FEBRUARY 10, 2012

SAY WHAT YOU MEAN AND MEAN WHAT YOU SAY

Every "**day**" we see examples where the usage of ambiguous wording in employment policies leads to confusion and litigation. While the people who drafted the wording may have decent annual salaries and may have understood what their wording was intended to mean, one wonders if they should "**also receive two weeks paid vacation per year**" for all their efforts.

This tongue in cheek paragraph highlights the result of recent court decisions that give fair warning to employers to be very careful in clearly drafting policies to avoid costly misunderstandings and litigation. Here are some examples that make it clear that nothing is as clear as what it may seem:

WHAT IS A DAY?

In a recent decision denying a motion to dismiss, a federal judge in the Southern District of Indiana found that the word "day" was ambiguous when "day" was not otherwise defined. The issue was whether the plaintiff had timely appealed her termination under her, which called for any appeal to be initiated "within five days." The five-day requirement was found in this language:

"If the resident does not agree with the decision that he/she should be dismissed, it is the resident's right to appeal in *five (5) days* to the Chairman of the Graduate Medical Education Committee in a letter describing why he/she should not be dismissed."

The plaintiff initiated her appeal six days after her termination and then argued that the appeal was timely because it was initiated within five *business* days. Relying on an Indiana Supreme Court case involving statutory interpretation, the District Court said:

The Court agrees with [plaintiff] that the word "day" is ambiguous; as the Indiana Supreme Court has noted, "'[d]ay' may be defined as either 'the mean solar day of 24 hours beginning at mean midnight' or 'the time established by usage or law for work, school, or business.'"

(quoting Merriam Webster's Collegiate Dictionary 294 (10th ed. 1994)).

Because the term "day" was not defined, the court held that the appeal was timely filed, much to the chagrin of the employer!

I THINK I "ALSO" NEED A VACATION

The Indiana Court of Appeals decided a case recently that reveals the unintended consequence of not clearly saying what you mean to say in a policy document. In this case, a union officer complained that he was shorted two weeks of paid vacation based on the wording of his union's bylaws that provided:

Business Manager/Secretary-Treasurer: The salary of the Business Manager/Secretary-Treasurer shall be as set forth in Section 213(c) of the International Constitution based on total package, plus $40 per day per diem (five days a week, 52 weeks a year), plus reasonable expenses. He or she shall also receive two weeks paid vacation per year.

The union officer argued that the wording of the bylaw provision was clear - he gets 52 weeks of pay, and he *also* gets two weeks of paid vacation each year. The court agreed and awarded the employee 54 weeks of pay!

THE MORAL OF THESE STORIES

Employers need to be very careful in drafting policy documents and think through all the possible interpretations that may be given to a certain word or phrase. Try to think like a crafty plaintiff's lawyer – what may seem like natural language and standard meanings can be twisted and confused. Because employers are the authors of their policies, they are the ones who will be held responsible for any ambiguities. Don't let words get the best of you!

If you have any questions or would like further information, please contact Stephen W. Lyman at slyman@hallrender.com or 317.977.1422.

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