Paying the Price of Judicial Activism under the Wage Payment and Collection Act

Elizabeth D. Harter
Bowles Rice McDavid Graff & Love

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Recommended Citation
Available at: https://researchrepository.wvu.edu/wvlr/vol96/iss3/8
PAYING THE PRICE OF JUDICIAL ACTIVISM UNDER THE WAGE PAYMENT AND COLLECTION ACT

ELIZABETH D. HARTER*

I. INTRODUCTION ................................................. 744

II. STATUTORY ANALYSIS OF THE WAGE PAYMENT AND COLLECTION ACT ........................................ 745
   A. General Terms and Provisions ............................ 745
   B. Compensation of Current Employees ...................... 747
      1. Time and Method of Payment of Wages ............. 747
      2. Assignment of Wages by Employees ............... 748
   C. Compensation after Resignation, Termination, Layoff or Labor Dispute ....................... 750
   D. Bonding Requirements .................................... 751
   E. Notification and Recordkeeping Requirements ........ 753
   F. Enforcement and Remedies ............................... 756
      1. Administrative Enforcement ......................... 756
      2. Employees’ Remedies .................................. 757

III. COURT INTERPRETATIONS OF THE WAGE PAYMENT AND COLLECTION ACT ........................................ 758
   A. Enforcement and Remedies ............................... 759
      1. New Rights under Farley v. Zapata Coal Corporation .................. 759
      2. Statute of Limitations ................................ 764
      3. Computation of Liquidated Damages ............... 765
   B. Personal Liability of Corporate Officers ............. 766

* B.A. 1987, Hillsdale College, Hillsdale, Michigan; J.D. 1990, Ohio State University; Associate, Bowles Rice McDavid Graff & Love, Charleston, West Virginia. The author gratefully acknowledges the guidance and constructive comment provided by Ricklin Brown, Partner, Bowles Rice McDavid Graff & Love.

743
C. Wage Assignments ........................................... 768
D. Relationship Between the Wage Payment and 
Collection Act and Federal Statutes ..................... 771
   1. The Labor Management Relations Act ............. 772
IV. Future Wage Payment and Collection Act Issues .. 776

I. INTRODUCTION

On its face, the West Virginia Wage Payment and Collection Act¹ is a straightforward statute governing the procedure of payment of employee wages. The Wage Act establishes certain time requirements and prohibits practices such as paying wages in other than “lawful money of the United States.”² However, as the rights of the American worker continue to be enhanced,³ state statutes like the Wage Payment and Collection Act are subjected to the expansive interpretation of activist courts.

Beginning with the 1981 decision in Farley v. Zapata Coal Corporation,⁴ the West Virginia Supreme Court of Appeals has consistently applied a liberal interpretation to the Wage Payment and Collection Act. As a result, the Wage Act has been transformed from a compilation of simple wage payment requirements to a collection of broad substantive rights. The Wage Act’s assigned role as “remedial

1. W. VA. CODE §§ 21-5-1 to -16 (1989 & Supp. 1993). Independent statutory provisions relating the use of polygraph tests by employers, and the discharge from employment of volunteer firemen and emergency service personnel also appears in the article generally referred to as the Wage Payment and Collection Act. See W. VA. CODE §§ 21-5-5(a) to -5(d) (1989); W. VA. CODE §§ 21-5-17 to -18 (1989). However, for purposes of this article, references to the “Wage Payment and Collection Act” or the “Wage Act” shall include §§ 21-5-1 to -16, and shall exclude the polygraph, firemen, and emergency service personnel provisions, unless otherwise noted.
legislation designed to protect working people and assist them in the collection of compensation wrongly withheld" has overrun the terms of the Wage Act itself.

Pursuant to this broad policy, employee advocates constantly pursue novel Wage Act theories both to avoid less advantageous state or federal laws and to take advantage of the Wage Act's broad remedial provisions, which include recovery of liquidated damages and attorneys' fees. This article examines both the terms of the Wage Payment and Collection Act and the trends in case law decided since Farley v. Zapata Coal Corp., analyzing the necessary limits of the Wage Act and discussing issues that may be presented to the Supreme Court of Appeals in the future.

II. STATUTORY ANALYSIS OF THE WAGE PAYMENT AND COLLECTION ACT

The Wage Payment and Collection Act regulates the following five main topics relating to the procedure of employee compensation: (1) compensation of current employees; (2) compensation of former employees; (3) bonding; (4) notification and recordkeeping; and (5) enforcement and remedies. In addition, certain general terms and provisions apply to all parts of the Wage Act. This section will identify these general terms and provisions, and then discuss each of the five main elements of the Wage Act.

A. General Terms and Provisions

The Wage Act generally applies to persons, firms, and corporations that employ employees. Although the Wage Act alternates using the terms "person, firm or corporation," "person, firm or corporation doing business in the state," and "employer," these terms consistently refer to entities that employ workers. Pursuant to this broad policy, employee advocates constantly pursue novel Wage Act theories both to avoid less advantageous state or federal laws and to take advantage of the Wage Act's broad remedial provisions, which include recovery of liquidated damages and attorneys' fees. This article examines both the terms of the Wage Payment and Collection Act and the trends in case law decided since Farley v. Zapata Coal Corp., analyzing the necessary limits of the Wage Act and discussing issues that may be presented to the Supreme Court of Appeals in the future.
describe the relationship between an employing person or entity and an employee, regardless of employer size or employee time of service. Therefore, the appropriate term to refer to persons and entities to which the Wage Act applies is "employer."

In addition, prime contractors may also become liable to employees other than their own under the Wage Act. For purposes of the statute, a prime contractor is a person, firm, or corporation that contracts with another for the performance of any work that the prime contracting person has undertaken to perform for another. Such a prime contractor may become liable for unpaid wages and fringe benefits of employees performing work under the contract, exclusive of liquidated damages. However, employees usually must exhaust all of their Wage Act remedies against their employer before claiming wages from a prime contractor. Moreover, an employer is liable to the prime contractor for any sums paid by the prime contractor to the employer's employees.

Finally, employers and/or employees are prohibited from avoiding or altering the terms of the Wage Act by contracts, agreements, personnel policies, or any other method. Any agreements between employers and employees in contravention of or setting aside the requirements of the Wage Act are null and void.

---

7. See generally W. Va. Code §§ 21-5-1(a), (b), (m), -3 to -5, -6, -8 to -12 (1989).
9. Id.
10. Id.
11. However, if the prime contractor has failed to notify the State Commissioner of Labor of the operative contract or subcontract as required by the Wage Act, then the employees need not exhaust all remedies against their employer. W. Va. Code §§ 21-5-7, -16 (1989).
B. Compensation of Current Employees

As set forth below, the Wage Act regulates compensation of current employees with specifications regarding time and method of payment of wages, limitations on the validity of assignment of wages by employees, and prohibitions of certain employer practices.

1. Time and Method of Payment of Wages

With the exception of railroad companies, most employers must pay their employees wages due, less authorized deductions and authorized wage assignments, at least once every two weeks. For purposes of this provision of the Wage Act, the term “wages” means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, price, commission, or other basis of calculation.

Payment of employees’ wages must be made by one of the following methods: (1) lawful money of the United States; (2) cash order, which may include checks or money orders on banks convenient to the place of employment where suitable arrangements have been made for the cashing of such check by employees for the full amount of wages; or (3) any method of depositing immediately available funds in an employee’s demand or time account in a bank, credit union, or savings and loan institution that may be agreed upon in writing between the employee and the employer. In addition, if an employee is absent from work and does not receive his wages through a designated representative, he is entitled to be paid at any time thereafter upon demand.

14. “Wages due” includes at least all wages earned up to and including the fifth day immediately preceding the regular payday. W. VA. CODE § 21-5-1(i) (1989).
15. W. VA. CODE § 21-5-3 (1989). However, an employer may, due to peculiar conditions under which it must operate and upon a compelling showing, seek authority from the commissioner to establish regular payday less frequently than every two weeks. 42 W. VA. C.S.R. §§ 5-10.1 to -10.4 (1990).
17. W. VA. CODE § 21-5-3 (1989). Such agreement must specifically identify the employee, the financial institution, the type of account and the account number. Id.
upon the proper paymaster at the place where such wages are usually paid and where the next pay is due.18

Railroad companies19 must pay their employees on or before the first day of each month for wages earned during the first half of the preceding month (ending on the fifteenth).20 Wages earned during the last half of a calendar month must be paid on or before the fifteenth day of the following month.21 In addition, railroad companies are permitted to pay wages by mail, so long as the payment is mailed in time to reach the post office of the employee by the applicable first or fifteenth day of the month.22

2. Assignment of Wages by Employees

The Wage Act specifically preserves the common law right of employees to assign their right to payment of wages.23 Wage assignments generally authorize an employer to pay some portion of an employee’s wages to a third party or to withhold some portion of the wages. In order to be valid, wage assignments must be made in accordance with the Wage Act.24

In contrast, deductions from employee wages are not subject to any procedural requirements. Deductions include amounts required by law to be withheld, and amounts authorized for union or club dues, pension plans, payroll savings plans, credit unions, charities, and hospitalization and medical insurance.25 Therefore, any amount to be withheld from an employee’s wages that is not a deduction must be authorized by a valid assignment.

The statutory requirements for wage assignments26 are often over-

18. Id.
21. Id.
22. Id.
24. Id.
25. W. VA. CODE §§ 21-5-1(g) to -3 (1989).
26. All provision establishing technical requirements for assignments also apply to
looked, but compliance is essential for the validity of such an assignment. Wage assignments must be in writing and acknowledged before a notary public, and the employer's written acceptance of the assignment must be endorsed on the face of the assignment. In addition, the assignment must specify the total amount due and collectible by virtue of the assignment, and must specifically state the requirement that three-fourths of the periodical earnings or wages of the assignor is at all times exempt from such assignment. However, no wage assignment is valid for a period exceeding one year from the date of such assignment. To assist with the creation of assignments, a wage assignment form has been promulgated by the division of labor and is set forth in the applicable legislative rules.

3. Prohibitions on Employer Compensation Practices

In addition to governing compensation to and assignments by employees, the Wage Act prohibits certain practices relating to alternative employee compensation. For example, employers are prohibited from requiring their employees to purchase goods or supplies in lieu of payment of wages. Violating this provision of the Act is a misdemeanor.

Moreover, if an employer sells goods and supplies in lieu of payment of wages at prices higher than the reasonable market value, the employer is civilly liable to such employees for double the amount in excess of the reasonable value of the charges made for such goods or supplies.

27. See infra part II.B.2.
29. Id.
30. Id.
33. Id.
34. Id.
C. Compensation after Resignation, Termination, Layoff or Labor Dispute

The Wage Act specifies time limits for compensation when employees resign or cease employment because of termination, layoff, or a labor dispute. When an employer discharges an employee, the employer must pay the employee's wages in full within seventy-two hours. On the other hand, if an employee resigns, the employer must pay the employee's wages no later than the next regular payday, either through the regular pay channels or by mail. However, if a resigning employee provides at least one pay period's notice of his intention to quit, then the employer must pay all wages earning by the employee at the time of resignation.

If the work of any employee is suspended as a result of a labor dispute, or when an employee for any reason whatsoever is laid off, the employer must pay in full all wages earned at the time of suspension or layoff no later than the next regular payday, either through regular pay channels or by mail. In addition, if requested by the employee at least twenty-four hours before the last hour of employment, all accrued benefits must accompany the payment of wages.

For purposes of the Wage Act provision realating to compensation upon resignation, termination, layoff, or labor dispute, the term "wages" has a more expansive meaning than as used in the provision relating to current employee compensation. In that section, the term "wages" includes not only compensation for labor or services, but also accrued fringe benefits capable of calculation and payable directly to an employee. "Fringe benefits" means any benefit provided to employees or which are required by law, including regular vacation, graduated vacation, floating vacation, holidays, sick leave, personal leave,
production incentive bonuses, sickness and accident benefits, and benefits relating to medical and pension coverage.41

D. Bonding Requirements

In 1981, the West Virginia legislature amended the Wage Act to include requirements that certain employers post a bond with the Commissioner42 for employee wages and fringe benefits.43 The bonding requirement applies to every employer engaged in or about to engage in construction work, or the severance, production, or transportation (excluding railroads and water transporters) of minerals.44 However, those entities with a history of doing business in the state, meaning that the entity has been actively and actually engaged in such work for at least five consecutive years preceding the posting of the bond, are excluded from the bonding requirement.45

The required bond for wages and benefits must be either a surety bond, collateral bond, escrow bond, or letter of credit, as those terms are defined in the governing legislative rules.46 The condition of the

---

42. The term “Commissioner” refers to the State Commissioner of Labor of his designee, who is charged with the enforcement and administration of the Wage Act. W. VA. CODE § 21-5-1(d), -11(a) (1989). The Commissioner is also charged with the control and management of the State Division of Labor.
44. The term “minerals” means clay, coal, flagstone, gravel, limestone, manganese, sand, sandstone, shale, iron ore and any other metallurgical ore. W. VA. CODE § 21-5-1(k) (1989).
46. 42 W. VA. C.S.R. § 5-2.5 (1990). The legislative rules define “bond” as a legal instrument binding the maker to pay a legal obligation for money. Id. A “surety bond” means a bond whereby a third party insures or guarantees that the wages of an employer shall be paid to employees when such wages are due, and that if such employer fails or defaults in the payments of such wages when they are, then the insuring party will pay such wages when due and shall seek redress from the defaulting employer. 42 W. VA. C.S.R. § 5-2.5(a) (1990). A “collateral bond” means the pledge and/or deposit of cash, certificates of deposit or other such certificates or securities owned by an employer, upon approval by the commissioner and the State Treasurer. The collateral of personal property may also include cash or collateral securities or certificates as follows: bonds of the United States or its possessions, or of the federal land bank or the homeowner's loan corporation;
bond must be that the employer pay the wages and fringe benefits of its employees when due. The amount of the bond must be the total of the employer's gross payroll for four weeks at full capacity or production, plus fifteen percent of that total.\textsuperscript{47}

According to the Wage Act, the Commissioner "shall waive the posting of any bond upon his determination that an employer is of sufficient financial responsibility to pay wages and fringe benefits."\textsuperscript{48} Although this waiver provision appears to be mandatory, legislative rules state that "[i]n no event will the Commissioner be compelled to issue a waiver."\textsuperscript{49} The Commissioner may also waive the bonding requirements for the wages and fringe benefits of owners, partners or corporate officers.\textsuperscript{50}

\textsuperscript{47} The amount of such bond may increase or decrease as the employer's payroll increases or decreases, however, the amount of the bond may not be decreased absent approval by the Commissioner and a determination that there are no outstanding claims against the bond. W. Va. Code § 21-5-14 (Supp. 1993).

\textsuperscript{48} W. Va. Code § 21-5-14(b) (Supp. 1993). The legislative rules specify certain financial documentation necessary to receive a waiver and provide that waivers are granted for a period of six months. 42 W. Va. C.S.R § 5-16.4(a), (c) (1990).


\textsuperscript{50} 42 W. Va. C.S.R. § 5-16.4(b) (1990).
A Wage Act bond may be terminated, with the approval of the Commissioner, after the employer submits a verified statement to the Commissioner that one of the following has occurred: (1) the employer has ceased doing business and all wages and fringe benefits have been paid; or (2) the employer has been doing business in the state for at least five consecutive years and has paid all wages and fringe benefits.  

The Wage Act’s bond provisions also incorporate criminal penalties. For example, any employer who fails to provide and maintain an adequate bond is guilty of a misdemeanor and subject to a fine of not less than $250 nor more than $5,000, and/or imprisonment for not more than one month. In addition, any entity that disposes of or relocates assets with the intent to deprive employees of their wages and fringe benefits is guilty of a felony and subject to a fine of not less than $5,000 nor more than $30,000, and/or imprisonment for not less than one nor more than three years. Finally, any person who threatens any officer, agent, or employee of the Division of Labor or other person authorized to assist the Commissioner in performing his duties under the bond provisions, or interferes with the performance of such duties, is guilty of a felony and subject to a fine of not less than $1,000 nor more than $3,000 and/or imprisonment for not less than one nor more than three years.

E. Notification and Recordkeeping Requirements

The Wage Act creates a number of notification and recordkeeping requirements relating to payment of wages, bonding requirements, and contracting. With regard to payment of wages, every employer must perform the following administrative functions:

(1) Notify his employees in writing, at the time of hiring of the rate of pay, and of the day, hour, and place of payment.

(2) Notify his employees in writing or through a posted notice of any changes in the arrangements specified in (1) at least one full pay period prior to the time of such changes.\textsuperscript{56}

(3) Notify employees in writing or through a posted notice of employment practices and policies with regard to vacation pay, sick leave, “and comparable matters.”\textsuperscript{57}

(4) Furnish each employee with an itemized statement of deductions made from his wages for each pay period such deductions are made.\textsuperscript{58}

(5) Keep posted in a place accessible to his employees an abstract of the Wage Act article furnished by the Commissioner.\textsuperscript{59}

(6) Maintain payroll and employment records.\textsuperscript{60}

With regard to employers to which the statutory requirements regarding bonding apply, the Wage Act specifies that such employers must post the following items in a place accessible to their employees:


\textsuperscript{57} W. VA. CODE § 21-5-9(3) (1989).

\textsuperscript{58} W. VA. CODE § 21-5-9(4) (1989); 42 W. VA. C.S.R. § 5-14.3 (1990).


\textsuperscript{60} Such records with respect to each and every employee must contain full name, identifying symbol or number if such is used in place of name, social security number, home address, date of birth if under eighteen, occupation or job classification, rate of regular pay and rate of overtime pay, hours worked each workday and total hours worked each workweek, and method of calculating the percent of fringe benefits owed to an employee at any given time. 42 W. VA. C.S.R. § 5-4.1 (1990). In addition, the records must be kept safe and accessible either at the place of employment or at one or more established central recordkeeping offices where such records are customarily maintained. All records of the employer shall be open to the division of labor for inspection and reproduction to insure compliance with the Act. W. VA. CODE § 21-5-9(5) (1989); 42 W. VA. C.S.R. § 5-4, -7 (1990). Records maintained in a central recordkeeping location must be made available within seventy-two hours of written notice from the Commissioner. 42 W. VA. C.S.R. § 5-7.1 (1990). However, an employer, due to peculiar conditions under which it must operate, may petition for authority to maintain records in a manner other than as required by the statute and legislative rule. \textit{Id.}
(1) A copy of the bond or other evidence of surety specifying the number of employees covered, or notification that the posting of a bond has been waived by the Commissioner.\(^6\)

(2) A copy of the notice prescribed by the Commissioner regarding the duties of employers under this section.\(^6\)

In addition, during the first two years that an employer is doing business in the state in construction or mining work, the employer must file verified quarterly reports of the number of employees with the Division of Labor, or a copy of the quarterly report filed with the bureau of employment programs showing the accurate number of employees.\(^6\) The Commissioner may waive this reporting requirement if the employer "is of sufficient stability that the reporting is unnecessary."\(^6\)

Finally, specific notice requirements apply to any person, firm, or corporation that contracts or subcontracts with an employer where such contract or subcontract contemplates either construction work or the severance, production, or transportation of minerals, or any combination of such activities.\(^6\) Within ten days following the execution of such a contract or subcontract, the prime contractor must notify the Commissioner, by certified mail, of the contract or subcontract.\(^6\) Such notification is not necessary if the prime contractor determines that the Commissioner has already obtained such information from another state agency.\(^6\) However, a prime contractor’s failure to give

---

62. W. VA. CODE § 21-5-14(f)(2) (Supp. 1993). Although the statute contemplates a notice, the Division of Labor has not prescribed the form of such a notice.
63. W. VA. CODE § 21-5-14(f)(2) (Supp. 1993). This report must be filed on or before the first day of February, May, August, and November of each calendar year. Id.
64. Id.
65. W. VA. CODE § 21-5-16 (1989). Railroads and water transporters are excluded from this provision. Id.
66. W. VA. CODE § 21-5-16 (1989); 42 W. VA. C.S.R. § 5-16.7 (1990). Such notification must include the employer’s name, the location of the job site, and the employer’s principal business location. Id. The prime contractor must also continue to identify specific contracts and subcontracts at each job site on behalf of the principal contract. 42 W. VA. C.S.R. § 5-16.7 (1990).
proper notice is a misdemeanor subject to a fine of not less than $500 and not more than $5,000.68

F. Enforcement and Remedies

The enforcement scheme created by the Wage Act is a combination of administrative and private remedies. Generally, the Commissioner is empowered to enforce the entire Wage Act and employees have certain private causes of action to recover damages.

1. Administrative Enforcement

As noted above, the Wage Act charges the Commissioner with the administration and enforcement of the Wage Act.69 Accordingly, the Commissioner has broad investigative powers,70 as well as the power to examine witnesses under oath, issue subpoenas, compel the attendance of witnesses and the production of documents, and to take depositions and affidavits in any proceeding before the Commissioner.71 In addition, the Commissioner may bring a legal action to collect a claim under the Wage Act on behalf of an employee.72

The Commissioner must issue a cease and desist order at any time that it is determined that an employer has not provided or maintained an adequate bond as required by the Wage Act.73 Such an order must provide that the offending employer either post an adequate bond or

68. Id.


70. The applicable legislative rules contemplate periodic inspections to ensure compliance with all provisions of the Act. 42 W. VA. C.S.R. §§ 5-3.1(d) to -3.2 (1990).


72. W. VA. CODE § 21-5-12(a) (1989); 42 W. VA. C.S.R. §§ 5-3.1 to -15.1 (1990). In legal actions brought by the commissioner, the commissioner is relieved from any filing fees or any other costs or fees of any nature in connection with such action, and need not file bond or other security of any nature. W. VA. CODE § 21-5-12(b) (1989). In addition, attorneys' fees may be assessed against the defendant in such actions. Id.

cease further operations in the state within a period of not less than five nor more than fourteen days. Any employer that continues to engage in construction or mining work without an approved bond after such period is guilty of a felony and subject to a fine of not less than $5,000 or more than $30,000, and/or imprisonment for not less than one or more than three years.

2. Employees' Remedies

Two Wage Act provisions govern the remedies available to employees who are not paid wages due in a timely fashion as required by the Wage Act. As discussed below, different remedies are available to current employees than those available to former employees. Employees may pursue either of these remedies by bringing "any legal action necessary to collect a claim under this article."

First, current employees are entitled to recover wages due, plus legal interest, if not compensated at the intervals of time required by the Wage Act. This provision applies not only to wages but also to payment of fringe benefits when due and to timely redemption of cash orders.

On the other hand, employees who resign or cease employment because of termination, layoff, or labor dispute are entitled to recover not only wages due (including fringe benefits) but also liquidated damages. Liquidated damages are calculated by multiplying the

74. Id.
75. W. VA. CODE § 21-5-15(c) (1989). An employer against whom such a cease and desist order is issued may seek judicial review of the order by filing a verified petition taking an appeal within fifteen days from the service of the order. Such a petition may be filed in the circuit court of the county where service of the order was completed or in the Circuit Court of Kanawha County. In order to be perfected, an appeal must be accompanied by the filing with the circuit court of a bond or other security in the amount of not less than the amount of the bond otherwise required to be posted under the Act. Unless the appeal is perfected within the fifteen-day period, the cease and desist order is final. Id.
79. Id.
number of days the employer is in default, up to a maximum of thirty, by the amount of wages at the employee’s regular rate. In other words, if an employee who earned $34 a day was owed $300 in wages upon his resignation, and his employer did not pay him the $300 until ten days after the regular payday following the resignation, then the employee could recover ten times the daily wage rate, or $340, in liquidated damages.

The Wage Act states that employees have the same lien and other rights and remedies for the protection and enforcement of liquidated damages as they would have been entitled had they rendered services for the liquidated damages.81 Furthermore, for purposes of liquidated damages, failure to pay wages is not deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer “if he is adjudicated bankrupt upon such petition.”82

In addition to the remedies set forth above, employees are entitled to recover attorneys’ fees.83 As a result, Wage Act claims are attractive to some attorneys representing employees, particularly when a large group of employees has not been properly paid upon termination. However, these generous remedies are not the only incentive for bringing Wage Act claims. As discussed in the following section, the West Virginia Supreme Court of Appeals has also enhanced the Act’s remedial provisions in order to prevent employees from being unduly limited by the plain meaning of the Wage Act.

III. COURT INTERPRETATIONS OF THE WAGE PAYMENT AND COLLECTION ACT

The predecessor provisions to the modern Wage Act were enacted in the late nineteenth century, but amendments since 1975 have created most of the Wage Act’s current provisions.84 Thus, the Wage Act in

81. Id.
82. Id.
83. W. VA. CODE § 21-5-12(b) (1989).
its present form is less than twenty years old. Moreover, prior to the
1981 decision in *Farley v. Zapata Coal Corp.*, very few reported
court decisions interpreted the Wage Act. Since 1981, however, the
Wage Act has become a common element in labor and employment
cases as a result of the generous interpretation given to many of its
provisions by the courts.

Courts have focused on the following four main issues relating to
the Wage Act: (1) enforcement and remedies; (2) personal liability of
corporate officers; (3) wage assignments; and (4) relationship between
the Wage Act and federal statutes. This section will analyze the man-
ner in which courts have construed the Wage Act by discussing the
cases in the context of these four issues.

A. *Enforcement and Remedies*

1. New Rights under *Farley v. Zapata Coal Corporation*

The enforcement and remedies provisions of the Act underwent a
substantial transformation in the decision of the West Virginia Supreme
Court of Appeals in *Farley v. Zapata Coal Corp.* As a result, the
Wage Act is not merely an employment statute but is also an impos-
ing threat of liability to companies acting as employers or conducting
business transactions with employers, particularly in the coal industry.
In order to enhance the ability of employees to recover unpaid or
improperly paid wages, the *Farley* court disregarded statutory language
in a manner that still affects the approach taken to the Wage Act by
courts and counsel.

The plaintiffs in the *Farley* case were employees of M & T Coal
Corporation (M & T), which operated a mine as a general contractor

---

Va. Laws c. 147. Finally, the bonding requirements were added in 1981. 1981 W. Va.
Laws c. 212. Minor revisions have been made since that time. 1991 W. Va. Acts c. 16;
Acts c. 113.

86. *Id.*
for Zapata Coal Corporation (Zapata), the lessee of the coal rights.\textsuperscript{87} When M & T ceased operations, it failed to pay wages and compensation for accrued vacation and sick pay to the plaintiffs. The Farley plaintiffs filed mechanics' liens\textsuperscript{88} against both M & T and Zapata, claiming entitlement to actual wages, accrued vacation and sick pay, and liquidated damages under the Act.\textsuperscript{89} Although this action was brought to enforce the mechanics' liens, the plaintiffs also sought to recover attorneys' fees pursuant to the Wage Act.

The circuit court held that the plaintiffs could not enforce their mechanics' liens for accrued vacation pay or sick pay or liquidated damages against Zapata,\textsuperscript{90} and that they were not entitled to an award of attorneys' fees.\textsuperscript{91} However, Justice McGraw, for the West Virginia Supreme Court of Appeals, reversed these holdings in an opinion that changed the face of both the Wage Act and the mechanics' lien statute. As Justice Miller commented in his dissenting opinion in Farley:

The Legislature may be slightly astounded by the way in which the majority has legislated new meaning into W. Va. Code § 25-5-1, \textit{et seq.} Despite the plain language of this statute confining its ambit to the employer-employee relationship, the majority has now opened it so wide that anyone may be sued if he has any connection with the wage earner's employer.\textsuperscript{92}

The Farley court's reasoning revolved around three basic issues: (1) whether a lien for accrued sick or vacation pay can be enforced under the mechanics' lien statute; (2) whether the plaintiffs' claim for liquidated damages could be enforced against Zapata; and (3) whether

\textsuperscript{87} Id.
\textsuperscript{88} Chapter 38, Article 2 of the West Virginia Code provides for numerous different types of liens that are generally referred to as mechanics' liens. W. Va. Code §§ 38-2-1 to -39 (1985 & Supp. 1993). However, the discussion of such liens in this article shall be limited to the lien created for "perfecting lien for work or labor against corporation." W. Va. Code § 31-2-31. Thus, subsequent references to the "mechanics' lien statute" shall specifically refer to W. Va. Code § 31-2-31.
\textsuperscript{89} 281 S.E.2d 238.
\textsuperscript{90} Zapata had conceded that the plaintiffs were entitled to enforce their liens for the four weeks of regular wages due at the time M & T ceased operations pursuant to W. Va. Code § 38-2-31, and the circuit court ruled accordingly. \textit{Id.} at 241.
\textsuperscript{91} Id.
\textsuperscript{92} \textit{Id.} at 246 (Miller, J., dissenting).
plaintiffs were entitled to recover attorneys’ fees pursuant to the Act. Underlying the court’s conclusions regarding all three of these issues, however, is its holding that the Wage Act and the mechanics’ lien statute both relate to employee liens to secure compensation and therefore should be read in pari materia. As Justice Miller explained in the dissenting opinion, the serious flaw in this reasoning is that the two statutes relate to distinctly different subjects. As a result, the entire majority opinion is nothing more than an exercise in judicial legislation.

First, the Farley court considered the issue of whether a lien for accrued sick leave or vacation pay can be enforced under the mechanics’ lien statute to be governed by the definition of wages set forth in other statutes and regulations. In other words, the court observed that fringe benefits are deemed wages under both the Wage Act, the unemployment compensation laws, and the federal bankruptcy law, and thus concluded that all fringe benefits must necessarily be considered part of the “value of such work or labor” to be paid under the mechanics’ lien statute.

Second, the court transplanted the liquidated damages penalty from the Wage Act to the mechanics’ lien statute. Although the liquidated damages provision of the Wage Act is strictly limited to the employer-employee relationship, the majority invented the following legal fiction applicable to liquidated damages:

The effect of W. VA. CODE § 21-5-4(e) is to create by 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 the work performed.

Thus, the majority ignored the penalty aspect of the liquidated damages provision and concluded that such damages are merely additional

93. Id. at 243.
94. Id. at 245 (Miller, J., dissenting).
95. Id. at 241-42. It should be noted that Justice Miller concurred with this portion of the majority’s holding. Id. at 244-45 (Miller, J., dissenting).
96. Id. at 242-43.
wages. Moreover, as Justice Miller observed, the majority imposed a penalty meant to induce employers to pay wages on third-party entities that have no control over the employer’s actions.\footnote{Id. at 245-46.}

In addition, the majority fuses the Wage Act and the mechanics’ lien statute by concluding that the latter “is properly used in aid of the enforcement of a lien for liquidated damages granted under” the Wage Act.\footnote{Id. at 243.} Incredibly, the enforcement procedures set forth in the Wage Act were deemed by the Farley court to include the mechanics’ lien statute without any action by the legislature.

Finally, the majority transformed the Farley plaintiffs’ cause of action from one pursuant to the mechanics’ lien statute to one pursuant to the Wage Act in order to award attorneys’ fees.\footnote{Id. at 246 (Miller, J., dissenting).} The Farley court determined that plaintiffs, who were enforcing mechanics’ liens, were entitled to recover attorneys’ fees under the Wage Act despite the Wage Act’s specific language that such fees may be recovered in “any action brought under this article.”\footnote{W. VA. CODE § 21-5-12(b) (1989) (emphasis added); Farley, 281 S.E.2d at 243-44.}

In addition to the specific judicial legislation promulgated by way of the Farley decision, the legacy of the case has been to promote a theme that the Wage Act’s terms may be disregarded when necessary and with impunity to justify the desired goal. As expressed by Justice McGraw in a portion of the Farley case that is commonly cited, that goal is simply stated: “[b]oth the Wage Payment and Collection Act and our mechanics’ lien statutes are designed to protect the laborer and act as an aid in the collection of compensation wrongfully withheld.”\footnote{Farley, 281 S.E.2d at 244.} While the goal of assuring just compensation for employees has considerable merit, the means to reach that goal that are promoted by the Farley case are to disregard statutory provisions when necessary. While no subsequent cases decided under the Wage Act have duplicated Farley’s radical departure from statutory language, that case’s liberal interpretation theme still pervades the Act.

\footnotesize{97. Id. at 245-46.  
98. Id. at 243.  
99. Id. at 246 (Miller, J., dissenting).  
100. W. VA. CODE § 21-5-12(b) (1989) (emphasis added); Farley, 281 S.E.2d at 243-44.  
101. Farley, 281 S.E.2d at 244.}
Recently, the West Virginia Supreme Court of Appeals declined an opportunity to modify the Farley holding in Amick v. C & T Development Co.\(^{102}\) In a similar case to Farley, the Amick court, per curiam, reaffirmed both the judicially-created interrelationship between the Wage Act and the mechanics’ lien statute and the susceptibility of third parties to the liability created for employees under the Wage Act.

The Amick plaintiffs were employees of C & T Development Company (C & T), which had entered into a contract with Elk River Sewell Coal Company (Elk River Sewell) to mine coal on property owned by Elk River Sewell.\(^{103}\) After C & T failed to pay its employees, the plaintiffs filed mechanics’ liens and pursued a civil action against both C & T and Elk River Sewell.

Affirming the decision of the circuit court, the Amick opinion mirrors Farley. Based on Farley, the Amick court held that plaintiffs could recover liquidated damages and that they were entitled to recover attorneys’ fees under the Wage Act.\(^{104}\) However, the Amick court also interpreted a portion of the liquidated damages provisions on which the court had not yet commented.

As noted above,\(^{105}\) the Act states that for purposes of liquidated damages, failures to pay wages shall not be deemed to continue after the date of the filing of a petition in bankruptcy with respect to the employer if he is adjudicated bankrupt upon such petition.\(^{106}\) In Amick, Elk River Sewell contended that the bankruptcy petition of C & T mitigated liquidated damages against Elk River Sewell pursuant to this provision. However, the Amick court concluded that the “plain meaning” of the statute is that this limitation is to be applied only to

\(^{103}\) Id. at 74-75. The Amick court also noted that pursuant to the contract, Elk River Sewell retained the right to designate the areas to be mined as well as the tonnages to be supplied, and retained the right to specify the mining plans. Id. However, the court did not rely on these facts in its decision.
\(^{104}\) Id. at 75-76.
\(^{105}\) See supra part III.A.1.
\(^{106}\) W. VA. CODE § 21-5-4(e) (1989).
the employer, thus obligating Elk River Sewell for the post-filing liquidated damages brought about by C & T. 107

The problem with this new enhancement of the Farley rights is that the Amick court ignored the fact that the cause of action against the third party is derivative of the cause of action against the employer. 108 In other words, under Farley, the Wage Act creates the substance of the employees’ "lien," and the mechanics’ lien is merely an aid to enforcement. 109 The Amick court’s conclusion that the bankruptcy limitation does not apply when the "lien" is enforced against third parties is not only an extension of the statutes but also beyond the Farley doctrine itself. As a result, if an employer files a bankruptcy petition only two days after failing to pay employee wages, then the employer is only liable for two days of liquidated damages. However, an entity related to the employer such that the mechanics’ lien statute applies could be liable, under Farley and Amick, for a full thirty days of liquidated damages if the employees remain unpaid. Non-employer coal companies like Elk River Sewell and Zapata have been rendered virtually helpless to avoid this result.

2. Statute of Limitations

Although employees pursuing a Farley cause of action must conform to the ninety-day statute of limitations for a mechanics’ lien, 110 employees pursuing causes of action pursuant to the actual terms of the Wage Act need only meet a five-year statute of limitations, regardless of the provision of the Wage Act on which the cause of action is based. 111 The West Virginia Supreme Court of Appeals has held that

107. Amick, 416 S.E.2d at 77.
108. Farley, 281 S.E.2d at 242-43 (recognizing that the ability to pursue a claim against a third-party contractor for liquidated damages that should have been paid by the employer is the same as pursuing a claim for wages that should have been paid by the employer).
109. Id.
110. See Amick, 416 S.E.2d at 77 (holding that an employee that did not file a mechanics’ lien in conformity with the ninety-day requirements set forth in W. VA. CODE § 38-2-32 could not recover liquidated damages against Elk River Sewell).
111. Goodwin v. Willard, 406 S.E.2d 752 (W. Va. 1991) (rejecting argument that one-year statute of limitations for civil penalty applied to cause of action under invalid assign-
the Wage Act creates a contract with employees for proper payment of wages, therefore, the five-year statute of limitations applicable to actions on contracts is appropriate. The Supreme Court of Appeals has never addressed the inherent contradiction between this view and the doctrine of employment at-will, which as of this writing is still viable law in West Virginia.

3. Computation of Liquidated Damages

One somewhat bright spot for employers in the cases interpreting the Wage Act is Cooper v. Glavas Contracting Co., which places a reasonable limitation on the computation of liquidated damages. In Cooper, the employer had withheld union dues from its employees wages in an amount dictated by the applicable collective bargaining agreement. However, the employer never sent these dues to the union.

The Cooper plaintiffs brought an action pursuant to the Wage Act to recover the wrongfully withheld dues as well as liquidated damages and attorneys’ fees. The plaintiffs contended that liquidated damages were to be calculated by multiplying their daily wage rate by the

---

112. See supra note 111.
115. Id. at 823.
116. Id. The one confusing aspect of this case is the court’s failure to explain whether the employees were current or former employees of the employer. As explained above, liquidated damages are available only when an employer fails to compensate employees timely upon termination, resignation, layoff or in the event of a labor dispute. W. VA. CODE § 21-5-4 (1989). However, if the employer merely violated the Act’s provision relating to payment of present employees in a timely manner, the employer should have prevailed on an argument that liquidated damages are not available to compensate violations of that portion of the Act. W. VA. CODE § 21-5-3 (1989).
thirty days. However, Justice Brotherton writing for the Cooper court upheld the decision of the circuit court, which had awarded the daily rate of union dues withheld by thirty days. The court explained its holding as follows: "The employees' reading of the statute is untenable. Were we to adopt it, it would prescribe the same punishment for an employer who negligently left a penny off each of his employees' paychecks and an employer who failed to pay his employees at all." 117

The Cooper court's holding recognizes that the Wage Act provides that if an employee is not paid "wages," the employer is liable for an extra thirty days of "wages" at the regular rate. In Cooper, the court acknowledged that the broad definition of wages included union dues. But because the unpaid "wages" were the union dues, the appropriate multiplier to calculate liquidated damages for which the employer was liable under the statute was the union dues withholding rate, not the full wage rate. 118 As noted above, this holding recognizes that under the Wage Act, liquidated damages bear some proportional relationship to the unpaid wages.

B. Personal Liability of Corporate Officers

Following in the footsteps of the Farley decision, the supreme court of appeals took a second major step in promoting an expansive interpretation of the Act in Mullins v. Venable. 119 Justice McGraw, writing once again for the court, seized this opportunity to conclude that an officer in the management of a corporation who knowingly permits the corporation to violate the provision of the Wage Act may be held personally liable for unpaid wages, fringe benefits, and liquidated damages. 120

The plaintiffs in the Mullins case were former employees of a corporation operating an underground coal mine. 121 These plaintiffs

117. Cooper, 354 S.E.2d at 824.
118. Id.; see also W. Va. CODE § 21-5-4(e) (1989).
119. 297 S.E.2d 866 (W. Va. 1982).
120. Id.
121. Id. at 868.
brought an action against Venable, the president of the employer-corporation, to recover wages and fringe benefits that remained unpaid after the corporation ceased operations.\textsuperscript{122} The circuit court granted summary judgment in favor of Venable on the basis that the Wage Act does not impose personal liability on corporate officers.

Venable contended, and the \textit{Mullins} court acknowledged, that the Wage Act does not explicitly impose liability on corporate officers. However, the court concluded that the West Virginia legislature “intended to impose liability on officers . . . who knowingly permit their corporation to act in violation of the provisions of the Act.”\textsuperscript{123} The \textit{Mullins} court relied on the Wage Act’s definition of “officer,” which includes “officers and agents in the management of a corporation or firm, who knowingly permit the corporation or firm to violate [the Act].”\textsuperscript{124} The court determined that because the term “officer” is also included in the Wage Act’s definition of “firm,” and because the term “firm” is used throughout the Wage Act to designate a liable party, then personal liability for damages under the Wage Act is necessarily extended to corporate officers.\textsuperscript{125}

Adding to the holding in the case, the \textit{Mullins} court observed that the Wage Act, in effect, “creates quasi-public officials who owe a duty to the public, as well as the corporation’s employees, to take care that [the Act] is enforced.”\textsuperscript{126} However, the court did not comment on the obvious contradiction between this “quasi-public officials” notion and the duty of loyalty and other fiduciary duties imposed by law on corporate officers and directors. Moreover, the court rejected the arguments that the employees should be required to exhaust their remedies against either the corporate employer or a third-party “prime contractor” prior to bringing an action against a corporate officer.\textsuperscript{127}

\textsuperscript{122} \textit{Id.} at 866-67.
\textsuperscript{123} \textit{Id.} at 869.
\textsuperscript{124} W. VA. CODE § 21-5-1(h) (1989).
\textsuperscript{125} \textit{Id.} The Act defines “firm” as including “any partnership, association, joint-stock company, trust, division of a corporation, the administrator or executor or estate of a deceased individual, or the receiver, trustee, or successor of any of the same, or officer thereof, employing any person.” W. VA. CODE § 21-5-1(a) (1989).
\textsuperscript{126} \textit{Mullins}, 297 S.E.2d at 871.
\textsuperscript{127} \textit{Id.} at 870-72.
In a subsequent decision applying the principle of individual liability as articulated in the *Mullins* case, the supreme court of appeals demonstrated its willingness to extend individual liability not only to corporate officers but also to individuals in an agency relationship with the employing entity. In *Goodwin v. Willard*, the court reversed and remanded the decision of the circuit court, which had granted summary judgment in favor of a shareholder of a coal mining business. The plaintiffs, former employees of the corporation, contended that the shareholder was liable for wages and fringe benefits.

The *Goodwin* court observed that the Wage Act's definition of "officer" on which the *Mullins* court had relied is broadly defined to include agents. The court remanded the case on the agency issue, recognizing that "[t]he question of whether an agency exists is ordinarily a question of fact." The court did not discuss whether any evidence supported the allegations of a knowing violation. As demonstrated by *Mullins* and *Goodwin*, officers and directors of employing entities must be aware that the supreme court of appeals does not hesitate to recognize a potential source of individual liability under the Wage Act.

C. Wage Assignments

As discussed above, the Wage Act strictly limits employee assignments of wages by imposing formal procedural requirements for the assignment agreement. State and federal courts have recognized that while the Wage Act does not create the legal right to assign wages, it does regulate and restrict that right in a manner to which strict compliance is required. In other words, an employer wishing to collect on loans or other obligations of an employee by deducting

129. Id. at 754.
130. Id. at 757.
131. Id.
132. See supra part II.B.2.
amounts from employees’ paychecks must be sure to obtain a valid assignment, unless such amounts are clearly “deductions” for purposes of the Wage Act.\textsuperscript{134}

For example, in \textit{Jones v. Tri-County Growers, Inc.},\textsuperscript{135} a number of foreign farm workers sued their former employer to recover amounts that were withheld from their wages. These withholdings were properly made pursuant to a master contract between the employer, the workers, and the Jamaican government.\textsuperscript{136} However, the employer had not received wage assignments executed by the employees in compliance with the Wage Act.\textsuperscript{137}

The \textit{Jones} court held that substantial compliance with the Wage Act’s wage assignment restrictions was not sufficient, and that compliance with \textit{all} requirements of the Wage Act is mandatory when assigning employee wages.\textsuperscript{138} The court relied on “a deliberate legislative intent to allow assignment of wages if, and only if, certain specified conditions are met.”\textsuperscript{139} This strict interpretation of the assignment provision is consistent with the approach taken in earlier cases decided under the Wage Act.\textsuperscript{140}

Courts have also taken a restrictive view of the category of permissible “deductions” from wages under the Wage Act. While wage assignments must comply with all of the formal requirements set forth in the Wage Act, “deductions” from wages may be made without any such written assignment agreement.\textsuperscript{141} As defined by the Wage Act, “the term deductions includes amounts required by law to be withheld and amounts authorized for union or club dues, pension plans, payroll

\begin{itemize}
\item \textsuperscript{134} \textit{See supra} part II.B.2.
\item \textsuperscript{135} 366 S.E.2d 726 (W. Va. 1988).
\item \textsuperscript{136} \textit{Id.} at 728.
\item \textsuperscript{137} \textit{Id.}
\item \textsuperscript{138} \textit{Id.} at 730.
\item \textsuperscript{139} \textit{Id.}
\item \textsuperscript{140} \textit{See Clendenin Lumber and Supply Co.}, 305 S.E.2d at 332 (holding that wage assignment that did not comply with all of the requirements of the Act was invalid); Mills \textit{v. Hollis-Lowman Sales Service, Inc.}, 101 Lab. Cases ¶ 34,566 (W. Va. Cir. Ct. Berk. Co. 1984) (assignment that is not acknowledged and that does not state on its face that three-fourths of periodic wage is exempt from assignment is invalid).
\item \textsuperscript{141} W. VA. CODE § 21-5-3 (1989).
\end{itemize}
savings plans, credit unions, charities and hospitalization and medical insurance.”  

Although the Wage Act’s definition of deductions is clearly not an exhaustive list, the courts have virtually disregarded the use of the term “includes” in favor of a view that the definition is exclusive. For example, the supreme court of appeals concluded in _Clendenin Lumber & Supply Co. v. Carpenter_ that “deductions are only those “amounts required by law to be withheld” or those amounts that fit into one of the specifically enumerated categories of common employment deductions.”  

The _Clendenin Lumber_ court reached this conclusion by reading two statutes in conjunction with one another—the wage assignment provision of the Wage Act and the assignment provision of the West Virginia Consumer Credit and Protection Act.  

In addition to ignoring the plain meaning of the Wage Act’s deduction definition as set forth above, this reasoning is flawed because the Consumer Credit and Protection Act provision on which it relies only applies to assignments for the payments of debt arising from one or more consumer credit sales, consumer loans or sales, as those terms are defined in the Consumer Credit and Protection Act.  

Moreover, the reference to

143. _Clendenin Lumber_, 305 S.E.2d at 338.
145. _W. Va. Code_ § 46A-2-116 (1992). A “consumer credit sale” is a sale of goods, services or an interest in land in which: (a) credit is granted either by a seller who regularly engages as a seller in credit transactions of the same kind pursuant to a seller credit card; (b) the buyer is a person other than an organization; (c) the goods, services or interest in land are purchased primarily for a personal, family, household or agricultural purpose; (d) either the debt is payable in installments or a sales finance charge is made; and (e) with respect to a sale of goods or services the amount financed does not exceed $25,000. A “consumer credit sale” does not include a sale in which the seller allows the buyer to purchase goods or services pursuant to a lender credit card or similar arrangement. _W. Va. Code_ § 46A-1-102(13) (1992). A “consumer lease” means a lease of goods: (a) which a lessor regularly engaged in the business of leasing makes to a person, other than an organization, who takes under the lease primarily for a personal family or household purpose; (b) in which the amount payable under the lease does not exceed $25,000; and (c) which is for a term exceeding four months. A “consumer lease” does not include a lease made pursuant to a lender credit card or similar arrangement. _W. Va. Code_ § 46A-1-102(14) (1992). Finally, a “sale” includes any sale, offer for sale or attempt to sell any goods for cash or credit or any services or offer for services for cash or credit. _W. Va. Code_ § 46A-6-102(d)
deductions in the Consumer Credit and Protection Act is clearly different than the definition of deductions in the Wage Act. Thus, reading these two provisions together, or, as the court describes, in pari materia, is not appropriate because of these distinct differences. Nonetheless, the Clendenin Lumber court disregarded the limitations imposed by statutory terms in order to restrict deductions under the Wage Act even more than the statutory meaning provides.

D. Relationship Between the Wage Payment and Collection Act and Federal Statutes

The Wage Act is only one of numerous state and federal statutes governing or in some way affecting the payment of wages and benefits to employees. With regard to applicable federal statutes, questions of preemption have regularly been addressed by courts interpreting the Wage Act most often in connection with the Labor Management Relations Act (LMRA) and the Employee Retirement Income Security Act of 1974 (ERISA).

Federal preemption is generally an unattractive option for employees because the Wage Act's liquidated damages and attorneys' fees provisions are more generous than the remedial provisions provided by ERISA and the LMRA. Moreover, actions under ERISA and the LMRA generally must be pursued in federal court. Without engaging in a complete discussion of the complicated topic of federal statutory preemption, this section will briefly discuss the manner in which federal:

---


al preemption issues raised by the LMRA and ERISA have been addressed by courts interpreting the Wage Act.

1. The Labor Management Relations Act

Section 301 of the LMRA provides that "[s]uits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties . . . ." This statute was enacted with the intent that federal labor law would uniformly prevail over state labor law. However, the United States Supreme Court has held that a state claim is preempted by section 301 "only if such application requires the interpretation of a collective bargaining agreement."

Preemption by section 301 of the LMRA is at issue when employees bring an action under the Wage Act seeking to recover compensation pursuant to the terms of a collective bargaining agreement. While the supreme court of appeals has acknowledged the principles of LMRA preemption, the court consistently refuses to find preemption of cases pursuant to the Wage Act in any given case. On the other hand, federal courts considering claims pursuant to the Wage Act have consistently held that such claims are preempted by section 301. Although the facts in these cases have varied, there is no tangible explanation for the differences in the decisions, other than the preference for an expansive interpretation of the Wage Act expressed by the supreme court of appeals.

In federal court, Briggs v. Heinz, U.S.A. involved former employees' claims for unused personal leave days. Provisions of the collective bargaining agreement governed these benefits, but the former employees brought an action pursuant to the Wage Act. The United States Court of Appeals for the Fourth Circuit observed that the employees' claim against Heinz was based on a provision for personal leave created by the collective bargaining agreement, and that West Virginia did not create the right to be paid for such leave. Thus, the Briggs court held that the state laws claims were preempted by section 301 of the LMRA because the employees' rights to such benefits presented questions for arbitration in accordance with the collective bargaining agreement.

Similarly, the Fourth Circuit held that employees' claims pursuant to the Wage Act for unpaid vacation and severance pay were preempted by section 301 in Barton v. Creasey Co. of Clarksburg. Affirming the decision of the district court, the Barton court relied on the fact that the source of the rights to compensation at issue in the case was the collective bargaining agreement and not state law. As the court explained, "despite [plaintiffs'] assertions that their claims arise wholly under the West Virginia statute, the [plaintiffs'] complaint in state court shows that any substantive right they might have to recovery of vacation and severance pay would require interpretation of the collective bargaining agreement."

In stark contrast, the West Virginia Supreme Court of Appeals has declined to recognize LMRA section 301 preemption. For example, in Ash v. Ravens Metal Products, Inc., employees filed claims pursuant to the Wage Act for recovery of accrued vacation pay allegedly earned prior to the beginning of an extended labor dispute. The Ash court concluded that no interpretation of the collective bargaining agreement was necessary because, as the court explained, "both sides

156. Id.
157. Id. at *2.
158. Barton, 29 Wage and Hour Cases (BNA) 1600.
159. Id.
acknowledge that the agreement called for vacation pay to be remitted if they worked one thousand hours in a year.\textsuperscript{161} The court relied heavy on language in the Supreme Court's \textit{Lingle} decision that the reference in a state law claim to a collective bargaining agreement, without any need for interpretation of the agreement, was permissible.\textsuperscript{162}

In the \textit{Ash} case, the West Virginia Supreme Court of Appeals also relied on its previous decision in \textit{Lowe v. Imperial Colliery Co.}, in which employees' claims under the Wage Act for vacation pay were deemed not to be preempted by the LMRA. The \textit{Lowe} court reasoned that although the state law claims related to matters that were the subject of collective bargaining, they were not preempted.\textsuperscript{163} However, the court failed to discuss whether interpretation of the collective bargaining agreement was necessary.

The main difference between the state and federal court decisions on this issue is that the federal courts recognize that the Act itself does not confer substantive rights to compensation, and that any rights to compensation are necessarily governed by the collective bargaining agreement, subject to section 301 of the LMRA. The supreme court of appeals, on the other hand, apparently views the Act as creating rights separate from the collective bargaining agreement that are not preempted by the LMRA.

2. The Employee Retirement Income Security Act of 1974

ERISA governs the administration of employee benefits, including pension, health care, and other employee benefit plans.\textsuperscript{164} In addition, ERISA prescribes specific remedies available for recovery of benefits wrongfully withheld.\textsuperscript{165} ERISA also includes a broad preemption provision stating that ERISA supersedes any state laws relating to "employee benefit plans."\textsuperscript{166} Therefore, to the extent that employees seek

\textsuperscript{161} \textit{Id.} at 260.

\textsuperscript{162} \textit{Id.} at 259.

\textsuperscript{163} \textit{Lowe}, 377 S.E.2d at 658-59.


\textsuperscript{166} 29 U.S.C. § 1144 (1988). The term "employee benefit plan" means an employee
to recover wages and benefits under the Wage Act, such actions may be preempted by ERISA if the benefits sought are provided by an employer pursuant to an employee benefit plan.

Both state and federal cases interpreting the Wage Act use a similar analysis to determine whether ERISA preempts employees' claims for benefits under the Wage Act.\(^ {167}\) Because of ERISA's broad preemption provision, the issue is whether the benefits at issue fall within ERISA's definition of "employee benefit plan."\(^ {168}\) For example, the United States District Court for the Southern District of West Virginia recently held that employees' claims seeking recovery of severance benefits pursuant to the Act were preempted by ERISA.\(^ {169}\) The district court determined that letters providing one month's severance pay, extended medical coverage, and preferential hiring constituted severance benefits fell within ERISA's broad definition of employee benefit plan.\(^ {170}\)

Similarly, other severance pay plans, lay off allowances, and accrued vacation pay plans have been found to be covered by ERISA in cases where the employees' claims to recover such benefits under the Wage Act were deemed to be preempted by ERISA.\(^ {171}\) However, the supreme court of appeals has determined that in order for ERISA preemption to apply, the benefits at issue must be provided pursuant to a preexisting plan relating to the administrative, funding, and payment of such benefits.\(^ {172}\)

---

welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan. 29 U.S.C. § 1002(3) (1988). The term "employee welfare benefit plan" refers to plans for health insurance, disability, vacation and similar benefits, while the term "employee pension benefit plan" generally refers to plans for retirement benefits. 29 U.S.C. § 1002(1)-(2) (1988).


168. See supra note 166.


170. Id.

171. Southern, 788 F. Supp. at 896; Fox, 400 S.E.2d. at 287-88.

172. Lowe, 377 S.E.2d at 656.
IV. FUTURE WAGE PAYMENT AND COLLECTION ACT ISSUES

As the Supreme Court of Appeals of West Virginia continues to play an activist role in interpreting the Wage Act, a number of additional issues and theories of recovery lurk in the state circuit courts and the administrative process. This section identifies selected issues that may be addressed by courts in upcoming years, and suggests that the Wage Act need not be a panacea for addressing perceived inequities in the employment relationship.

As previously discussed in the context of LMRA preemption, the supreme court of appeals appears to have adopted the view that the Wage Act itself creates substantive rights to compensation separately from an employment contract or collective bargaining agreement. Outside of that context, at least one group of plaintiffs attempted to capitalize on this view. In a case in which appellate review was rejected by the supreme court of appeals, a group of city employees brought actions pursuant to the Wage Act based on contentions that they had been compensated at an incorrect wage rate.

In Reeves v. Beckley, city employees contended that as a result of being compensated at allegedly inappropriate wage rates, they were entitled to recover wages, liquidated damages, and attorneys’ fees pursuant to the Wage Act. In effect, the employees alleged that the Wage Act provides a private cause of action to seek a higher rate of pay. One difficulty with these claims is that the Wage Act merely sets specific time requirements for payment of wages, not an entitlement to any particular amount.

173. See supra part III.D.1.
The circuit court granted the city's motion to dismiss the employees' claims based on the conclusion that the city, as a municipal corporation, is not subject to the Wage Act. The supreme court of appeals has never addressed this issue. The circuit court's opinion relies on the legislature's failure to specifically reference public entities within the Wage Act's provisions. This failure to include municipal corporations within the purview of the Wage Act is in contrast to statutes that explicitly include public corporations such as the minimum wage and maximum hours law and the statutory provisions relating to polygraph tests.

Another issue creating claims against employers relates to section 21-5-4 of the Wage Act, which governs the payment of compensation to employees who have resigned or cease employment due to termination, layoff, or a labor dispute. As noted above, the wages that must be paid to such employees within the time periods specified in section 21-5-4 include "then accrued fringe benefits capable of calculation and payable directly to an employee."

However, section 21-5-4 also contains a proviso that states as follows: "Provided, That nothing herein contained shall require fringe benefits to be calculated contrary to any agreement between an em-


177. Compare W. VA. CODE §§ 21-5-1 to -5, -6 to -16 (1989 & Supp. 1993) with W. VA. CODE §§ 21-5-5a to -5d (1989) and W. VA. CODE § 21-5C-1 (1989). In addition to the statutes cited by the circuit court (minimum wage and polygraph), a number of other state statutes specifically include public entities. See Unemployment Compensation Law, W. VA. CODE § 21A-1-3 (Supp. 1993); Workers' Compensation Act, W. VA. CODE § 23-2-1 (Supp. 1993); West Virginia Human Rights Act, W. VA. CODE § 5-11-3(d) (Supp. 1993). Moreover, in 1940, the Attorney General rendered the opinion that the assignment provision of § 21-5-3 of the Act "is apparently not applicable to public employees or officers. It is found that the labor provisions of our Code, and the history and background of these laws, overwhelmingly indicate that their application is confined to private industry and labor employment generally." Op. Att'y Gen. 242 (1940).


ployer and his employees which does not contradict the provision of [the Act]."180 Courts have not yet interpreted the meaning or application of this proviso, but a liberal interpretation provided by the Division of Labor has created difficult issues for employers.

The section 21-5-4 proviso clearly recognizes that employers and employees may agree as to the manner of calculation of fringe benefits. While such agreements are sometimes by means of a collective bargaining agreement, often the details as to fringe benefits are the subject of personnel policies. Regardless of the source, such agreements detail not only the manner of earning fringe benefits but also the manner in which such fringe benefits may be used by employees.

However, the Division of Labor consistently takes the position that any employment policy or agreement that effectively eliminates fringe benefits once they are "capable of calculation" is invalid.181 For example, some employers may permit unlimited accrual of sick or vacation time, but limit monetary compensation for such benefits at the time of termination or resignation to a specified number of days. Other employers may require a certain attendance record to maintain eligibility for sick or vacation time. These policies are subject to challenge, according to the Division of Labor, at the time of an employee's termination or resignation because they may limit the availability of compensation for such accrued benefits.

Although the Division of Labor takes a dim view of such policies, these are precisely the types of agreements contemplated by the plain meaning of the section 21-5-4 proviso. Therefore, the Division of Labor's aggressive view of the substantive rights of employees under the Wage Act confronts employers with the unexpected costs of benefits that were never extended to employees. Clearly, this interpretation is an extension of employees' entitlement to compensation well beyond the terms of the Act that should not be affirmed by any court. However, the Farley case's theme that the terms of the Act are not a real limitation poses a threat of future judicial legislation in this area.

181. Reverence to the Division of Labor's approach to this issue is based on personal observation and experience of the author. To date, the Division of Labor's view is not a matter of reported opinion.
Although the *Farley* decision is over thirteen years old, the West Virginia Legislature has never amended the Wage Act or the mechanics’ lien statute to legitimize the *Farley* interpretation. Therefore, the supreme court of appeals may continue to act as if it has been conferred by the legislature with the authority to further amend the Wage Act. On the other hand, advocates that refuse to accept an approach that the Wage Act’s provisions may be ignored may prevail in convincing both the supreme court of appeals and other courts that such a sweeping view is contrary to the purposes of legislative and judicial processes. In the meantime, employers and entities even remotely related to employers must continue to exercise caution with regard to this evolving body of law.