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April 23, 2008

The Honorable Martin J. O'Malley
Governor of Maryland
State House
Annapolis, Maryland 21401-1991

RE: Senate Bill 797

Dear Governor O'Malley:

We have reviewed and hereby approve for constitutionality and legal sufficiency Senate Bill 797, "Labor and Employment - Wage Payment and Termination of Employment - Accredited Leave." We write to discuss the retroactive application of the bill.

Senate Bill 797 adds leave benefits to the list of things as to which an employer is to give notice at the time of hiring and provides that an employer is not required to pay accrued leave to an employee if the employer has a written policy that limits compensation of accrued leave, notice of that policy was given to the employee as required by law, and the employee is not entitled to payment for accrued leave at termination under the terms of the written policy.

Section 2 of the bill provides that:

for an employee whose employment terminated on or after November 1, 2007, and before the effective date of this Act, if the employer of the employee had a written policy regarding the payment of accrued leave and, before termination of the employee's employment, communicated that policy to the employee, the employer is required to pay accrued leave to the employee only if the employee is entitled to the payment under the terms of the employer's written policy.

Section 3 of the bill provides that it does not apply to any case for which a final judgment has been rendered and for which all judicial appeals have been exhausted prior to the effective date of this Act.

This bill was introduced in reaction to the unpublished decision of the Court of Special Appeals in *Catapult Technology, Inc. v. Wolfe*, No. 997, September Term, 2006 (August 20, 2007). In that case, the Court found, and the parties did not dispute, that unused accrued leave is a "fringe benefit," and therefore a wage recoverable under Maryland's Wage Payment and Collection Law, Labor and Employment Article, § 3-501, *et seq.* The Court further held that the employer's policy requiring that two weeks notice be given before termination to qualify for payment of accrued leave was contrary to State law and could not be enforced to prevent collection in this case. The bill does not address the first portion of this holding, but allows an employer to limit the right of employees to payment of accrued leave under a written policy.

In November, apparently in reliance on this decision, the Division of Labor and Industry changed its *Guide to Wage Payment and Employment Standards* to provide that:

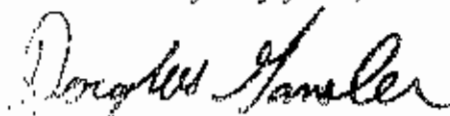
When an employee has earned or accrued his or her leave in exchange for work, an employee has a right to be compensated for unused leave upon the termination of his or her employment regardless of the employer's policy or language in the employee handbook.

It is well settled that a "statute will be given retrospective effect if that is the legislative intent, but not if this would impair vested rights, deny due process, or violate the prohibition against *ex post facto* laws." *Bereano v. State Ethics Commission*, ___ Md. ___ (No. 32 September Term 2007 (March 19, 2008)). In *Duo v. Comcast Cable*, 370 Md. 604, 632 (2002), it was held that "there is a vested right in an accrued cause of action and that the Maryland Constitution precludes the impairment of such right." The Court further held that this principle applies to both common law and statutory causes of action. The *Duo* case related to legislation passed by the General Assembly to overrule the decision of the Court of Appeals in *United Cable v. Burch*, 354 Md. 658 (1999), that a late fee could not exceed the legal rate of interest of 6%. Following that case numerous class actions were filed to recover late fees that had been believed legal in that case but were excessive under the rule announced in *Burch*. The Court held that retroactive application to these cases violated the plaintiffs' vested rights in their accrued causes of action.

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This situation can be distinguished from that in *Dua* for two reasons. First, the decision in question is unpublished. "An unreported opinion of the Court of Appeals or Court of Special Appeals is neither precedent within the rule of stare decisis nor persuasive authority." Md. Rule 1-104. Second, as the Court noted in *Catapult*, Maryland's Division of Labor and Industry Guidance is not law. Nor was it promulgated as a regulation. Thus, it is without legal effect and could not create vested rights. *Evans v. State*, 396 Md. 256, 345 (2006). As a result, no person other than the parties in the *Catapult* case has an expectation that they will receive payment of their accrued leave upon termination regardless of the policies of their employer to the contrary, and the retroactive application of the bill does not disrupt vested rights.

Very truly yours,



Douglas F. Gansler
Attorney General

DFG/KMR/lck

cc: The Honorable John C. Astle
The Honorable Dennis C. Schnepfe
Joseph Bryce
Karl Aro