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New York Court Puts Breaks on Manual Worker Weekly Wage Payment Claims

January 23, 2024 | Blog | By **Evan M. Piercey**, **Michael S. Arnold**

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In a hotly anticipated decision, the New York State Appellate Division, Second Department held in ***Grant v. Global Aircraft Dispatch, Inc.*** that manual workers **do not** have a private right of action under the New York Labor Law ("NYLL") to pursue violations of the law's weekly pay frequency requirement. The victory for employers is significant, and while it has created a split with New York's First Department, further help may be on the way: Governor Hochul has weighed in on this issue in her **Executive Budget Proposal**, where she is recommending that the state legislature amend the NYLL to effectively codify *Grant's* holding. We discuss the Second Department's decision, Governor Hochul's Executive Budget Proposal, and implications for employers below.

The First Department's Vega Decision Places Employers on Their Heels

NYLL Section 191 sets forth pay frequency requirements for various categories of workers, including manual workers. "Manual worker," which is broadly defined as an employee who spends more than 25 percent of their working time performing physical labor, must be paid on a weekly basis, not biweekly or semi-monthly. The plain language of NYLL Section 191 authorizes the New York State Department of Labor to institute proceedings against an employer that violates the pay frequency requirements, but it does not expressly authorize a private right of action, and historically no such right had been implied or inferred.

This changed in 2019 when the First Department issued its Vega decision. In *Vega*, even though the employee, a manual worker under NYLL Section 191, had received all of their owed wages in a biweekly payroll run, they argued that the employer should still be on the hook for liquidated damages in an amount equal to those wages (plus interest, attorneys' fees and costs) because the employer failed to pay the wages on a weekly basis.

The *Vega* Court agreed, and held that an employee could pursue a private right of action where an employer failed to pay wages on a weekly basis *even if the employee received all their wages*. Reasoning that the "moment an employer fails to pay wages in compliance with [NYLL's section 191 pay frequency requirements,] the employer pays less than what is required," the First Department concluded that delayed payments constitute an "underpayment" within the meaning of NYLL Section 198(1-a) allowing for damages.

Not surprisingly, the *Vega* decision unleashed a torrent of class litigation. New York State and Federal courts thereafter largely followed the decision, particularly because the New York Court of Appeals has not yet weighed in on the issue. And, while New York's four other appellate divisions were not bound by *Vega*, they too declined to depart from its holding until *Grant v. Global Aircraft Dispatch, Inc.*

The Grant Decision is Welcomed By Employers

In *Grant*, the Second Department departed from *Vega*, explaining "we do not agree that payment of full wages on the regular biweekly payday constitutes nonpayment or underpayment" and that 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.***" (emphasis added). The Second Department affirmed that the Commissioner of the New York State Department of Labor is authorized by statute to pursue frequency of payment claims, not private citizens.

This holding, according to the *Grant* Court is "consonant with [NYLL Section 198(1-a)'s] legislative history," which "reveals that Labor Law § 198(1-a) was aimed at remedying employers' failure to pay the amount of wages required by contract or law," but is notably devoid of any "reference … to the frequency or timing of wage payments." In further support of this proposition, the Second Department cited *Konkur v. Utica Academy of Science Charter School,* a decision issued by the New York Court of Appeals after *Vega* declining to imply a private right of action for violations of NYLL Section 198-b (a provision prohibiting wage kickbacks) in part because the New York State Legislature "expressly provided two

robust enforcement mechanisms" and thus implying an additional, private mechanism "would not be consistent with the legislative scheme."

Governor Hochul's Executive Budget Proposal Aligns with Grant

The day before the *Grant* decision was issued, Governor Hochul released her Executive Budget Proposal, which included a provision addressing this very pay frequency issue. Specifically, Part K of the Executive Budget Proposal includes a proposed amendment to NYLL Section 198, which would provide that "liquidated damages shall not be applicable to violations of [NYLL Section 191(a)] where the employee was paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly." While this proposal does not have the force of law, should the New York State Legislature adopt Governor Hochul's proposed amendment, manual workers would be precluded from pursuing liquidated damages where they were paid all wages and only alleged a technical pay frequency violation. This would effectively codify the Second Department's holding in *Grant*.

Implications for Employers and Next Steps

The *Grant* decision creates a conflict between the First and Second Departments (the Third and Fourth Departments have yet to weigh in), which can be resolved either by the New York Court of Appeals or through an amendment to the New York Labor Law (such as the one proposed by Governor Hochul). However, until either scenario comes to pass, the *Vega* decision remains good law. This means that courts in the First Department (which covers New York and Bronx counties) must still follow *Vega*, but courts in the Second Department (which covers Dutchess, Kings, Nassau, Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester counties) must follow *Grant*. This dichotomy may lead to disparate strands of law developing, at least until (and if) the Court of Appeals resolves the issue, or the legislature intervenes.

This is obviously a welcome decision for employers operating in the Second Department, but employers should generally err on the side of caution as this issue continues to play out. Indeed, even if the Court of Appeals or New York State legislature agrees with the Second Department's interpretation, employers could still face civil penalties issued by the Labor Commissioner for failing to pay manual workers on a weekly basis.

Mintz's Employment Group will continue monitoring these developments and stands ready to assist employers with pay frequency practices going forward.

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