

## MEMORANDUM

TO: Personnel, Legislative and Public Affairs Subcommittee

SUBJECT: Recommended Amendments to P-MRNRD Sick Leave and Annual Leave

DATE: January 30, 2007

FROM: John Winkler, General Manager

In light of the recent Nebraska Supreme Court ruling in the Roseland v. Strategic Staff Management, Inc case, I have asked Randy Stevenson, Baird Holm, to take a look at the District's annual leave and sick leave policies to make sure that we are in compliance. A copy of Mr. Stevenson's opinion is attached for your review.

**Annual Leave:** The current P-MRNRD policy states that, "no more than thirty days of annual leave may be carried over into the next calendar year on December 31st. This most likely violates Nebraska law because this would be a forfeiture of earned vacation/wages if an employee had over 30 days of annual leave on December 31<sup>st</sup>. Mr. Stevenson has suggested that the following be added to the policy:

"Employee may carry-over all unused annual leave days into the next calendar year; however, no employee will continue to accrue annual leave once he or she has accumulated 53 days of annual leave.

I am also suggesting that a clarification for extended paid annual leave which would require GM approval be changed from "2 weeks" to "10 consecutive working days."

**Sick Leave:** The current P-MRNRD policy states that, "no allowance will be granted for accrued but unused sick leave upon separation from employment," and that, "this leave may only be used in the case of actual sickness and/or for actual, necessary visits to doctors or dentists." Mr. Stevenson states that while the Nebraska Department of Labor would likely tell a separating employee that the District should pay him or her all unused sick leave, it is his believe that a court should conclude that the employee is not due such payment because the employee did not meet the "conditions stipulated." In other words, if the employee is not sick, the necessary prerequisite to receive payment is not met. There is no precedent in Nebraska case law regarding the payment of unused sick leave upon separation when it is clear that the sick leave is only payable if the employee is actually sick. Attached is an Omaha World Herald article regarding four former Douglas County employees who are suing the Douglas County to be reimbursed for unused sick leave. Needless to say, we will be closely monitoring this case. In the meantime, it is suggested that the following be added to the policy to bolster the District's position that sick leave is not payable unless an employee is actually sick:

"Sick leave is neither an earned benefit that has independent cash value, nor a form of deferred compensation. Rather, it is an income protection program only for those employees who, while employed by the District are absent from work due to the reasons stated in this policy. Therefore, conversion of sick leave accruals to pay in lieu of sick leave is not permitted. Likewise, no sick leave benefits are paid upon termination of employment for any reason."

Mr. Stevenson also mentioned the possibility of the District looking at steps to reduce our current maximum accrual level of 180 days and the possibility of a one-time buy back of sick leave to limit the District's exposure. Mr. Stevenson has advised to wait to address these issues. Two bills (LB255 and LB271) have been introduced into the Legislature regarding sick leave. If one of these bills passes in its current form, it may eliminate the potential exposure that the District might have.

I have attached an article from Baird Holm Labor & Employment Law Alert – Unused Accrued Vacation? Pay Up!, regarding the Roseland v. Strategic Staff Management ruling for your review.

Randy Stevenson will be at the PLPA to answer any questions you might have.

**It is Management's recommendation that the PLPA Subcommittee recommend to the Board that the following amendments to the District's annual leave and sick leave be approved:**

**ANNUAL LEAVE/VACATIONS:**

Vacations must be earned before they can be taken. Vacations will be considered "earned" only to the extent that vacation time has been accrued according to the following schedule, and all conditions for using vacation have been met. The employee's date of hire will be the eligibility date for determining the amount of vacation earned.

Each full-time employee shall accrue annual leave bi-weekly at the following rates:

0 through 5 years of service -- 13 working days per year

6 through 10 years of service -- 18 working days per year

11 years of service or greater -- 23 working days per year

**Employees may carry-over all unused annual leave days into the next calendar year; however, no employee will continue to accrue annual leave once he or she has accumulated 53 days of annual leave. No more than thirty (30) days of annual leave may be carried over into the next calendar year on December 31.**

No annual leave can be taken during the first six (6) months of employment.

All annual leave shall be scheduled in advance and taken at a time that is agreeable to the employee and your Supervisor. Any paid vacation more than ~~two weeks~~ **10 consecutive working days** in duration will require a minimum of ninety (90) days notice and approval of the General Manager.

Annual leave is accrued on a bi-weekly basis and an employee may not take more time than that which he/she has already accrued and have available at the time annual leave is taken.

Employees will be paid for all accrued but unused vacation upon termination from employment.

Part-time employees will accrue annual leave on a pro-rata basis according to average hours worked. Temporary employees are not eligible for annual leave.

## **SICK LEAVE:**

Each full time employee will accrue one and one-half (1-1/2) days per month sick leave. This leave may only be used in the case of actual sickness and/or for actual, necessary visits to doctors or dentists.

It is the purpose and intent of this plan to provide for eligible employees when they suffer the misfortune of an extended illness or disability. Therefore, to avoid possible abuse of this benefit, a physician's statement will be required by the District as verification of illness or accident, before sick leave benefits are paid when an employee has been absent for three (3) consecutive working days. Sick leave pay benefits for work related injury/accidents will be coordinated with Worker's Compensation benefits received by the employee.

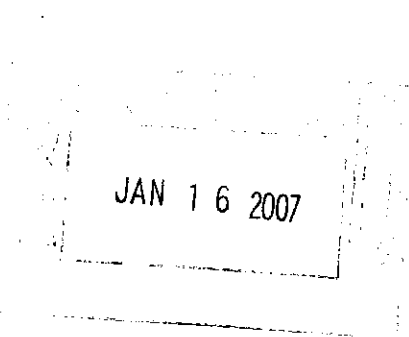
The General Manager has the authority, in his discretion, to permit an employee to utilize sick leave to tend to the needs of his/her spouse and "immediate family." The term "immediate family" is defined to include spouse, children and parents of the employee and children and parents of employee's spouse. The use of sick leave for this purpose will require approval by the General Manager. An example of approved sick leave under this situation would be where an employee's spouse is ill and children require attention until other adequate arrangements can be made. The illness of a spouse requiring a doctor's attention would be a second example.

Accrued but unused sick leave may be carried forward from year to year, up to a cumulative total of 180 days. For those employees who have over 180 days of accumulated sick leave, their cap will be set at the amount of accumulated sick leave as of June 30, 1994. If an employee whose cap is over 180 days drops below 180 days of sick leave as of June 30th of any given year, that employee's cap would be re-established at 180 days.

**Sick leave is neither an earned benefit that has independent cash value, nor a form of deferred compensation. Rather, it is an income protection program only for those employees who, while employed by the District, are absent from work due to the reasons stated in this policy. Therefore, conversion of sick leave accruals to pay in lieu of sick leave is not permitted. Likewise, no sick leave benefits are paid upon termination of employment for any reason. No pay allowance will be granted for accrued but unused sick leave upon separation from employment.**

Abuse of this sick leave policy may result in loss of the sick leave benefit and/or discharge.

Part-time and temporary employees are not eligible for sick leave.



**R. J. Stevenson**

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January 12, 2007

**CONFIDENTIAL**

Ms. Patricia J. Teer  
Administrative Coordinator  
Papio-Missouri River Natural Resources District  
8901 South 154th Street  
Omaha, Nebraska 68138-3621

Re: Vacation/Sick Leave Policy

Dear Pat:

You've asked us to review the District's "Annual Leave/Vacations" and "Sick Leave" policies and render an opinion to the District regarding the legality of these provisions in light of Nebraska's Wage Payment and Collection Act and the recent case decided by the Nebraska Supreme Court, *Roseland v. Strategic Staff Management, Inc.* We are opining herein only as to Nebraska law and we express no opinion with respect to the applicability thereto, or the effect thereon, of federal laws or the laws of any other state or jurisdiction.

We have examined the above-referenced policies in order to render our opinion expressed below. As to all questions of fact material to this opinion, we have (without any investigation or independent confirmation) relied upon, and assumed the accuracy of, the documents you provided to us.

Based upon the foregoing, we reached the following conclusions:

1. Annual Leave/Vacations

We are of the opinion that in the wake of the *Roseland* case, an employer may not take away earned vacation time from an employee. In reviewing the Annual Leave/Vacations policy, we note that it states that "no more than thirty (30) days of annual leave may be carried over into the next calendar year on December 31." We believe this likely violates Nebraska law because in operation it constitutes an improper

forfeiture of vacation/wages. We are also of the opinion that a Nebraska court would likely conclude that an employee who had more than thirty days of unused annual leave actually carried all of those days into the next calendar year and that no forfeiture should have occurred. Thus, those days would be due to the employee upon separation of employment. Should a former employee resort to litigation to recover such forfeited annual leave, the District would be liable not only for the forfeited leave, but also not less than 25% of the recovery in attorney's fees and up to an additional 200% of the recovery payable to the state's common schools fund as a penalty.

The District may wish to consider modifying its policy going forward to further limit its exposure. For example, the district could allow employees to carry-over all unused annual leave, but then prevent further/new accrual of annual leave until the number of annual leave days dropped below a certain number. For example, the policy could state that "employees may carry-over all unused annual leave days into the next calendar year; however, no employee will continue to accrue annual leave once he or she has accumulated 53 [or whatever number of days the District chooses] days of annual leave." To the extent the District would like to explore this or other options, we would be happy to assist.

## 2. Sick Leave

The Nebraska Wage Payment and Collection Act requires that when an employee separates from employment, the employer must pay unpaid "wages." The Act defines "wages" broadly to include all "compensation for labor or services rendered by an employee, including fringe benefits . . . ." The Act further states that "fringe benefits includes sick and vacation leave plans . . . ." Importantly, however, the Act also states in its definition of "wages" that compensation is not wages unless "previously agreed to and conditions stipulated have been met by the employee."

It is the position of the Nebraska Department of Labor that unused sick leave must be paid to an employee upon separation of employment. We believe that if an employer has informed its employees that sick leave is to be used only in the event that an employee is sick, the better analysis is that the employee has not met the "conditions stipulated" for the sick leave and the benefit is not payable as a wage.

We note that the District's Sick Leave policy states that "no pay allowance will be granted for accrued but unused sick leave upon separation from employment." The policy also states that "this leave may only be used in the case of actual sickness and/or for actual, necessary visits to doctors or dentists." Indeed, the policy further requires a physician's statement in many instances.

While the Nebraska Department of Labor would likely tell a separating employee that the District should pay him or her all unused sick leave, we believe that a court should instead conclude that the employee is not due such payment because the

employee did not meet the "conditions stipulated." That is, the employee did not become sick—a necessary prerequisite to receiving payment. It is our opinion that there is no binding precedent in Nebraska case law regarding the payment of unused sick leave upon separation when the employer has made it clear that the sick leave is only payable if the employee actually becomes sick. Because of this absence of case law, we cannot opine as to how a court would rule upon this issue; rather, we can only state our belief that a court should determine that sick leave is not payable because the "conditions stipulated" were not met. We also note that the Nebraska Department of Labor does not, itself, have enforcement power such that it can either recover or litigate against the District to recover an individual's unpaid sick leave; rather, only the allegedly-aggrieved former employee can bring an action to recover unpaid wages (which, arguably, may include unpaid sick leave).

To further bolster the District's position that sick leave is not payable unless an employee is actually sick, we suggest adding the following verbiage to the policy:

Sick leave is neither an earned benefit that has independent cash value, nor a form of deferred compensation. Rather, it is an income protection program only for those employees who, while employed by the District, are absent from work due to the reasons stated in this policy. Therefore, conversion of sick leave accruals to pay in lieu of sick leave is not permitted. Likewise, no sick leave benefits are paid upon termination of employment for any reason.

The above-paragraph should be substituted for the sentence in the current policy which states that "no pay allowance will be granted for accrued but unused sick leave upon separation from employment."

Given the risk that a court could determine that sick leave is payable upon termination in all instances, the District should consider whether steps should be taken to reduce the current maximum accrual level of 180 days. For example, the District could implement a new maximum accrual of 60 work days (which would be long enough to carry an employee through his or her twelve weeks of protected leave provided by the Family and Medical Leave Act). If the District were to do this, we are not suggesting that current employees forfeit their sick leave which is in excess of 60 days. Rather, they would stop accruing sick leave, and would not start again until their accumulated days dropped below 60. Another way for the District to reduce high balances would be to offer a voluntary, one-time buy-back of sick leave benefits at a discount, for example, 50 cents on the dollar. Even if sick leave benefits are payable as wages, we do not believe such a buy-back program would constitute an improper forfeiture of wages if an employee's participation in the program is truly voluntary. Again, this is not to suggest that we believe a court will determine that sick leave benefits are payable upon separation in all instances; rather, it is simply a measure for the District to consider to reduce a potential exposure.

Ms. Patricia J. Teer  
January 12, 2007  
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We also note that we have worked with others to draft bills which have just been introduced into the Nebraska Unicameral for consideration this session, LB255 and LB271. If one of these bills passes in its current form, it may eliminate the potential exposure that the District has regarding sick leave. Passage of one of these bills would not, however, affect any potential claims by employees who separated from the District's employment prior to the bill's effective date.

We hope that you find this letter informative. Of course, please feel free to contact us if you have any questions.

Yours very truly,

A handwritten signature in cursive script, appearing to read "Randy Stevenson".

R. J. Stevenson  
FOR THE FIRM

RJS/sum  
DOCS/774643.1



Published Tuesday  
January 16, 2007

## Sick-leave claims trip alarms

BY TODD COOPER

WORLD-HERALD STAFF WRITER

In October, four former employees of an Omaha business secured a groundbreaking Nebraska Supreme Court decision that cemented a departing employee's right to be reimbursed for vacation he has earned but hasn't used.

Now, four former employees of Douglas County are trying to take that case one step further.

The four, former attorneys in the Douglas County Attorney's Office, want to be reimbursed for their unused sick leave, too.

It's a request that is turning heads, and stomachs, of policymakers and paycheck writers in both the public and private sectors.

Government officials, business owners and labor attorneys have been bracing for what might come on the heels of the Oct. 20 Supreme Court ruling concerning vacation leave. Two state senators have introduced bills that would rewrite state law to allow bosses to decide whether workers are entitled to unused vacation pay, among other benefits.

And labor attorneys are rewriting hundreds of benefit policies for concerned employers.

"This is probably as significant an employment decision as the Nebraska Supreme Court has made in years," said Omaha attorney David Kramer, who represents employers. "And it goes straight to an employer's bottom line.

"If it is determined that sick leave should be treated the same as vacation leave, it's going to cost employers across the state millions and millions of dollars."

But not all believe a financial collapse is coming.

Many employment attorneys, including the Omaha attorney who secured the vacation-pay ruling, say there is no need for state senators or business owners to panic.

They say the Nebraska Supreme Court's decision in Roseland vs. Strategic Staff Management narrowly applies to an earned benefit such as vacation. It doesn't apply to hardship benefits such as sick leave that require other conditions to be met.

"The sky is not falling," said Mary L. Hewitt, an Omaha attorney who has represented both employees and employers. "And it's certainly not falling as fast or as hard as some would have you believe."

At issue is Nebraska's Wage and Payment Collection Act.

The law requires employers to pay departing employees for unpaid wages, including fringe benefits, when "conditions stipulated have been met by the employee."

It goes on to say that fringe benefits include "sick and vacation leave plans, disability income protection plans, retirement, pension or profit-sharing plans, health and accident benefit plans."

Labor attorneys note that state law and, often, the Nebraska Supreme Court use the term "sick and vacation leave" in tandem.

That has created concern that employers would be on the hook for untold amounts of unused sick leave. For example, if successful, the four Douglas County attorneys would receive a combined \$90,000 for their unused sick leave.

### RELATED STORY

» Sick-leave claimants backed losing candidate

### Bar Association dues also sought

The four former deputy Douglas County attorneys who filed claims for sick leave also are asking the county to pay their 2007 bar dues - \$320 - even though they worked just two days before new Douglas County Attorney Don Kleine took over Jan. 4.

The attorneys argue that they couldn't have performed legal work for the county Jan. 2 and 3 without being licensed by the bar.

Kleine suggested that Douglas County could pay a pro-rated portion of those dues, but he said he doesn't think the county should have to foot the full bill for the attorneys.

#### A breakdown of their claims:

Attorney	Start date	Unused vacation*	Unused sick leave**
Christine Lustgarten	Sept. 1993	\$8,881	\$63,114
James Thibodeau	April 2000	\$8,255	\$17,086
Peter Garofalo	June 2004	\$1,104	\$4,868
Arturo Perez	Oct. 2004	\$2,089	\$4,260
<b>Total</b>		<b>\$20,329</b>	<b>\$89,328</b>

\*Typically paid by county

\*\*Never has been paid by county

Source: Douglas County Clerk's Office



Apply those four employees' average payout (\$22,500) to the county's 2,000 employees and you get a sense of how staggering an employer's long-range costs could be: \$45 million in Douglas County's case.

Ronald Sedlacek, general counsel of the Nebraska Chamber of Commerce, said those eyeball-popping amounts caused more than 25 private and public employers to meet and propose legislation.

Sedlacek noted that employers are not required by law to offer benefits - be it vacation or sick leave. In turn, Sedlacek said, employers ought to have a right to manage benefits as they see fit.

For example, Sedlacek questioned whether employers should be required to pay unused vacation to employees who commit gross misconduct, such as workplace violence.

One bill goes so far as to propose striking the term "fringe benefits" - such as vacation - from what's owed a departing worker.

"We have some employers who offer very liberal benefits," Sedlacek said. "Their fear is that the court case is going to cause them to cut back on benefits."

It shouldn't, Hewitt said.

Hewitt, who won the vacation-pay case, said it dealt specifically with pay for unused vacation.

Mike Roseland, a former interim president, and three other employees left Strategic, a now-inactive labor staffing company, in the same year. The company refused to pay them for their unused vacation, citing an employee handbook that said: "Upon termination, employees will not be paid for unused vacation time."

The high court ruled that the handbook violated state law requiring payment for unused vacation.

Kramer said some employers now are questioning the fiscal wisdom of paid-time-off plans. Many employers have gone to PTO plans that combine vacation and sick leave into a lump sum. Such plans require no explanation for the need for time off.

After the ruling, Kramer said some clients had him rewrite their PTO plans to go back to vacation and sick-leave plans. That way, he said, they aren't on the hook for the larger PTO sum.

Employers also are concerned that the ruling could nullify use-it-or-lose-it vacation caps, under the theory that employers cannot take away vacation once it has been earned.

But Hewitt said the ruling didn't deal with vacation carryover. Other states have upheld caps as reasonable in preventing employees from stockpiling vacation, she said.

Hewitt said sick leave is a different beast - a hardship benefit taken only if the hardship exists. It's no different from military or maternity or funeral leave, she said.

That's where the wage act's language - "when conditions stipulated have been met" - is critical, attorneys say.

"You're not entitled to bereavement leave if no one in your family has died," Hewitt said. "Likewise, you don't get sick leave if you're not sick."

Some labor attorneys say they think the law could be amended to include exceptions in which an employee wouldn't be paid, such as: embezzlement, failure to give notice or workplace violence.

But Hewitt and attorney Robert Broom said making it optional for bosses to pay unused vacation would leave departed employees with no right to collect a benefit they have earned.

And it would further diminish the state's image when it comes to workers' rights, they said.

"I think there has been an overreaction on everybody's part," said Broom, who represents employees. "Not only employers, but some employees who now think they are entitled to everything."

"The reality is, the law is limited in what employees can collect. (Workers) don't need more restrictions."

Contact the Omaha World-Herald newsroom

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# Labor & Employment Law Alert

October 2006  
Allison D. Balus, Editor

*Practical and preventive information for managing  
your workplace*

## *Unused Accrued Vacation? Pay Up!*

Until October 20, 2006, Nebraska employers who chose to limit the ability of employees to be compensated for unused accrued vacation pay at termination simply said so by rule or by agreement. No more. The Nebraska Supreme Court has unanimously held that “accrued vacation time, which is part of an employment agreement, is due and payable as wages upon termination of employment.”

In *Roseland v. Strategic Staff Management*, four employees who had voluntarily resigned demanded payment of their accrued vacation pay. The company vacation policy provided that an employee accrued one week of vacation after one year of continuous service with the company, two weeks after two years of continuous service, and three weeks after five years of continuous service. There were no other conditions to be eligible for vacation pay. The company refused to make payment to the former employees, citing the employee handbook, which stated that “accrued, but unused vacation will not be carried over from year to year. Upon resignation or termination, employees will not be paid for vacation time available.” (emphasis in original). The four employees filed suit.

The District Court ruled in favor of the former employees, holding that non-payment of accrued vacation violated the Nebraska Wage Payment and Collection Act (the “Wage Act”). The Court of

Appeals disagreed and reversed the District Court. The Court of Appeals held that under the Nebraska Supreme Court’s decision in *Professional Business Services v. Rosno*, courts are obligated to look to employer handbooks to determine whether an employee is entitled upon termination to receive earned but unused vacation pay. The Court of Appeals then held that because Strategic Staff Management’s employee handbook stated that the employee forfeited any accrued but unused vacation, the employees were not entitled to any pay for unused vacation time at termination. (See our March Newsletter for further details on the Court of Appeals ruling).

The Nebraska Supreme Court disagreed and reversed the Court of Appeals. The Supreme Court found that the Court of Appeals reliance on the *Rosno* case was misplaced because the handbook in question in that case permitted employees to receive compensation for unused vacation and sick leave. The Supreme Court looked instead to *Moore v. Eggers Consulting*, which held, among other things, that employment agreements could not circumvent the statutory definition of wages and agreements that attempted to do so would be void.

The Wage Act requires employers to pay unpaid “wages” to their employees or suffer possible penalties and attorneys’ fees if an

**LABOR, EMPLOYMENT  
AND EMPLOYEE  
BENEFITS LAW OR  
RELATED SERVICES**

**Jill Robb Ackerman (1)**  
**Allison D. Balus (6)**  
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**Gary N. Clatterbuck**  
**Steven D. Davidson (2)**  
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**Heidi A. Guttan-Fox (1)**  
**Christopher R. Hedican (5)**  
**Mark P.A. Hudson (7)**  
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**Lindsay K. Lundholm**  
**Scott P. Moore (4)**  
**Scott S. Moore (3)**  
**Jerome C. Okolo (8)**  
**David M. Pedersen (1)**  
**Charles A. Smith**  
**R.J. (Randy) Stevenson (1)**

*All attorneys are admitted to practice in Nebraska unless otherwise noted.*  
*(1) Also admitted to practice in Iowa*  
*(2) Also admitted to practice in Missouri*  
*(3) Also admitted to practice in Iowa and Colorado*  
*(4) Also admitted to practice in Iowa and Missouri*  
*(5) Also admitted to practice in Iowa, Kansas, Missouri, Wyoming and Montana*  
*(6) Also admitted to practice in Virginia and the District of Columbia*  
*(7) Also admitted to practice in Iowa and Montana*  
*(8) Admitted to practice in Iowa, Nebraska Bar application pending.*



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employee must sue 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 specifically includes sick and vacation pay within the definition of “wages” and “fringe benefits.” As a result, the Supreme Court concluded that the provision in the handbook “stating that employees shall not be paid for unused vacation leave upon termination conflicts with state law and is void.”

What does this mean for Nebraska employers? They will no longer be able withhold vacation pay if it is unused at the time of termination. Employers should also note that while the Supreme Court did not specifically address it, one of the outcomes of this case is that “use it or lose it” vacation policies are likely void as well. Moreover, given the fact that “sick leave” is treated the same as vacation leave under the Wage Act, this ruling calls into question the legality of PTO plans that pay less than 100% of sick leave at the time of termination. Once employees have accrued their vacation or sick leave, it would be unlawful for an employer to take it away. While it remains unresolved whether this case will be applied to others retroactively, there is a significant likelihood that the issue will be litigated, especially given the four year statute of limitation for Wage Act claims, as well as the fact that the Wage Act provides for payment of attorneys fees at a minimum of 25% of the amount recovered.

Employers who currently have these types of provisions in their handbook or similar policy documents should modify them to reflect these changes in the law. In addition, all employers should consider taking this opportunity to evaluate their sick leave, vacation, or PTO policies to determine whether the current accrual system continues to make sense.

David J. Kramer

\*The contents of this update are intended for general informational purposes only and should not be construed as legal advice. Readers are urged not to act upon the information contained in this publication without first consulting an attorney.