided by the Court of Special Appeals in *Gilroy v. SVF Riva Annapolis LLC*, on September 1, 2017. The case focused on what seemed like a straightforward interpretation of Maryland’s statute of repose, which is set forth at Section 5-108 of the Courts and Judicial Proceedings Article of the Maryland Code. As is often the case, however, things were not as they seemed.

{00359091v. (99996.00005)}



What is a Statute of Repose?

A statute of repose generally establishes an absolute deadline for filing a lawsuit. After the statute runs, a lawsuit is absolutely barred. In that way, it is similar to a statute of limitations, which also acts to bar lawsuits after the passage of a certain time period. However, generally speaking, a statute of limitation begins to run when a party knew or should have known that the wrong occurred – the so-called “discovery rule.” Thus, the longer the wrong goes undiscovered, the longer one has to file suit. A statute of repose sets an absolute deadline for filing suit – regardless of whether the wrong is ever discovered.

Statutes of repose and the discovery rule, are particularly relevant in the construction industry, because defective work is oftentimes not discovered for an extended period of time. The statute of repose, in particular, provides certainty to contractors, engineers, architects, and others by providing absolute immunity from suit after the statute’s passage of time. However, Maryland, like many states, exempts some claims from the statute of repose, and the *Gilroy* case examines these exemptions.

Gilroy v. SVF Riva Annapolis

Gilroy arises from the untimely death of a repairman hired to service an HVAC unit located on the roof of a Chuck E. Cheese restaurant in Annapolis. When the repairman stepped off the ladder on the roof, he fell more than 20 feet onto a concrete pad and later passed away. The repairman’s survivors filed a wrongful death action for negligence and premises liability against the shopping center, the shopping center’s management company, and Chuck E. Cheese restaurant.

The defendants argued that the statute of repose barred the suit because the restaurant had been constructed more than 23 years earlier. The trial court agreed and dismissed the action, and plaintiffs appealed. The appeal hinged on four exceptions contained in the Maryland’s statute of repose. Three of those exceptions related to asbestos claims. A fourth exception exempted those in actual possession and control of property when the injury occurred. The *Gilroy* plaintiffs argued that this actual possession exception applied, thus exempting it from the statute of repose. Defendants responded that this “actual possession” exception only applied to asbestos-related claims, because it was found under the heading “personal injury or death caused by asbestos.”

The appeals court examined the statute of repose’s legislative history and remanded the case to the trial court for consideration of arguments raised before the trial court but not on appeal.

The Takeaway?

It is obviously important to know the law that governs Maryland’s statute of repose. As the Court of Special Appeals noted, headings and captions in published statutes are merely for informative purposes and not intended to limit or define the law in any way. In other words, what appears as a heading in a published version of a law is not always “The Law.” Ask Jason jpotter@wcsllaw.com.