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CURRENT ISSUES ARISING UNDER THE WEST VIRGINIA WAGE PAYMENT AND COLLECTION ACT AND THE FAIR LABOR STANDARDS ACT

a) *The West Virginia Wage Payment and Collection Act*

The West Virginia Wage Payment and Collection Act, set out in W. Va. Code §21-5-1 et. seq., has been in place since 1917. The Act's coverage is very broad since its requirements apply to all "employers," a term which includes any "person, firm or corporation" employing any employee.[1] A "firm" is defined as "...any partnership, association, joint-stock company, trust, division of a corporation, ...administrator or executor of the estate of a deceased individual, or the receiver, trustee, or successor. The definition of "officer" includes "...agents in the management of a corporation or firm..."[2] ***or officer thereof*** employing any person."[3] The effect of these definitions is that *you are covered if you employ any person.* Note the inclusion of the term "...or any officer thereof..." within the definition of "firm". Any officer in management of a corporation or other entity included in the definition of "firm" and "employer" may be held ***personally liable*** if he or she "knowingly permits" the business to violate the provisions of the Act. Not only those holding the official positions may be held liable; any manager who "knowingly permits" a violation of the Act is fair game. Of course, this has resulted in one or more officers or management employees of businesses which failed to pay wages when due becoming individual defendants when litigation is filed.

Further, the act does not define the term "knowingly permits." It seems clear, however that if an office has any degree of responsibility for the administration of payroll

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[1] W.Va. Code §21-5-1(m).
[2] W.Va. Code §21-5-1(h).
[3] W.Va. Code §21-5-1(a).

has actual knowledge that wages are unpaid he or she could be held liable. But what if the officer has no significant role in the preparation of payroll, administration of benefits, or other activities related to employee compensation? Does the statute implicitly require every officer of the employing entity to personally monitor its financial status and take steps to either assure employees are paid, or to raise red flags if he or she believes there is any real chance the business would default in payment of wages?

If the officer is aware that the employer is having financial difficulties and *may not be able to meet the next payroll* due to the bankruptcy of the employer's largest customer (and nonpayment of the company's invoices), will he or she be charged with "knowledge" of the nonpayment when it occurs? And if the officer does have the "knowledge" of the impending nonpayment disaster, can he or she be held to have "permitted" the nonpayment when the largest customer files for bankruptcy protection? Is the officer who knows of the impending nonpayment of wages obligated to take affirmative steps to prevent it?

Best Practices

In order to minimize the risk to officers and managers arising from the possible nonpayment of wages and benefits, we regularly recommend that each of our clients maintain cash reserves sufficient to meet at least two full payroll obligations, and that the employer adopt a policy requiring managers to immediately disclose any matter which might result in either significant curtailment of cash flow or nonpayment of wages. Such matters could include notice of the impending bankruptcy of a major customer/client, significant change in the timing of a customer's payments (slipping from payment within 30 days to payments being delayed beyond 90 days, for instance). We also advise that

the employer arrange for a credit line sufficient to cover at least two full payrolls in the event cash flow or reserves would be insufficient. Finally, we advise that all officers of the business be named insured under general liability policies, that the business have specific agreements under which it will indemnify officers who might become personal defendants in wage collection actions, and that each officer make reasonable efforts to monitor the financial health of his or her employer even if the officer has no direct responsibility for wage administration.

Bonds and Indemnity

W.Va. Code §21-5-14 (2012) requires that every "...employer, person, firm or corporation engaged in or about to engage in construction work, or the severance, production or transportation ...of minerals..." to post a bond with the Commissioner of Labor guaranteeing that wages and benefits will be paid to its employees in a timely manner. That bond is not required of those businesses which have been actively engaged in such work for more than 5 years, and the requirement may be waived for businesses which have been actively engaged in these activities for a period of less than 5 years where the Commissioner determines the employer is "...of sufficient financial responsibility..." to pay the amounts owed. The amount of the bond is specified to be "...equal to the total of the employer's gross payroll for four weeks at full capacity or production..." and is to be increased or decreased as payroll increases or decreases. Id.

However, most employers forget that W. Va. Code Sec. 21-5-4(e) requires an employer which fails to pay wages when due to also pay three (3) times the amount of the unpaid wages as liquidated damages. [4] The definition of "wages" contained in the act

[4] W.Va. Code §21-5-4(e).

includes such things as accrued vacation, sick pay and similar entitlements unless payment of these "fringe benefits" is specifically excluded by a written policy, handbook or contract existing between the employer and employee.[5] Therefore, the amount of the bond may well be insufficient to pay the amounts owed, since the ultimate value of the obligation may be four or more times the value of the unpaid hourly wages.

The "teaching point" here is that there is a "disconnect" between the provisions of W. Va. Code §21-5-14 which requires a bond equal to 4 weeks payroll plus 15% for "benefits" and the provisions of W. Va. Code §21-5-4(e) which allows recovery of not only the wages (which include vacation, sick days, etc.) but also the statutory liquidated damages for nonpayment. That "disconnect" can result in the bond being woefully insufficient to cover the actual amount recovered by workers as a result of wage nonpayment.

Best Practices

Of course, the "best practice" is to follow the suggestions above and assure that the employer has the wherewithal to fund the wage and benefit obligations in the face of financial difficulties through adequate reserves, lines of credit and other means. The "teaching point" here is that the business must never underestimate the amount of the funding which might be required.

Liability for wages owed by third parties

W.Va. Code §21-5-7 (2012) provides that any "...person, firm or corporation..." which contracts with another "...for the performance of any work which the prime contracting person has undertaken to perform for another..." becomes liable for the

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[5] *See, Wolfe v. Adkins,* 229 W.Va. 31, 725 S.E.2d 200 (2011).

payment of wages owed by the contractor to its employees. Where an energy company, has entered into a lease or "contract" for the removal of minerals and then contracts with another entity to remove the coal or drill the wells, the mining or gas company may be liable to the employees of the contractor for unpaid wages and benefits.

Most businesses are aware that such contractors are usually required to post a bond with the West Virginia Commissioner of Labor to assure payment of the wages owed their employees, and often assume the required bond is sufficient to protect them against potential liability. To that end, most businesses include in their contracts provisions by which the "subcontractor" provides representations that the required bond has been posted, etc.

Many forget, however, that the "prime contractor" has a statutory obligation to notify the Commissioner of Labor of its contract with the "subcontractor" within 10 days after its execution. If the proper notification is not given, the employees of the contractor need not exhaust their remedy against the wage bond posted by their employer before suing the prime contractor. And, the prime contractor which has failed to provide the required notice is guilty of a misdemeanor.[6]

Another disconnect lurks in the statute. While it is the "subcontractor" which is the "employer" as defined by W. Va. Code §21-5-1(m), the "prime contractor" may be liable under W.Va. Code §21-5-7 (2012). While an officer of the "employer" may be held personally liable if he or she knowingly permits the wages to go unpaid, the liability of the prime contractor is absolute; it is a strict liability statute. And under the law, the employees of the subcontractor may proceed against an officer of their employer without

[6] W.Va. Code §21-5-16 (2012)

proceeding first against the prime contractor.[7] Simply stated, the "subcontractor's" employees may proceed first against any bond, may proceed against the prime contractor, may proceed against the officers of their employer, or in all likelihood, will join all in the same suit.

Best Practices

We advise our clients never to assume the amount of any wage bond is sufficient to cover the claims which may be asserted by the employees. We also advise that any "prime contractor" (in addition to complying with the notice requirements of the statute and assuring the contractor has posted the required wage bond) include a significant "retainage" in any contract relating to the production or transportation of minerals (or construction contracts). Even if the "subcontractor" has been in business for many years and is therefore exempt from the bonding requirement, or a waiver has been granted by the Commissioner, the retainage should be demanded. In addition, the prime contractor should obtain a broad indemnity provision in its contracts under which the 'subcontractor" and its officers indemnify the prime contractor and its employees against any wage, benefit or liquidated damages liability incurred by the prime contractor as a result of the "subcontractor's" nonpayment.

Timing of Wage Payment

The statute requires payment "every two weeks."[8] "Every two weeks" is NOT "twice per month." We continue to see clients which pay hourly wages "twice a month" believing this is the same as "every two weeks" and that they are in compliance with the

[7] Mullens v. Venable, 171 W.Va. 92, 297 S.E.2d 866 (1982).
[8] W.Va. Code §21-5-3 (2012).

statute. The only manner in which the "every two weeks" requirement can be modified is through a "special agreement." While many employers believe the "special agreement" is simply an arrangement between the employer and employee, the law requires that the "special agreement" be approved by the Commissioner of Labor.[9] Those who pay their employees twice per month are not in compliance, in most cases.

Best Practice

Pay employees every two weeks, and assure that all "subcontractors" do the same.[10]

The Class Action Crisis

Over the past 18 months we have seen a virtual explosion in the use of class action claims under W.Va. Code §21-5-4(e). In years past, the focus of litigation under the Act was largely upon the nonpayment of wages and traditional fringe benefits such as medical insurance premiums and pensions. Particularly during the early 1980s, most employment lawyers were spending a significant portion of their time litigating claims involving coal miners whose wages or benefits had gone unpaid as contract mining companies failed or simply walked away leaving the employees to sue the prime contractor to recover what they were owed. The current landscape is different; the litigation now takes the form of class actions seeking to recover liquidated damages pursuant to W. Va. Code §21-5-4(e).

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[9] 42 CSR 5-6.1 et. seq.

[10] We must also recognize that failure to calculate and pay hourly employees every two weeks can result in significant liability under state and federal wage and hour laws as they relate to overtime compensation. One of the most common errors we see in our practice is the employer which pays nonexempt employees on a "salaried" basis twice per month. Not only does this approach likely violate the West Virginia Wage Payment and Collection Act, but it may well violate wage and hour statutes.

Recall that the Act formerly required an employer who discharges an employee to pay all wages due within 72 hours of the discharge.[11] When the employer fails to comply, the employee will be awarded "liquidated damages" in an amount equal to three times the unpaid wages.[12] Individually, the value of these claims is usually quite small. In several recent cases in our office, the unpaid wages were less than $100, and liquidated damages totaled less than $300. The total claim was less than $400.

The statute also permits the unpaid employee to recover his or her "reasonable attorneys' fees.[13] We have seen numerous cases in which the claim itself was less than $400 but attorneys' fees claimed were in excess of $3,000 despite the fact the employer paid the unpaid wages and liquidated damages almost immediately after suit was filed. Further, in the vast majority of these cases, only the claim for liquidated damages is at issue; the wages have already been paid albeit more than 72 hours after the discharge.

Now, lawyers representing single employee plaintiffs are asserting class actions in which they bring suit in behalf of a putative class comprised of all employees of that employer within the state of West Virginia who were discharged within 5 years immediately preceding suit and whose wages were not paid within 72 hours after termination. Not only are these cases much more significant but they also raise numerous procedural and substantive questions.

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[11] W.Va. Code §21-5-4(b). This provision was amended effective July 1, 2013 to extend the time within which wages must be paid to 4 business days. The amendment is not retroactive, however, and claims for unpaid wages prior to that date may be based upon the former 72 hour requirement.

[12] W.Va. Code §21-5-4(e). Interestingly, the statute does not prescribe the basis for calculating the liquidated damages. Since the employee would be paid "net" wages at termination (less required taxes and withholdings), there exists a question of whether the liquidated damages should be calculated based on "gross" wages owed or "net."

[13] W.Va. Code §21-5-12.

First, we face the question of the definition of "paid" as the term is used in W.Va. Code §21-5-4 (2012). The statute itself originally contemplated payment in cash or through a "paper" check, and that mechanism continues to be the method described in the statute.[14] That mechanism is far more limited than the means of payment set forth in the immediately preceding section of the statute which contemplates the direct deposit, electronic transfers, "payroll cards" and means other than the "cash order" contemplated in W.Va. Code §21-5-3 (2012). The inference, then, is that while regular payrolls may be administered using any of the mechanisms described in W.Va. Code §21-5-3 (2012), *only payment via "cash order" is sufficient to meet the requirements of the Act related to the payment of discharged employees.* Therefore, an employer which discharges an employee may be required to "pay" them in cash or a check or money order "... on banks convenient to the place of employment where suitable arrangements have been made for the cashing of such checks by employees for the full amount of wages."[15] Technically then, a discharged employee who receives payment within 72 hours through some means other than that described in W.Va. Code §21-5-4(a) may claim a violation of the Act.

And what action constitutes "payment?" While one might assume it means receipt of the money by the employee, perhaps it is the employer's issuance or offer of the payment which is more relevant. For instance, if the employer discharges the employee on a Monday afternoon and instructs the worker to leave the premises immediately, then calls the former employee on Tuesday and advises him or her the final pay check is waiting for them at the store, has the employee been "paid" within the meaning of the statute? Is the employer's creation of the check and offer to tender it to

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[14] W.Va. Code §21-5-4(a).
[15] W.Va. Code §21-5-4(a).

the employee sufficient, or must the employer place it in the former employee's hand? Having prepared the check and offered it to the employee, does the employer violate the act if the employee refuses to retrieve the check or simply chooses to wait several days before obtaining it?

And the issue is even more complex where the employer is a larger one. Most employers of any size use third parties to administer payroll. Once the employer advises the payroll provider that an employee has been discharged, it is the payroll provider which is responsible for calculating and issuing the payment. Payment may be made by check, direct deposit or otherwise, and it is issued by the payroll service provider. Assume our employee was discharged on Monday afternoon, and the employer reported the discharge to the payroll provider at the same time. The payroll provider calculates and issues the check on Tuesday, mailing it to the employee's home address (as it has done with all of the employee's previous paychecks). The employee receives it on Saturday, more than 4 business days after discharge. Was the employee "paid" at the time the employer notified the payroll service provider of the termination, when the provider issued the check (thus committing the employer's funds to the payment) or when the check was actually received by the employee? Under the terms of the statute, the employee will argue he or she was not "paid" until the check was actually received. What if the provider sent the check via certified mail (signature required) rather than regular mail in order to have a record showing the employee received it on Friday (within the 4 business days). Rather than sign for the check on Friday, however, the employee simply waited until Monday to pick up the check at the Post Office. Does the employee's

declining to accept the check until Monday render the employer liable on the basis the employee had not received the check on Friday?

Finally, with any large employer which uses a payroll service provider, it is extremely difficult to perform the necessary tasks to have the check in the employee's hands within the statutory period. The fact the Act includes no "safe harbor" for those who attempt in good faith to comply in the era of electronic systems creates an illogical and unnecessary "snare" for employers without providing any real benefit to employees – except for increasing the likelihood of litigation.

There is also a growing question as to what constitutes a "discharge" within the meaning of the statute A "discharge" may be entirely different than a "termination." Many larger employers use the word "termination" to designate a removal of an employee from active payroll *for any reason.* "Discharge" on the other hand means an active decision by the employer to end the employment immediately.

But even that raises the question of "when" the discharge occurs. In today's environment, the majority of employers often suspend the employee pending the completion of an investigation and make the disciplinary decision only after all of the facts are known. The investigatory suspension may be with or without pay.

Where the suspension is without pay and the decision to discharge is made several days after the employee's last active day of employment, the employee may argue the "discharge" occurred the moment his active employment – and his entitlement to wages – ended. In such circumstances, it would be virtually impossible for the employer to comply with the provisions of the Act since the decision to discharge is made (in many cases) more than 4 business days after the employee last actively worked.

Then there are procedural issues. For instance, the provisions of W.Va. Code §21-5-12 (2012) vest the employee with the right to bring a claim "under this article." However, the statute speaks in terms of the Commissioner championing the employee's cause and specifically refers to the "Commissioner" throughout the section. Finally, the statute provides that: "The *Commissioner* shall have the power to join various claimants in one claim *or lien,* and in case of suit to join the in one cause of action."[16] While this provision might seem to vest only in the Commissioner of Labor the right to bring such cases for multiple plaintiffs, the rules governing court proceedings allow the employees to assert claims in behalf of an entire class of employees. These "class actions" are now regularly brought in our courts.

Further, the wage payment statutes seem to invoke remedies spelled out in various West Virginia "lien" statutes. The phrase *"or lien"* as used in W.Va. Code §21-5-12(b) is certainly consistent with the language of the penalty provision of W. Va. Code §21-5-4(e) which also provides that the unpaid employee "...shall have such *lien* and all other rights and remedies for the protection and enforcement of such ...wages...". All of that seems entirely consistent with the decision in *Farley v. Zapata Coal Corp,*[17] in which the Court ruled that employees of a contractor could use Chapter 38 (the mechanics lien statutes) of the West Virginia Code to enforce a claim for statutory penalties against a "prime contractor" on the basis that the provisions of W.Va. Code §21-5-4(e) as it then existed created a "fictitious 30 days of continued employment" as the basis for the penalty.[18] The *Zapata* court held that the workers where therefore entitled to collect the

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[16] W.Va. Code §21-5-12(b).

[17] 167 W.Va. 630, 281 S.E.2d 238 (1981).

[18] At the time the case was decided, the statute calculated liquidated damages based upon an amount equal to the daily wage for each day the wages were unpaid, with a limit of 30 days. The Court found

statutory penalty as additional wages encompassed within the ambit of the mechanics lien.

In *Zapata Coal Corp., supra*, the court interpreted the provisions of W.Va. Code §21-5-4(e) in the context of a mechanic's lien suit brought pursuant to W.Va. Code §38-2-31. The employees in *Zapata* had worked for M&T Coal Corporation, a contractor hired by Zapata. M&T had terminated the employees when its contract with Zapata ended, and had failed to pay the employees their final wages and benefit entitlements. The employees then filed a traditional "mechanics' lien" against Zapata claiming the company owed them the unpaid wages and benefits inasmuch as they had performed work which benefited Zapata, and further asserted a claim for the statutory penalty. After concluding that Zapata was a "prime contractor" as defined in W.Va. Code §21-5-7 (1975),[19] the court held the unpaid employees of M&T were entitled to enforce their lien through the mechanisms specified in W.Va. Code §38-2-31 (the mechanics lien statute)..

The *Zapata* court said:

> ... we construe "value of such work or labor" as contained in W. Va. Code §38-2-31 to mean *all* compensation contracted to be paid by the employer for the employee's services regardless of the nature of such compensation.
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> * * *
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> ...W.Va. Code §21-5-4(e) ...provides that an employee shall have a lien and all other rights and remedies for the enforcement of his claim for liquidated damages equal to thirty days' pay, as he would have been entitled to had he actually rendered service therefore in the manner last employed. *Zapata, supra* at 242.

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this methodology created a "fictitious" continuation of the employment. Thereafter, in *Lucas v. Moore*, 172 W.Va. 101, 303 S.E.2d 739 (1983), the Court focused upon this "fictitious" continuation of the employment to support a "contract of employment" for that period and to impose a 5 year statute of limitations period for liquidated damage claims under the act.

[19] This provision of the WPCA provides that when one person contracts with another "which the prime contractor has undertaken to perform for another..." the prime contractor becomes liable for any unpaid wages owed by the direct contractor to its employees, *excluding liquidated damages provided in W.Va. Code §21-5-4(e).*

In the course of confirming that the mechanics lien statutes should be used to enforce claims under the WPCA, the WVSCA held:

> The effect of W.Va. Code, 21-5-4(e) is to create by operation of law a fictitious additional thirty days of employment, and to grant the employee the same remedies and procedures for enforcing his lien for compensation for that fictitious thirty days that he would have had for the value of work actually performed.

281 S.E.2d 242.

Since the M&T employees had brought their suit against Zapata Coal Corp. pursuant to Chapter 38, and had fully followed the statutory requirements by not only asserting the lien but also "perfecting" it by filing suit to enforce it within the 90 day period allowed in W.Va. Code §38-2-2, there was no statute of limitations issue before the *Zapata* court.

The *Lucas* court considered whether the liquidated damages provided in W.Va. Code §21-5-4(e) were in the nature of a "civil penalty" subject to the one (1) year statute of limitations set forth in W.Va. Code §55-2-12(c) (1959). In determining the "liquidated damages" provided in the statute could not be characterized as a "civil penalty," the *Lucas* court referred to the "fictitious contract of employment" which at that time formed the basis for calculating the liquidated damages. Purely on the basis that the statute as it then existed created a "fictitious contract of continuing employment," as the basis for calculating the liquidated damages, the *Lucas* court determined that a five (5) year statute of limitations applicable to contract under W.Va. Code §55-2-6 (Actions to recover on award or contract other than judgment or recognizance) applied. Id. at 740.

In *Lucas, supra*, the WVSCA ignored the fact the claims in *Zapata* were prosecuted under the mechanics lien statute, seized upon the "fictitious contract theory" and used it as the basis for a pronouncement that the WPCA carried with it the five (5) year statute of limitations applicable to contract actions.[20]

However, in the later case of *Amick v. C&T Development Co., Inc.* 187 W.Va. 115, 416 S.E.2d 73 (1992), the West Virginia Supreme Court of Appeals seems to have affirmed the application of the limitations period set forth in W. Va. Code §38-2-32 to actions brought under W.Va. Code §21-5-4(e). In that case, Elk River Sewell Coal Company, the owner of coal property, had contracted with C&T Development Co., Inc. for the removal of the coal. When C&T Development Co., Inc. filed bankruptcy, its employees sued Elk River as a "prime contractor" under W.Va. Code §21-5-7, seeking unpaid wages, overtime and liquidated damages under W.Va. Code §21-5-4(e). The *Amick* court stated:

> In *Farley v. Zapata Coal Corp. (citation omitted)*...the court recognized that a proceeding for enforcement of a mechanic's or laborer's lien brought under W.Va. Code 38-2-31 could properly be used for enforcement of a lien for liquidated damages under W.Va. Code 21-5-1 et. seq.
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> In reaching this conclusion, the (*Zapata*) Court noted...W.Va. Code 21-5-4(e) explicitly provides that an employee shall have the same lien and other rights and remedies for enforcement of his claim for liquidated damages as he would have been entitled to had he actually rendered service therefore in the manner as last employed. *Id.* at 75 – 76.

Finally, the *Amick* court concluded:

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[20] W.Va. Code §55-2-6 establishes the limitations periods for actions to enforce contracts.

> West Virginia Code 38-2-32 requires that a party who obtains a lien against a corporation for work or labor must perfect that lien within ninety days ...It further provides that if such perfection does not occur, the lien is discharged. *Id.* at 77.

The *Amick* court affirmed the ruling of the trial court which barred a claim for liquidated damages under W.Va. Code §21-5-4(e) on the basis that the lien recognized in that section had not been perfected within ninety days as required by W.Va. Code §38-2-32. Thus, even after *Lucas, supra* was decided, the West Virginia Supreme Court of Appeals not only concluded that claims under W.Va. Code §21-5-4(e) created a lien within the ambit of W.Va. Code §38-2-31, but also that claims for liquidated damages under 4(e) would be barred if not perfected within the ninety days required by W.Va. Code §38-2-32.

In 2006 the West Virginia legislature amended the provisions of W. Va. Code Sec. 21-5-4(e).

The statute now reads as follows:

> If a person, firm or corporation fails to pay an employee wages as required under this section, such person, firm or corporation shall, in addition to the amount which was unpaid when due, be liable to the employee for three times that unpaid amount as liquidated damages. Every employee shall have such lien and all other rights and remedies for the protection and enforcement of such salary or wages, as he or she would have been entitled to had he or she rendered service therefore in the manner as last employed; except that, for the purpose of such liquidated damages, such failure shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he or she is adjudicated bankrupt upon such petition.

W. Va. Code § 21-5-4(e) [2006].

Thus, the convoluted "fictitious contract of employment" read into the 1975 Act by the *Zapata* court and echoed in *Lucas,* was replaced with a simple and straightforward

penalty: liquidated damages pursuant to this provision are to be simply calculated as "treble damages." However, the 2006 provision continues to include specific language creating a lien and recognizing that the employee may enforce his or her claims under the statute through use of a mechanics lien asserted and perfected under Chapter 38 – the same procedure addressed in the *Zapata* and *Amick* decisions.

The 2006 Amendments have created a question regarding the applicability of the 5 year statute of limitations set forth in *Lucas, supra.* With the elimination of the language upon which the "fictitious contract" was based, the logic of requiring employees to bring claims for unpaid wages through the use of the mechanics lien statutes seems impeccable. W.Va. Code §38-2-31 & 32 have provided the enforcement mechanism for unpaid wages since its inception. With the adoption of the mechanics lien enforcement procedures as the vehicle for assertion of claims under the WPCA, however, came the requirement that such claims be filed ("perfected") within 90 days after the employee last performed services.

If for some reason the ninety day filing period provided in W.Va. Code §38-2-32 does not apply to claims brought under W.Va. Code §21-5-4(e), only two other limitations statutes seem relevant. Under the rule that W. Va. Code §21-5-1, et. seq. must be considered *in pari materia* with statutes of similar ilk, we must look to any other statutes within Chapter 21 for guidance. Within that Chapter the Legislature has included Articles 4 through 8 which deal with hours of labor, wage payment and collection, equal pay and maximum hours. Two Articles (5 and 5B, the West Virginia Wage Payment and Collection act and the West Virginia Equal Pay Act, respectively) contain provisions related to the obligations of private employers to pay wages in defined circumstances.

Each of those Articles provides that the W.Va. Commissioner of Labor shall enforce the statutes and further provides employees with a private right of action to recover both unpaid wages and liquidated damages.[21] While the WPCA is silent as to the limitations period, the Equal Pay Act establishes a one year statute of limitations applicable to any action seeking unpaid wages and the "civil damages" or "liquidated damages" recoverable under the law. W.Va. Code §21-5B-4 (2012).[22]

Application of a one year statute of limitations to actions seeking to recover liquidated damages pursuant to W. Va. Code §21-5-4(e) would also consistent with the general statute of limitations provisions set forth in W. Va. Code §55-2-12. Specifically, W. Va. Code §55-2-12 contains the general limitations periods applicable to civil actions in our courts. It states:

> Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and *(c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative.* (emphasis added).

W. Va. Code § 55-2-12.

In summary, the West Virginia Wage Payment and Collection Act is a statute which contains a variety of snares, raises as many issues as it resolves, and created a veritable "mine field" for employers in the state. Practicing attorneys must be mindful of

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[21] It should be noted that the provisions of W.Va. Code §21-5-12 (2006) establishes a right of action on the part of the Commissioner of Labor to file suit to enforce the provisions of the WPCA. In that connection, W. Va. Code §21-5-12(b) (2012) specifies that the Commissioner may join "various claimants in one claim or lien, and case of suit to join them in one cause of action." This provision may be read to provide that only the Commissioner may bring such claims as a "class action."

[22] Interestingly, the remedial provisions of both the West Virginia Wage Payment and Collection Act and the West Virginia Equal Pay Act are contained in section 4 of each Article.

its requirements and adopt strategies to avoid the many pitfalls which await the uninitiated.

b) The Fair Labor Standards Act

Since its inception, the FLSA has generated problems for employers. Any lawyer will probably tell you that one of the most common problems has been the "misclassification" of workers as "exempt" from the payment of overtime compensation. The issue has largely involved workers paid on a "salaried" basis that the U.S. Department of Labor later determined were "nonexempt" and therefore owed overtime pay for between 2 and 3 years, depending on circumstances. Now, however, the landscape is changing.

The Obama administration created "Vice President Biden's Middle Class Task Force" with an objective of (among others) "restoring the rights denied" to employees under the wage and hour statutes. The primary focus of this effort has resulted in the Department of Labor Misclassification Initiative. The primary purpose of the initiative is to resolve the "serious problem" of "...the misclassification of employees as something other than employees such as independent contractors...". Clearly, the initiative is an effort to reclassify "independent contractors" as employees whenever possible.

Misclassification of an employee as an "independent contractor" carries significant risk for the employer. Not only would the misclassified employee be entitled to be paid minimum wage and overtime, he or she would be entitled to a variety of employment benefits such as pension, health care, vacation, FMLA leave and the like. Even for a single misclassified employee, the liability can be significant. Worse yet, if

the employer has numerous misclassified employees, the liability could be disastrous.[23] It therefore becomes critical for every employer to understand how the USDOL will analyze each case to determine whether a worker is indeed an "independent contractor" or is instead an employee.

Unfortunately, there is no consistent statement of what constitutes an independent contractor. For instance, the Internal Revenue Service uses a 20 factor "test" to determine an employer's tax liability where independent contractors are at issue. This "test" requires analysis of the following factors:

a) Whether the individual is required to follow instructions;

b) Amount of training of the individual related to that particular job;

c) Amount of integration of the individual into the employer's business;

d) Whether services are rendered personally;

e) Whether the employer hires, fires and pays assistants;

f) Existence of a continuing relationship;

g) Establishment of set amount of work hours;

h) Whether the individual must devote substantially full time to the job;

i) Whether the individual works on the employer's premises;

j) Whether the individual works according to a sequence set by the employer;

k) Whether the individual must submit regular or written reports to the employer;

l) Whether the individual is paid by time rather than by the project;

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[23] In May, 2013, the USDOL recovered nearly $1.1 million in back wages and damages when it obtained a judgment against Bowlin Group LLC and Bowlin Services LLC after determining the employer had misclassified 77 employees as independent contractors. In the press release associated with the recovery, the DOL asserted "...the misclassification of employees as independent contractors cheats workers of wages and benefits to which they would otherwise be entitled under the law...".

m) Whether the individual is reimbursed for expenses;

n) Whether the individual furnishes the necessary tools and materials;

o) Whether the individual has invested in the facilities for performing the services;

p) Whether the individual can realize a profit or a loss;

q) Whether the individual works for more than one firm at a time;

r) Whether the individual makes his or her services available to the general public;

s) Whether the employer has the right to discharge the individual; and,

t) Whether the individual has the right to terminate the relationship.

However, under state law the "test" can be different. For example, the "common law" test (the one established by the courts as they consider independent contractor cases) can be synthesized to include:

a) The degree of "employer" control over the details of the work;

b) Whether the individual's business is a distinct occupation or business;

c) Whether the individual's occupation usually is done without supervision;

d) Whether a high level of skill is required by the occupation;

e) Whether the worker provides the supplies, tools and the place of work;

f) The length of time the services are provided;

g) Method of payment, by the job rather than the hour or day;

h) Whether or not the work is part of the regular business of the employer;

i) Whether the parties believe they are creating an independent contractor relationship; and