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New York Appellate Division Says No Private Action for Violations of Weekly Pay Law, Creating Split in Precedent

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In a hotly anticipated decision, the Appellate Division, Second Department held on January 17, 2023 that no private right of action exists for a violation of Labor Law § 191(1)(a), which—absent a waiver by the Commissioner of Labor—requires New York employers to pay "manual workers" no less frequently than weekly. The decision, in *Grant v. Global Aircraft Dispatch, Inc.*, rejected the reasoning and holding of the Appellate Division, First Department's 2019 decision in *Vega v CM & Assoc. Constr. Mgt., LLC*, which determined that such a private right of action exists and permits a plaintiff to seek liquidated damages equal to the amount of the late-paid wages. In the wake of *Vega*—which, for the first time in the 130-year history of New York's weekly pay law, recognized a private remedy for its violation—attorneys representing "manual workers" filed a slew of class actions for late-paid wages. The decision in *Grant* creates a split among the Appellate Division Departments with respect to whether or not such a private cause of action exists—potentially leaving the ultimate decision in the hands of New York's highest court, the Court of Appeals.

Legislative History

Labor Law § 191(1)(a) states that, absent authorization from the Commissioner of Labor to pay less frequently, an employer must pay a "manual worker" weekly and not later than seven calendar days after the end of the week in which the wages are earned. The requirement first appeared in the Labor Law in 1890 and was intended to assure prompt payment of daily wages to workers who depended upon their earnings for support on a per diem rather than on a salary basis. The enforcement mechanism for a violation of the law—at least according to the Legislature that drafted it—was up to a $50 civil penalty to be recovered by the Commissioner. The weekly pay requirement remains largely in the same form today as it was in 1890—it did not then, and does not now, expressly authorize a private right of action by employees for its violation. Nonetheless, in *Vega*, the Appellate Division, First Department held that an *implied* right of action existed in the law, permitting late-paid manual workers to recover liquidated damages equal to the amount of the late-paid wages—essentially, to double their earnings over a six-year limitations period notwithstanding that they had been paid in full for their work (albeit on a biweekly or semi-monthly schedule and not weekly).

The Decision

In *Grant*, the Second Department concluded that "neither the language nor the legislative history of [the] Labor Law … supports the plaintiff's contention that [the statute] expressly provides a private right of action to recover liquidated damages, prejudgment interest, and attorneys' fees for a violation of Labor Law § 191(1)(a) where … the employer pays wages pursuant to a regular biweekly pay schedule."

Section 191 is within Article 6 of the Labor Law, and the remedies section of Article 6 is § 198(1-a). That section permits the Commissioner to bring an action or administrative proceeding "[o]n behalf of any employee paid *less than* the wage to which he or she is entitled … to collect such claim." It also states that "[i]n any action instituted in the courts upon a wage claim by an employee or the commissioner in which the employee prevails, the court shall allow such employee to recover the full amount of any *underpayment*, all reasonable attorney's fees, [and] prejudgment interest," together with "an additional amount as liquidated damages equal to [100%] of the total amount of the wages *found to be due*." In *Vega*, the First Department concluded that failure to pay wages on a timely basis is tantamount to an "underpayment," and that "[t]he moment that an employer fails to pay wages in compliance with [§] 191(1)(a), the employer pays less than what is required," thereby permitting recovery of liquidated damages. In *Grant*, the Second Department flatly rejected that reasoning:

"The plain language of Labor Law § 198(1-a) supports the conclusion that this statute is addressed to nonpayment and underpayment of wages, as distinct from the frequency of payment …, and we do not agree that payment of full wages on the regular biweekly payday constitutes nonpayment or underpayment.… The natural import of [the statutory language permitting an employee to recover] "the full amount of any *underpayment*" … is that an employee has received a lesser amount of earnings than agreed upon, not that the employee received the agreed-upon amount one week later[.]"

Having determined that there is no "underpayment" of wages in this circumstance, there can be no recovery of liquidated damages, as the court in *Grant* explains:

"[U]nder the statute as written, the recovery of liquidated damages is dependent upon the recovery of an underpayment. Thus, absent an underpayment or nonpayment, liquidated damages are not available. While we agree … that "[m]oney later is not the same as money now" …, we nevertheless are bound to "give effect to the plain meaning of [the] words used" in the statute and may not "legislate under the guise of interpretation[.]""

As for the authority of a court to *infer* a private right of action for a statutory violation, as the First Department did in *Vega*, the Second Department was unconvinced:

"A private right of action cannot be implied from the statutory provisions and their legislative history unless, among other factors, “creation of such a right would be consistent with the legislative scheme” …. “[I]n the face of significant enforcement mechanisms provided for in the statute,” a private right of action would not be consistent with the legislative scheme … [and] cannot be implied[.]"

What’s Next?

Under New York law, the Appellate Division is a single state-wide court divided into four Departments—each covering a different geographic region—for administrative convenience. Under the doctrine of *stare decisis*, trial courts within a particular Department are bound to follow the precedent of the Appellate Division in that Department. That means that unless or until *Grant* is overturned on appeal by the Court of Appeals or superseded by future legislation, trial courts within the Second Department—those in Richmond, Kings, Queens, Nassau, Suffolk, Westchester, Dutchess, Orange, Rockland, and Putnam Countries—will be required to follow *Grant* and trial courts within the First Department—those in Manhattan and the Bronx—will continue to follow *Vega.* Trial courts in the Third and Fourth Departments are at liberty to consider either *Grant* or *Vega* persuasive but are free to reach their own decisions. If there is an appeal to the Court of Appeals in *Grant*, any court within the state would be within its authority to stay a determination pending the resolution of the appeal.

What about federal courts? As a general matter, a federal court analyzing a state law issue would presumably follow the decisions of the state’s highest court. Where the state’s highest court has yet to rule directly on an issue, federal courts would typically apply the law as interpreted by the state’s intermediate appellate courts unless there is persuasive evidence that the state’s highest court would reach a different conclusion. Here, where the Court of Appeals has yet to rule directly on the issue and two of New York’s intermediate courts have reached entirely different conclusions, a federal court would ostensibly consider what it believes the Court of Appeals would find if the issue were before it.

Takeaways

Advocates for employers have always been highly skeptical of the reasoning in *Vega*, which represented a seismic shift in the interpretation of the Labor Law's pay frequency provisions. To them, the decision in *Grant* presents a considerably clearer and more defensible analysis of the statute, grounded in its plain language and legislative history. Both employers and employees will be paying attention to what happens next with pay frequency claims, including whether the Court of Appeals will be asked to resolve the split in the First and Second Departments.

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