Mar 2024 | Articles Blog: The Westchester Litigator

SDNY Sides with the First Department on Appellate Division Split, Holds a Private Right of Action for Manual Employees Exists Under New York Labor Law Section 191

New York Labor Law (NYLL) Section 191 requires employers to pay manual workers on a weekly basis. In 2019, the First Department in *Vega v. CM & Associates Construction Management, LLC* (Vega) held that applied together, NYLL Sections 191 and 198 provide an express and implied private right of action for employer violations of Section 191's pay frequency requirements. To date, the Court of Appeals has not opined on the issue. Taking advantage of the reality that many employers pay all their employees bi-weekly, post-Vega, employees qualifying as "manual workers" have flooded the state and federal courts in New York with claims under Section 191.

On January 17, 2024, the Second Department weighed in on the issue. In *Grant v. Global Aircraft Dispatch, Inc.* (Grant), the Second Department held no private right of action exists, creating a department split. Now, the Southern District of New York has joined the fray. On a motion to dismiss, the defendant asked the court to side with the Second Department's holding in *Grant* and dismiss the case. Judge Briccetti declined to do so, holding the Court of Appeals would likely agree with *Vega* and find that a private cause of action exists under NYLL Section 191.

The Case: *Zachary v. BG Retail, LLC*

In *Zachary*, the plaintiff, a retail manual employee, brought a putative class action against her former employer, BG Retail, LLC, an operator of "branded retail establishments." The plaintiff claimed damages resulting from the defendant's failure to pay her and others similarly situated on a weekly basis, as required under NYLL Section 191. Relevant here, in moving to dismiss the plaintiff's Section 191 claim, the defendant argued that Section 191 does not confer an express or implied private right of action, relying upon *Grant*, and requested that the court depart from the opposite holding in Vega. In analyzing the competing holdings, Judge Briccetti stepped into the shoes of the New York Court of Appeals, as is required where there exists a split in authority among the Appellate Divisions, to predict how the Court of Appeals would likely rule.

First, the court analyzed whether an express private right of action exists under Section 191, agreeing with the First Department that an employee could be considered "underpaid" within the meaning of NYLL § 198, when the employer fails to pay on a weekly basis, yet still eventually pays the full amount. The court pointed to applicable legislative history and the plain language of the statute in agreeing with the reasoning in *Vega* and concluded that the stated legislative purposes of the 2010 amendments to Section 198 would be better served where low-wage workers could bring their own private suits rather than

relying upon administrative procedures. Additionally, the Court recognized that time inherently has value, and thus when no payment is made on the required date, receipt of the full amount a week later still qualifies as an "underpayment."

Despite finding the existence of an express private right of action under Section 191, the court went further, determining that an implied private right of action under Section 191 can also be inferred, siding with the dissent in *Grant* and applying the multi-factor test established by the Court of Appeals in *Konkur v. Utica Academy of Scientific Charter Schools* (Konkur). While the Grant majority conceded the first two factors (i.e. plaintiff is part of the class for whose particular benefit the statute was enacted, and the private right of action would promote the legislative purpose), it then relied upon *Konkur* to hold that since "multiple enforcement mechanisms" are in place to enforce Section 191, creation of the implied private right would not be "consistent with the legislative scheme." The court disagreed with this line of reasoning, instead siding with the *Grant* dissent to distinguish *Konkur*, determining that it did not "suffice to overcome the sound reasoning" of *Vega*, and ultimately declined to dismiss the Section 191 claim.

Finally, as stated by the court in *Zachary*, it is important to note that Governor Hochul's Proposed 2025 Budget includes an Article VII bill, amending NYLL Section 198 (1-a), to exclude liquidated damages from plaintiff's claims where "the employee was paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly." The court held that the proposals were not persuasive evidence of the Court of Appeals position but clarified that if the amendment did eventually become law, the court would be bound by it.

Takeaways

Until the Court of Appeals weighs in on this department split, employers with "manual workers" and litigators in the employment defense sphere should be wary and continue to monitor the state and federal court dockets, as well as Governor Hochul's proposed 2025 budget, to ensure that any advice given is consistent with any new developments and the then-current state of the law.