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News

Judicial and Legislative Developments in Maine Employment Law

BY: Devin W. Deane, Esq.

The last several months have seen a great deal of activity in the field of employment law. In a series of decisions, the Maine Supreme Judicial Court and the United States District Court for the District of Maine have more clearly defined the limits on liability under the Maine Whistleblowers Protection Act (MWPA). Meanwhile, the Maine Legislature has enacted several laws which grant Maine workers new rights in the areas of leave, pay, and protection from discrimination.

Judicial Decisions

Pushard v. Riverview

On January 30, 2020, the Maine Supreme Judicial Court decided the case of *Roland Pushard v. Riverview Psychiatric Center*, 2020 ME 23. In *Pushard*, the Court clarified that an employee does not necessarily qualify as a whistleblower simply because he or she complained about a dangerous condition in the workplace. Rather, one must actually reveal a condition that is not generally known to the employer.

Roland Pushard was the Director of Nursing at Riverview. He complained to the hospital director, Jay Harper, about his concern with the inadequacy of the institution's staffing practices. He told Harper that he believed Riverview patients were put at risk because the hospital was staffed by under-qualified caregivers. After Pushard was terminated, he brought suit alleging that he was fired in violation of the MWPA, which prohibits retaliation against an employee who, "acting in good faith, . . . reports to the employer . . . , orally or in writing, what the employee has reasonable cause to believe is a condition or practice that would put at risk the health or safety of that employee or any other individual." 26 M.R.S. § 833(1)(B). The Law Court had previously ruled, in *Cormier v. Genesis Healthcare LLC*, 2015 ME 161, 129 A.3d 944, that a healthcare worker could be protected under the MWPA for reporting staffing-related safety concerns. The Court said, however, that Pushard was not protected under the Act because "he was not exposing a concealed or unknown safety issue. Instead, he was simply giving his opinion concerning his supervisor's attempts to address well-known problems related to staffing." The Law Court explained:

Pushard's conduct does not meet that standard because he was simply engaged in a policy dispute with his employer about how best to handle Riverview's staffing issues. That Riverview was understaffed was known to the public, the Legislature, and Riverview employees. Even if the specific staffing decisions about which Pushard complained were not widely known, it is uncontroverted that Pushard "did not believe that he was making Harper or anyone else aware of anything they were not already aware of." For this reason, Pushard was not *reporting*; he was complaining.

The implications of the *Pushard* case are hard to gauge. It seems unlikely that the Maine Legislature meant to deny job protection to those who complain about unsafe conditions or illegal practices whenever those things are already known to some members of management. On the other hand, in situations like the one in *Pushard*, where a problem truly is public knowledge, the protection of the MWPA arguably should not extend to every employee who echoes what others have said. The Law Court seems to have understood that the facts of the *Pushard* case were fairly unusual, and therefore tried to limit the reach of its holding. The Court expressly observed that it had "no occasion

here to articulate a comprehensive standard for what qualifies as a protected report." In particular, the Court "decline[d] to adopt an 'initial reporter' rule for WPA cases, as urged by Riverview." Therefore, it remains to be seen how momentous the decision will be. At the very least, however, we can be sure that in cases to come, there will be litigation over the question of when pre-existing awareness of an unsafe condition or an illegal practice makes an employee a "complainer," who can be disciplined for commenting on those conditions and practices, rather than a statutorily-protected "reporter."

Apon v. ABF Freight Systems, Inc.

In two separate decisions rendered over the course of several months in the same case, the United States District Court for the District of Maine established additional limits on liability under the Whistleblowers Protection Act.

The Plaintiff in the Apon case was an Operations Supervisor for ABF Freight System, Inc., a national trucking company. When the federal government enacted rules to implement "hours of service" and meal break requirements in the Federal Motor Carrier Safety Act – measures to make sure that drivers didn't become overworked and overtired while driving – ABF took steps to ensure compliance. The company required all management personnel to sign a document entitled "Leadership Responsibility Hours of Service and Meal Break Compliance Form." The "Leadership Form" stated that "[c]ompliance must be achieved through oversight, enforcement, and leadership of the Branch Managers and Linehaul Managers." Because the Leadership Form did not mention Apon's job title (Operations Supervisor), he refused to sign it, and he was fired for his refusal. He then sued, alleging violations of both the "reporting" and "refusal" protections of the Whistleblower Protection Act. Apon claimed that his firing was motivated in part by the fact that he had reported to a supervisor his reasonable, good faith belief that his signature on the form would violate state or federal transportation laws, rules, or regulations. He also claimed that the firing was motivated in part by his refusal to commit an illegal act.

ABF, represented by NH&D, first moved to dismiss the "refusal" claim on the ground that Apon had not identified any particular law he would have violated if he had signed the Leadership Form. There is well-settled authority that employees are protected from retaliation if they *report* what they genuinely and in good faith believe to be violations of the law, even if they are wrong – that is, even if the employer is not actually violating the law. ABF argued, however, that in order to be protected under the MWPA for refusing to carry out a directive, an employee must allege, and ultimately prove, that the directive was actually illegal. The District Court agreed and granted the motion, reasoning that "Section D of the MWPA . . . does not protect an employee who has refused to carry out a directive to engage in an activity that he *genuinely believes would be* a violation of a law or rule. Rather, it protects employees who, acting in good faith, refuse to carry out a directive or engage in an activity that "*would be* a violation of a law or rule."

After the dismissal of the "refusal" claim, the parties conducted discovery on the "reporting" claim, and at the close of discovery ABF moved for summary judgment. ABF argued that the "reporting" claim also failed because, even if Apon was telling the truth when he said he believed it would be illegal for him to sign the Leadership Form, he had not conveyed that belief to anyone at ABF. The District Court agreed on this score as well. According to the Court, it was not enough that Apon objected to the form, telling his supervisor that he "had an issue with the form" and that he needed someone to explain why he, as an Operations Supervisor, was required to sign it. The Court reasoned that "for an employee's conduct to fall within the protection of the MWPA, the purpose of which is to deter retaliation against employees who report what they reasonably believe to be illegal acts, *the employee must communicate that he or she thinks the reported act is illegal*. Put another way, 'it is a basic prerequisite to a whistleblower protection claim that the plaintiff has actually blown the proverbial whistle.'"

Legislative Developments

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In the fall of 2019 the Maine legislature enacted several new laws and amendments to existing laws that affect employment law in Maine. Many of the laws, which took effect in the fall and by now have been widely publicized, are intended to curb unfair or discriminatory employment and pay practices. Others are intended to provide Maine workers opportunities for paid time off for inevitable life events.

Earned Employee Leave

The Maine Legislature enacted LD 369, "An Act Authorizing Earned Employee Leave," which is intended to ensure that Maine workers have adequate opportunities to take time off without losing pay to take care of inevitable life events. The law is the first of its kind in the United States. It requires an employer – except an employer in a seasonal industry – that employs more than 10 employees for more than 120 days in any calendar year to provide each employee earned paid leave based on the employee's base pay. The law specifies that an employee is entitled to earn one hour of paid leave for every 40 hours worked, up to 40 hours in one year of employment, with accrual of leave beginning at the start of employment. The employee is required to work for 120 days before an employer is required to permit use of the paid time off. The law requires reasonable notice prior to use of the paid time off. The Department of Labor is required to prepare rules for the implementation of this law. The rulemaking process is underway and the law will take effect January 1, 2021. The Department of Labor has the exclusive authority to enforce the new law and remedy violations thereof.

Pay Equality

The Legislature also enacted LD 278, "An Act Regarding Pay Equality." The law prohibits an employer from inquiring about a prospective employee's compensation history until after an offer of employment that includes all terms of compensation has been negotiated and made to the prospective employee. As stated in the Act's legislative findings and intent, it is intended to address wage inequality that is perpetuated when an employer bases its compensation decision on the pay history of a prospective employee. The rationale is that a prospective employee will continue to experience wage inequality if her pay is based on the unequal pay she received in the past. The Act further provides that an employer's inquiry into a prospective employee's compensation history is evidence of unlawful employment discrimination under the Maine Human Rights Act and Maine Equal Pay Act, for which the employee may recover compensatory damages. An employer may be fined not less than $100 and not more than $500 for each violation of the Act.

Pregnant Workers

Through enactment of LD 666, "An Act to Protected Pregnant Workers," the Legislature required employers to provide reasonable accommodations for employees' pregnancy-related conditions, unless providing the accommodations would impose an undue hardship on the employer. The Act specifies that reasonable accommodations may include, but are not limited to, providing more frequent or longer breaks; temporary modification in work schedules, seating, or equipment; temporary relief from lifting requirements; temporary transfer to less strenuous or hazardous work; and provisions for lactation.

Gender Identity

LD 1701, "An Act to Clarify Various Provisions of the Maine Human Rights Act," was also enacted into law. The Act adds gender identity as a protected class under the Maine Human Rights Act and prohibits "[d]iscrimination in employment . . . on the basis of sexual orientation or gender identity." The Act defines gender identity as "the gender identity, appearance, mannerisms or other gender-related characteristics of an individual, regardless of the individual's assigned sex at birth." Religious organizations that do not receive public funds are exempted from compliance with the law.

Noncompete Agreements

Another law enacted by the legislature, LD 733, "An Act To Promote Keeping Workers in Maine," limits the scope and enforceability of non-compete agreements. The Act states that "[n]oncompete agreements are contrary to public policy" and are enforceable only to the extent that they are reasonable and no broader than necessary to protect:

1. The employer's trade secrets (as defined by statute);
2. The employer's confidential information that does not qualify as a trade secret; or
3. The employer's goodwill.

26 M.R.S. § 599-A. The Act outright prohibits noncompete agreements for an employee earning wages at or below 400% of the federal poverty line. 400% of the current federal poverty line is $49,960. According to the U.S. Census Bureau, per capita income and median household income in Maine were $29,886 and $53,024 in 2017, respectively. Thus, noncompete agreements are now prohibited for a significant majority of Maine employees. An employer may be fined not less than $5,000 for violating this prohibition. The Department of Labor is responsible for enforcement of the prohibition; the Act does not create a private right of action for the affected employee.

"Wage Theft"

Finally, the Legislature enacted LD 1524 "An Act to Prevent Wage Theft and Promote Employer Accountability." The law creates additional remedies for so-called "wage theft" by an employer, which is defined as a violation of state laws regarding minimum wage, overtime, and timely and full payment of wages, among others. The additional remedies include injunctive relief through the courts and cease operations orders from the Commission of Labor. The remedies are in addition to existing penalties and, with respect to injunctive relief, the Act provides that an employer must pay costs and attorneys' fees to the prevailing party (either an employee or the Department of Labor). The Act is intended to curb abusive wage payment practices, which affects the employee involved, but also affects the State's payroll tax base, and creates an unfair advantage as compared to competitors who play by the rules.

Employers should review their personnel policies, including policies regarding compensation, paid leave, reasonable accommodations, and noncompete agreements, to ensure their consistency with the newly enacted laws. Employment counsel at Norman, Hanson & DeTroy are available to provide further and specific guidance with these and other employment matters.

NHD COVID-19 Safety Considerations

In light of the COVID-19 outbreak, Norman, Hanson & DeTroy, LLC, has adjusted its policies so that its services and response capabilities for clients remain unaffected, while doing our best to prevent risk of spreading the coronavirus in our workplace and our community.

Because of safety considerations relating to COVID-19, we are closing reception to all walk-in traffic. Every effort will be made to conduct meetings and conferences via telephone or other electronic forms of communication. If the circumstances require an in-person meeting, it will need to be scheduled through your attorney, and we will ask any visitor to respect social spacing recommendations from the CDC.

We are following state and federal CDC Guidelines, and are:

- limiting our business travel plans and in person meetings in favor of conference calls or video conferencing where possible;
- assuring that our lawyers are technologically enabled to work remotely in case of a need for confinement or spread prevention. The quality of work and communications will not be affected adversely;
- instructing that if meetings need to be held in person, every effort will be made to avoid close contact;
- updating our practices to be consistent with current CDC guidelines on prevention and risk management.

Norman, Hanson & DeTroy is committed to continuing to provide our clients with experienced, effective and efficient legal services in a timely manner, consistent with the official recommendations for dealing with the coronavirus outbreak.

Thank you for your understanding as we work through this health crisis together.

Several NHD attorneys recognized in the 2019 edition of New England Super Lawyers and New England Rising Stars

Norman, Hanson & DeTroy is proud to announce that the 2019 edition of New England Super Lawyers and the 2019 New England Rising Stars has recognized several of our attorneys for inclusion in the publications. We congratulate each of these attorneys for this accomplishment.

Top 100 2019 New England Super Lawyers
Mark G. Lavoie – 2019

Super Lawyers
Jonathan W. Brogan – 2019 – Personal Injury – General: Defense
Stephen Hessert – 2019 – Workers' Compensation
Kelly M. Hoffman – 2019 – General Litigation
John H. King, Jr – 2019 – Workers' Compensation
Mark G. Lavoie – 2019 – Personal Injury – Med Mal: Defense
Thomas S. Marjerison – 2019 – Personal Injury – General: Defense
James D. Poliquin – 2019 – Insurance Coverage
John R. Veilleux – 2019 – Personal Injury – General: Defense

Super Lawyers Rising Stars
Christopher L. Brooks – 2019 – Creditor Debtor Rights
Devin W. Deane – 2019 – Civil Litigation: Defense
Joshua D. Hadiaris – 2019 – General Litigation
Grant J. Henderson – 2019 – Workers' Compensation
Matthew Mehalic – 2019 – Insurance Coverage
Darya I. Zappia – 2019 – Business/Corporate

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NHD honored to be included among the top "Highly Recommended" law firms in the State of Maine

Norman Hanson & DeTroy is honored to be included among the top of the "Highly Recommended" law firms in the State of Maine in the 2020 edition of *Benchmark Litigation's* "The Guide to America's Leading Litigation Firms and Attorneys" In addition, the following attorneys received individual recognition from *Benchmark Litigation*:

Local Litigation Stars

Jonathan W. Brogan – 2020

Mark G. Lavoie – 2020

Future Stars

Thomas S. Marjerison – 2020

Joshua D. Hadiaris – 2020

Benchmark 40 & Under Hot List!

Joshua D. Hadiaris – 2019

Norman Hanson & DeTroy Attorneys Receive Honors from Best Lawyers

Norman, Hanson & DeTroy is proud to announce that fourteen of its attorneys have been named to the 2020 edition of The Best Lawyers in America, the oldest and most respected peer review publication in the legal provision. First published in 1983, Best Lawyers is based on an exhaustive annual peer-review survey comprising of nearly 4 million confidential evaluations by some of the top attorneys in the country. The Best Lawyers list appears regularly in Corporate Counsel Magazine, and is published in collaboration with U. S. News & World Report. The following attorneys were honored by Best Lawyers for their work and expertise in the listed practice areas:

John W. Geismar – 2020
Tax Law

Robert W. Bower, Jr – 2020
Labor Law
Worker's Compensation Law – Employers

Jonathan W. Brogan – 2020
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

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Paul F. Driscoll – 2020
Litigation – Real Estate
Real Estate Law

Stephen Hessert – 2020
Worker's Compensation Law – Employers

Kelly M. Hoffman – 2020
Litigation – Labor and Employment
Professional Malpractice Law – Defendants

John H. King, Jr – 2020
Worker's Compensation Law – Employers

Mark G. Lavoie – 2020
Medical Malpractice Law – Defendants
Personal Injury Litigation – Defendants

Thomas S. Marjerison – 2020
Personal Injury Litigation – Defendants

Russell B. Pierce, Jr. – 2020
Appellate Practice
Commercial Litigation
Ethics and Professional Responsibility Law
Product Liability Litigation – Defendants
Professional Malpractice Law – Defendants

James D. Poliquin – 2020
Appellate Practice
Bet-the-Company Litigation
Commercial Litigation
Insurance Law
Personal Injury Litigation – Defendants

Daniel P. Riley – 2020
Administrative/Regulatory Law
Government Relations Practice

Roderick R. Rovzar – 2020
Corporate Law
Real Estate Law

John R. Veilleux – 2020
Insurance Law
Personal Injury Litigation – Defendants

In addition, six attorneys have been designated by Best Lawyers as the "Lawyer of the Year" for 2020 for the greater Portland area. We congratulate them for having achieved this impressive recognition.

James D. Poliquin – 2020 Appellate Practice

Kelly M. Hoffman – 2020 Professional Malpractice Law – Defendants

Mark G. Lavoie – 2020 Medical Malpractice law – Defendants

Paul F. Driscoll – 2020 Litigation – Real Estate

Robert W. Bower, Jr. – 2020 Workers' Compensation Law – Employers

Russell B. Pierce, Jr. – 2020 Product Liability Litigation – Defendants

NH&D Recognized by Chambers & Partners

Chambers & Partners USA 2019 has recognized NH&D as a Top Firm in the category Litigation: General Commercial. Additionally the following NH&D attorneys have received the **"Ranked Lawyer"** distinction in the publication:

Emily A. Bloch – Maine Litigation: Medical Malpractice & Insurance

Jonathan W. Brogan – Maine Litigation: Medical Malpractice & Insurance

Mark G. Lavoie – Maine Litigation: Medical Malpractice & Insurance

Russell B. Pierce – Maine Litigation: General Commercial

James D. Poliquin – Maine Litigation: General Commercial

Christopher C. Taintor – Maine Litigation: Medical Malpractice & Insurance

Immunity for Physicians Who Criticize Their Peers

By Christopher C. Taintor, Esq.

Section 2511 of the Maine Health Security Act grants immunity from suit to physicians (and some others) "for making any report or other information available to any . . . professional competence committee . . . committee pursuant to law." A "professional competence committee" is any committee which has "responsibility effectively to review the professional services rendered in [a healthcare] facility for the purpose of insuring quality of medical care of patients therein." The term can include a credentialing, peer review, quality assurance, or medical executive committee, as long as its purpose is at least in part to "maintain or improve . . . quality of care," "reduce morbidity and mortality," or "establish and enforce appropriate standards of professional qualification, competence, conduct or performance."

In *Strong v. Brakeley*, which was decided in 2016, the Maine Supreme Judicial Court ruled that for physicians, the immunity afforded by Section 2511 is absolute – that is, even if a doctor who is asked to comment on the competence or character of a peer maliciously lies in response to that inquiry, he cannot be held liable for damages. The Court reasoned that the immunity provision is intended to encourage the candid reporting which is essential to promoting quality in the healthcare profession, and that allowing liability upon proof of bad faith would discourage doctors from exposing incompetent or unprofessional colleagues.

In *Argerow v. Weisberg*, the Law Court took the immunity analysis one step further. In that case Argerow, a nurse practitioner, resigned from her position with Dr. Weisberg and accepted a job at Mercy Hospital. In a lawsuit against both Weisberg and Mercy, Argerow alleged that Weisberg, who had an incentive to retaliate against her because she had testified against him in a workers compensation hearing, then contacted Mercy and accused her of incompetence, which led the hospital to withdraw its job offer. The Superior Court dismissed the complaint, citing Section 2511 of the MHSA. Argerow appealed and the Law Court affirmed the dismissal.

For a majority of the Law Court, the case was a simple application of the rule it had established in *Strong v. Brakeley*. However, two justices dissented, arguing that the Court had gone too far. Most notably, the dissenters said that it was error for the Superior Court, and a majority of the Law Court, to treat any and all information presented to a hospital as falling within the scope of Section 2511. In their view, Argerow should have been allowed to conduct some limited discovery focused on the immunity defense before the Superior Court ruled on the motion. They argued that "[t]he Court's decision expand[ing] the scope of immunity to include *any* information supplied to any representative of a hospital by a physician" was wrong, because the statute was "intended to apply to information supplied by a *qualified* reporter to an *appropriate* authority during a *legitimate* peer review process." According to the dissenters, context is critical in deciding questions of immunity, and from the complaint alone the Court could not know "to whom Weisberg placed his call or report, . . . or whether that person could be properly deemed an appropriate 'board, authority, or committee' pursuant to Section 2511."

Argerow illustrates the difficult policy choices confronted by a court called upon to interpret and apply an immunity statute like Section 2511. There is no doubt that important public policies are served by encouraging doctors and representative of health care organizations to be candid about the shortcomings of their peers. Patients can be harmed if doctors and hospitals are afraid to divulge that information to organizations that are prepared to hire their former employees, because they might be sued for defamation or on some other theory. On the other hand, as the law has now developed, healthcare professionals like Argerow have no recourse for even the most savage, career-crippling falsehoods, shared behind closed doors and with malicious purpose, regardless of the existence of any formal credentialing, peer review, or quality assurance process.

NHD's Robert P. Cummins is Appointed to the Maine Commission on Indigent Legal Services

Last week (June 2019), the Legislature approved all eight of Governor Mills' nominations to the Maine Commission on Indigent Legal Services. The new Commissioners include: the Honorable Joshua A. Tardy of Newport; the Honorable Michael Carey of Lewiston; Robert C. LeBrasseur of Sabattus; Sarah A. Churchill of Windham; Mary J. Zmigrodski of Vassalboro; Robert P. Cummins of Portland; Robert W. Schneider Jr. of Wells; and the Honorable Roger J. Katz of Brunswick. Following legislation passed last year, the Commission was expanded from five to nine members and

includes two non-voting members to be nominated from lists of names submitted by the Maine State Bar Association and the Maine Association of Criminal Defense Lawyers. There is currently one seat on the Commission that remains to be filled.

Bob Cummins joined the firm of NHD as "Of Counsel" in 2015 and practices in the area of civil litigation.

WC Appellate Division Decision issued on June 7, 2019 – Termination Due to Cause from Post-Injury Employment

Termination Due to Cause from Post-Injury Employment

A recently issued Appellate Division case provides some clarity to the murky question as to what effect, if any, does termination due to cause have on the analysis of an injured worker's post-injury earning capacity.

In O'Leary v. Northern Maine Medical Center, the employee sustained a 2011 back injury. For a period following the injury, she was able to return to her regular job but her employment subsequently ended based on her termination for cause. After her termination, she found employment with a new employer earning less. She filed a Petition for Review seeking to establish entitlement to ongoing partial benefits given the reduced earnings. In the underlying decree, the ALJ made the factual finding that the work injury continued to result in the need for restrictions. However, he held that the work injury had not resulted in reduced earning capacity. In doing so, the ALJ held that while the earnings for the new employer did constitute prima facie evidence of her post-injury ability to earn, it was also appropriate to include the earnings from the job she lost in his analysis given that the termination was due to her own fault. Since she was earning consistent with her pre-injury average weekly wage prior to her termination, the ALJ concluded that the employee failed to demonstrate that the reduced earnings were caused by the injury. As such, her Petition for Review was denied.

On appeal, the Appellate Division affirmed. Although this would appear to be the perfect opportunity for the Appellate Division to address the ambiguity present in 39-A M.R.S. §214(1)(D) and (E), they chose not to do so. Rather, they simply confirmed that analysis of the ALJ contained no legal error and the post-injury/pre-termination earnings constituted competent evidence of earning capacity.

Please feel free to contact Lindsey M. Sands, Esq. at lsands@nhdlaw.com with any questions.

WC Appellate Division Decision issued on May 14, 2019 – Social Security Retirement Benefits and 14-Day Violation

Social Security Retirement Benefits and 14-Day Violation

The Appellate Division recently issued a notable decision in a case titled Butler v. City of Portland. This decision

addresses two issues: (1) the applicability of the Social Security retirement benefit authorized under the coordination of benefits provision in §221; and (2) whether a 14 day violation exists in the absence of an affirmative request for lost time benefits.

The first argument was that the City of Portland was not entitled to take the statutory offset for Social Security retirement benefits being paid because the City had never contributed to the Social Security system on the employee's behalf. Based on the plain language of the statute, the Administrative Law Judge had rejected this argument and allowed the City to take the offset. The Appellate Division affirmed this finding and expressly noted that while the legislature could have implemented a provision limiting the offset to the contributing employer, it chose not to do so.

The employee had also argued that a 14 day violation occurred when the City's insurer had failed to either increase his partial benefits to total or file a Notice of Controversy within 14 days of having actual knowledge that he was taken out of work in part due to his restrictions. The employee had been working part time in an accommodated position due to his work injury while receiving partial benefits based on his reduced wages. He ultimately left work when the City told him that they could no longer accommodate the restrictions. He took a disability retirement package and continued to receive partial benefits. The administrative law judge found that he did not seek an increase in incapacity benefits when he went out of work, neither did anyone on his behalf. Per these facts, the administrative law judge rejected the argument of a Rule 1.1 violation. On appeal, the employee did not dispute the factual findings but argued that the City's actual knowledge of his out of work status was sufficient to trigger Rule 1.1. The Appellate Division disagreed and affirmed the underlying decision. In doing so, they noted that Mr. Butler continued to have earning capacity and in fact found part-time work thereafter. "As a matter of law, he was not automatically entitled to benefits on account of the circumstances that ended his employment. To invoke the penalty provision in Me. WCB Rule, ch. 1, § 1, he had to make an affirmative claim for benefits." Of note, a footnote suggests a potentially different answer may have been reached if the employer had "knowledge 'from the circumstances of the injury' that is responsible to pay benefits. This could occur when an ALJ finds as fact an actual loss of earning capacity implied by the circumstances of the injury."

We continue to recommend that Notice of Controversies be filed anytime when there is knowledge that an employee loses time as a result of an injury; regardless of whether a verbal assertion of a claim is made. With that said, this case will clearly be helpful in defending allegations of a 14 day violations premised on what the employer knew or should have known.

Please feel free to contact Lindsey M. Sands, Esq. at lsands@nhdlaw.com with any questions.