

Baird Holm Legal Alert

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What's Next in the Wake of *Roseland*?

As you may have heard, the Nebraska Supreme Court on October 20th unanimously held in *Roseland v. Strategic Staff Management* that “accrued vacation time, which is part of an employment agreement, is due and payable as wages upon termination of employment.” This Alert is intended to provide you with some additional detail regarding this case. In particular, this Alert describes the positions taken by the parties in *Roseland*, the posture being taken by the Nebraska Department of Labor (“NDOL”) and, most importantly, some basic issues for employers to consider as they determine whether to revise their personnel policies.

The Nebraska Wage Payment and Collection Act (the “Wage Act”), requires that when an employee separates from a private sector employer’s payroll, the employer must pay unpaid “wages” on the next regular pay period or within two weeks of the date of termination, whichever is sooner. Political subdivision employers have a somewhat similar requirement. Employers who fail to make such payment may suffer possible penalties and attorneys’ fees if a former employee successfully sues for payment. The Wage Act defines “wages” broadly to include all “compensation for labor or services rendered by an employee, including fringe benefits...” The Wage Act says that “fringe benefits includes sick and vacation leave plans, disability income protection plans, retirement, pension, or profit-sharing plans, health and accident benefit plans, and any other employee benefit plans or benefit programs regardless of whether the employee participates in such plans or programs.”

The only issue before the Nebraska Supreme Court in *Roseland* was whether accrued vacation was a fringe benefit that needed to be paid at termination. Strategic argued that its handbook, which provided for no payout of unused but accrued vacation, governed. *Roseland* (who was the former President of Strategic) argued that the handbook conflicted with the statute, and

therefore the statute governed. The Court agreed with *Roseland* saying vacation is an earned wage that cannot be forfeited by an employer’s policy. The NDOL views *Roseland* as vindication of its long held position that vacation is payable to employees once it is earned.

Interestingly, a significant amount of the *Roseland* oral argument was spent addressing “use it or lose it policies” even though the Court did not address such policies in its written opinion. The Court was troubled by the thought that an employer could take away earned vacation from one day to the next. The Court seemed less concerned about “use it or lose it” policies where an employee immediately received an amount equal to or greater than the amount lost on the day of forfeiture. In other words, an employee who had three weeks of vacation that were unused on December 31 might forfeit them as long as he or she was entitled to three weeks on January 1. The Court seemed to make no distinction as to whether these were new or old vacation days, only that the employee was no worse off than he or she had been the day before. This discussion appears to mirror the current position taken by the NDOL.

On its face, the *Roseland* decision appears fairly simple and straightforward: the Nebraska Supreme Court has ruled that once a benefit has been earned by an employee, the employer cannot take it away. If one accepts this interpretation of *Roseland*, the next critical question is how other items included in the definition of “fringe benefits” should be treated? We believe *Roseland* may have profound implications for the provision of a wide variety of fringe benefits, including sick leave, personal leave, PTO plans, and possibly even such benefits as bereavement leave.

If there is any doubt about that conclusion, consider the fact that the NDOL views *Roseland* as consistent with its

interpretation that earned sick leave is *also* payable to a separating employee. The NDOL's position is that sick leave and vacation leave are the same types of leave (indeed, the Wage Act refers to "sick and vacation leave plans" together). While NDOL acknowledges that there may be a difference between when an employee earns sick leave and when an employee can use it, the NDOL's position is that the employee is entitled to payment at termination for the sick leave once it has been earned, not once the employee is eligible to use it. Perhaps the best way to describe the NDOL's position is to picture each employee having a "basket." According to the NDOL (and perhaps even the Court in *Roseland*), once the employer places an earned fringe benefit in the employee's basket, the employer cannot take it away.

We disagree with the NDOL's interpretation with respect to sick leave and other types of fringe benefits for that matter. We believe that there is a strong argument to be made that the *Roseland* decision recognizes that employers can impose *conditions precedent* in order for a fringe benefit to be "earned" by an employee. In *Roseland*, the condition precedent was that the employee had to be employed for one year to get one week of vacation, three years to get two weeks of vacation, and five years to get three weeks of vacation. In *Roseland*, the employees met the condition precedent and, therefore, the vacation had been earned by them. With a sick leave policy, the condition precedent for earning the benefit ought to be that the employee (or a close family member) actually be sick. In the case of life insurance, the employee would have to die for the benefit to be earned. In the case of short term disability, the employee would have to be disabled. In the case of bereavement leave, the family member would actually have to die.

What about surrounding jurisdictions? While Iowa courts have not reached the issue presented in *Roseland*, the Iowa Wage Payment Collection Act similarly requires that "when the employment of an employee is suspended or terminated, the employer shall pay all wages earned, less any lawful deductions specified . . ." Wages are specifically defined under the Iowa Act to include: "vacation, holiday, sick leave, and severance payments which are due an employee under an agreement with the employer or under a policy of the employer." Iowa Stat. 91A.2(7)(b). In Minnesota, the Court of Appeals recently reached the same conclusion as did the Nebraska Supreme

Court in *Roseland*. In *Lee v. Fresenius Medical Care, Inc.*, a 2006 decision, the Minnesota Court of Appeals interpreted section 181.13(a) of the Minnesota statutes as requiring employers to promptly pay a terminated employee any earned but unpaid wages. While the statute does not explicitly define wages, the Minnesota Court of Appeals held that it had long ago concluded that earned vacation pay may be considered wages. "Whether accrued vacation constitutes wages is a matter of contract interpretation. Therefore . . . vacation will not be considered wages if it is not yet earned and accrued pursuant to an employer's written vacation policy." Once earned and accrued, it must be paid.

Employers who currently have these types of provisions in their handbook or similar policy documents should have them reviewed immediately. We are not advocating wholesale changes in light of *Roseland*. Instead, we are encouraging employers to be aware that there are varying levels of risk and they can manage that risk through properly drafted fringe benefit policies.

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