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August 1, 2001

Michael V. Frett, Director
Bureau of Labor Standards
45 State House Station
Augusta, ME 04333-0045

Dear Director Frett:

You have asked our opinion as to the severance pay liability of an employer who has owned a covered establishment for more than three years to employees who were employed at that establishment for a period that is longer than the period of that employer's ownership of the establishment.[1] This appears to be the first time that this Office has been asked to render a formal opinion on this issue. For the reasons set forth below, it is the opinion of this Office that the severance pay liability of the employer that has owned a covered establishment for more than three years is one week's pay for each year the employee has worked in that establishment, regardless of any change(s) in ownership of the establishment during an employee's period of service.

The Maine severance pay statute, 26 M.R.S.A. § 625-B (1988 & Supp. 2000),[2] "was enacted to address the 'economic recession that invariably results in a community where a large number of people simultaneously lose their jobs' and to 'alleviate the adverse economic impact upon the employees and the community in which they live.'" State v. L.V.I. Group, 1997 ME 25, ¶ 12, n. 5, 690 A.2d 960, 965 (quoting L. D. 424, Statement of Fact (105th Legis. 1971)). It is "[d]esigned to protect Maine citizens from the economic dislocation that accompanied closing of large establishments." Director of Bureau of Labor Standards v. Fort Halifax Packing Co.,

[1] Your question assumes that the prerequisites to liability under Maine's severance pay law have been satisfied, i.e., that an employer has relocated or terminated a covered establishment within the meaning of those terms as defined by the statute. This opinion is limited to the issue of the amount of severance pay that is owed to employees who have worked in a covered establishment for period of time that is longer than the time that it has been owned by the owner of the facility at the time of the relocation or termination.

[2] Formerly 26 M.R.S.A. § 625-A. The severance pay statute has its roots in an 1887 enactment of the Legislature, later codified as R.S. ch. 40 (1903), which provided that employers and employees could contract for the employer to pay a forfeiture of the week's wages to an employee if the employer discharged the employee without providing one week's notice; or for an employee to forfeit a week's wages if the employee quit without affording one week's notice. Section 625-B is largely the result of substantial amendments in 1971 and 1973, which established severance pay liability for certain employers who ceased or relocated operations, the calculation of which was generally based on length of service.

510 A.2d 1054, 1066 (Me. 1986), aff'd. 482 U.S. 1 (1986) (citations omitted). With this background, we begin our analysis of your question with the language of the statute, which defines an employer's liability for severance pay as follows:

> Any employer who relocates or terminates a covered establishment shall be liable to his employees for severance pay at the rate of one week's pay for each year of employment by the employee in that establishment.

26 M.R.S.A. §625-B(2)(1988)(emphasis added). The statutory definition of "covered establishment" reads as follows:

> A. "Covered establishment" means any industrial or commercial facility or part thereof which employs or has employed at any time in the preceding 12-month period 100 or more persons.

26 M.R.S.A. §625-B(1)(A) (1988 & Supp. 2000).

"The 'fundamental rule' in statutory construction is that the legislative intent as divined from the statutory language controls the interpretation of the statute." State v. Edward C., 531 A.2d 672, 673 (Me. 1987). "Unless a statute as a whole discloses a contrary intention, unambiguous language should be afforded its plain meaning." Director of Bureau of Labor Standards v. Diamond Brands, Inc., 588 A.2d 734, 736 (Me. 1991) (citations omitted). The language of the statute requires an employer to calculate severance pay owed to an employee based on that employee's years of work in that establishment, without regard to the number of owners of that establishment for whom the employee ultimately worked. For example, if an employer who is terminating a covered establishment has owned that establishment for twenty years and has an employee who worked in that establishment for those twenty years as well as an additional five years for a previous owner(s), the employer would be liable to that employee for 25 weeks of severance pay.

The length of time an establishment is owned by a particular employer is relevant to severance pay liability in one important respect. Section 625-B(3) provides certain exceptions to the severance pay obligation, often referred to as "mitigating factors," including an exception for any employee who "has been employed by the employer for less than 3 years." 26 M.R.S.A. § 625-B(3)(D)(1988 & Supp. 2000).[3] This exception could apply in one of two ways: first, the

[3] Subsection 3 in its entirety reads:

> 3. Mitigation of severance pay liability. There is no liability under this section for severance pay to an eligible employee if:
>
> A. Relocation or termination of a covered establishment is necessitated by a physical calamity;

employer may have owned the facility for less than three years at the time of termination or relocation; or, alternatively, an individual employee may have less than three years of service with an employer who owes severance pay to other employees.

It might be argued that the language in this exception supports a reading of the statute as a whole that limits an employer's severance pay liability to the period of that employer's ownership of the facility in question. However, while the exception in § 625-B(3)(D) focuses on length of service with the employer, the language defining liability for severance pay focuses on the employee's length of service in the establishment. The policy served by the exception, that of encouraging potential buyers of a financially distressed company,[4] is served by affording them a three year window to determine whether a business can be made to be profitable enough to continue it. Limiting the window to three years represents a balancing of such an interest with the primary purpose of the statute, which is to ease the financial impact on employees and their communities when a business closes.[5]

Maine's Law Court has not decided the precise question we discuss in this opinion. However, the Court has addressed the distinction between "employer" and "establishment" in a slightly different context in section 625-B. The Court's reasoning in Director of the Bureau of Labor Standards v. Diamond Brands, 588 A.2d 734 (Me. 1991), directly supports the plain language interpretation of the statute we have outlined above. In the Diamond Brands case, the Bureau of Labor Standards sought to enforce an interpretation of the exception in 26 M.R.S.A. § 625-B(3)(D) that would make employees who worked in the same facility for more than three years eligible for severance pay despite the fact that the facility had been owned by the employer for less than three years. The Law Court rejected the Bureau's interpretation, based on the distinction between "employer" and "establishment."

B. The employee is covered by an express contract providing for severance pay that is equal to or greater than the severance pay required by this section;
C. That employee accepts employment at the new location; or
D. That employee has been employed by the employer for less than 3 years.

[4] See Director of Bureau of Labor Standards v. Diamond Brands, 588 A. 2d 734 at 737, n. 7 (Me. 1991).

[5] It has been suggested that severance pay liability varies depending on the nature of the transaction which effects the change of ownership, e.g., an asset purchase agreement which provides that the successor employer does not assume the debts of the predecessor employer consistent with the common law rule on successor liability. Such an interpretation, whereby the statutory purpose of protecting displaced workers can be avoided by the way in which a transaction is structured, raises a host of policy issues. More importantly, to the extent that the severance pay law is inconsistent with common law principles by imposing liability measured in part by an employee's years of service under prior owners, the statute is sufficiently clear that the common law rule is modified. *Cf.* Diamond Brands at 736. In short, an acquiring employer takes ownership subject to the terms of the severance pay law.

The three year ownership exception as worded in a 1973 amendment to the severance pay law provided that no liability would be imposed on an employer if the employee had been "employed for less than 5 years at said establishment." P.L. 1973, ch. 545 (emphasis added). In 1975, however, this paragraph was further amended to preclude liability in the case where an employee had been "employed by said employer for less than 3 years." P.L. 1975, ch. 512 (emphasis added). In determining that this section could not be read to impose severance pay liability on an employer based on the employee's length of employment at the facility, the Law Court focused on the statutory change from "at said establishment" to "by said employer."

> The reference to establishment in the exemption provision ties liability to the period of time served by the employee at a particular site, rather than to the identity of the employer. Under this version of the statute [1973], successor corporations, including Diamond Brands, would have been liable for severance pay, regardless of the length of time between the purchase of the corporate assets and the date of the plant closure, and regardless of the number of predecessors in interest in their chain of title.

Diamond Brands, 588 A.2d at 737 (emphasis added).

Similarly, in *Director of the Bureau of Labor Standards v. Fort Halifax Packing Co.*, No. CV-81-516/515 (Me. Sup. Ct., Kenn. Cty., May 2, 1985) *aff'd. on other grounds* 510 A.2d 1054 (Me. 1986), *aff'd. on other grounds* 482 U.S. 1 (1986), the Maine Superior Court addressed the question, "who among Fort Halifax's former employees is entitled to severance pay and the amount thereof." (Attachment at A24)[6] Central to Fort Halifax's argument was that if it was liable for severance pay, it should only be liable for "the years after 1975 when the severance pay statute achieved what is essentially its present form" (Attachment at A26); and, in any event, it should not be liable for severance pay for the years worked by the employees at the establishment prior to 1972, the year in which Fort Halifax purchased the establishment. In rejecting this argument, the Court stated:

> Finally, with respect to all employees . . . [t]he important time period in the statute is the number of years the employee worked at a "covered establishment" before termination. Although this time period may extend back beyond the 1975 amendment and although defendant will be liable to employees for years the employees worked at the "covered establishment" before defendant acquired

[6] This version of the Superior Court's opinion in the Fort Halifax case is a copy produced in a filing with the U.S. Supreme Court in the case on appeal.

> the Winslow plant, this result is perfectly consistent with the purpose of the statute.[7]

(Attachment at A26.)

These cases confirm the unambiguous language of the statute. Because the severance pay calculation is based on "each year of employment by the employee in that establishment," any employer terminating or relocating a covered establishment who does not qualify for one of the mitigating factors must calculate severance pay based on the employee's actual years of work in the establishment.

Please let me know if we can be of any further assistance.

Sincerely,

G. Steven Rowe
Attorney General

GSR:jawp
Enclosure

[7] This issue, as addressed here by the Superior Court, was not reached by either Maine's Law Court or the U. S. Supreme Court.

APPENDIX B

May 2, 1985—Judgment and Order of the Superior Court for Kennebec County, Maine

STATE OF MAINE

SUPERIOR COURT

KENNEBEC, SS.

Civil Action,
Docket No. CV-81-516/515

MARVIN W. EWING, Director of the Bureau of Labor Standards, Maine Department of Labor

—v.—

FORT HALIFAX PACKING COMPANY, INC.

and

RAYMOND BOURGOIN, *et al.*

—v.—

FORT HALIFAX PACKING COMPANY, INC.

ORDER

The trial of these consolidated cases was held on April 1, 1985 before the Court sitting without a jury. At issue is whether defendant Fort Halifax Packing Company, Inc. ("Fort Halifax") owes severance pay to former employees, pursuant to 26 M.R.S.A. § 625-B (Supp. 1984-1985). Defendant contends: 1) that section 625-B is not applicable on the facts of this case, and 2) that if section 625-B is applicable, defendant has met its obligations under the statute. After reviewing the evidence and arguments presented by the parties, the Court concludes

that section 625-B is applicable to defendant and that defendant has not fully met its obligations under the statute.

Fort Halifax is a Maine corporation with its principal place of business in Winslow. Fort Halifax is a wholly owned subsidiary of Corbett Enterprises, a Missouri corporation. In turn, Fort Halifax wholly owns Corbett Brothers, a Maine corporation. Fort Halifax's operations began in 1972 when it acquired the assets of the Ralston Purina Company located in Winslow, chiefly a broiler processing and packaging plant. Fort Halifax operated the Winslow poultry plant until May 23, 1981 when it laid off nearly all its employees.

Section 625-B(2) provides:

> Severance pay. Any employer who relocates or terminates a covered establishment shall be liable to his employees for severance pay at the rate of one week's pay for each year of employment by the employee in that establishment. The severance pay to eligible employees shall be in addition to any final wage payment to the employee and shall be paid within one regular pay period after the employee's last full day of work, notwithstanding any other provisions of law.

As used in section 625-B, a "covered establishment" means a facility "which employs or has employed at any time in the preceding 12-month period 100 or more persons." *See* 26 M.R.S.A. § 625-B(1)(A). Fort Halifax qualifies as a "covered establishment." Under section 625-B(3), there is no liability for severance pay if:

> A. Relocation or termination of a covered establishment is necessitated by a physical calamity;

B. The employee is covered by an express contract providing for severance pay;

C. That employee accepts employment at the new location; or

D. That employee has been employed by the employer for less than 3 years.

Separate actions were brought by a small number of former employees and by the Director of the Bureau of Labor Standards (the "Director") to enforce the severance pay statute. In an opinion and order deciding cross motions for summary judgment in the case brought by the Director, *Ewing* v. *Fort Halifax Packing Company, Inc.*, CV81-516, this Court upheld the validity of section 625-B(2) against defendant's charges of preemption and unconstitutionality. Specifically, defendant argued that the Federal Employment Retirement Income Security Act ("ERISA), 29 U.S.C. § 1007, *et seq*, preempted Maine's severance pay statute. Defendant also argued that the Maine statute and its application was a violation of due process and equal protection, an improper exercise of the police power, and an impairment of contract. In a separate motion, defendant moved for summary judgment on a number of grounds, among them, that the National Labor Relations Act (the "NLRA"), 29 U.S.C. §§ 141, *et seq*, preempts Maine's severance pay statute. The presiding Justice denied that motion without opinion.

Now that the cases have been consolidated, defendant renews its argument that section 625-B is unconstitutional and is preempted by ERISA and the NLRA. Even if the law of the case doctrine did not stand as an obstacle to reopening these issues in the present case, this Court is unpersuaded by defendant's arguments on unconstitutionality and preemption.

May 2, 1985—Judgment and Order of the Superior Court for Kennebec County, Maine

Turning to the central controversy, this Court must determine who among Fort Halifax's former employees is entitled to severance pay and the amount thereof. On the assumption that section 625-B(2) is enforceable, the non-administrative employees who worked exclusively at the plant are clearly entitled to severance pay under the statute. The sole question in regard to them is the amount of severance pay to which they are entitled.

The employees in dispute can be divided into four categories: 1) Corbett Farms employees, 2) feed mill employees, 3) "live haul" employees, and 4) administrative employees. Four Fort Halifax employees, Carl Fenwick, Betty Partridge, Robert Grenier, and Raymond Daigle, went to work for Corbett Farms, Inc. ("Corbett Farms"). At the time of their transfer, Corbett Farms was owned by Charles J. Auger who had been the president of Fort Halifax until the Winslow plant ceased operation. The four employees were transferred, with their consent, directly to Corbett Farms without any loss of pay or vacation benefits. Under these circumstances, the Court is compelled to conclude that the four Corbett Farms employees suffered no severance and are not entitled to severance pay.

The second category is composed of a unique class of one—Robert Grenier. Mr. Grenier worked at a feed mill owned by Corbett Brothers, some distance from the Fort Halifax plant. Mr. Grenier's supervisor was not an employee of Fort Halifax. Mr. Grenier, however, was on the Fort Halifax payroll, and he collected his wages at the Winslow complex. Mr. Grenier lost his job at the feed mill when the Fort Halifax plant was closed. Although Mr. Grenier received his paycheck from Fort Halifax, he was not employed at a "covered establishment" within the meaning of section 625-B(1)(A). Therefore, he is not entitled to severance pay from Fort Halifax.

May 2, 1985—Judgment and Order of the Superior Court for Kennebec County, Maine

The "live haul" employees in dispute are Robert Cummings, Harold Hubbard, Larry Hubbard, Wilfred Morey, Edgar Pooler, Robert Richardson, Winslow Tobey, Lawrence Roy, William Bird, Durwood Dow, and Edison Hubbard. These men were employed and paid by Fort Halifax. They reported to the Fort Halifax plant and were supervised by a Fort Halifax foreman in their job of gathering chickens from outlying farms. The live haulers lost their jobs as a result of the plant closing. The live haulers were an essential part of Fort Halifax's integrated operation. Although much of the physical activity required by their job occurred off the premises of the Winslow plant, their performance constituted an integral part of the operation of the plant. The live haulers met at the Winslow plant and received instructions at the Winslow plant. They then went to outlying farms and "caught" the chickens needed for the production line of the plant. On these facts, the Court finds that the live haulers were employees at a "covered establishment" who are entitled to severance pay.

The final category consists of the administrative employees: Arthur Simpson, Norris Willette, Larry Corbin, David Gagnon, Fernando Roderique, Trene Boucher, Michael Aglio, Edward Daigle, Erwin Emery, and Eugene Bourgoin. Defendant does not dispute that the administrative employees worked at a "covered establishment" and are entitled to severance pay. Rather, defendant contends that these employees have been paid severance pay pursuant to express contracts between defendant and the administrative employees. Section 625-B(3)(B) provides that no liability for severance pay exists under the statute if an eligible employee "is covered by an express contract for severance pay."

Contrary to defendant's contentions, the evidence does not support the conclusion that the administrative employees and

defendant were parties to express contracts providing for severance pay. While defendant may have occasionally paid one month's salary to administrative employees who had been terminated other than for cause, there is no indication of any written or oral agreement between defendant and its employees concerning severance pay.

Despite the absence of an express agreement, defendant did pay some administrative employees money in addition to their earned salary after the plant ceased operations. Although these payments do not establish the existence of an express agreement, the parties have agreed that these payments along with unearned vacation pay must be subtracted from gross pay before obtaining the weekly average used to compute the total severance pay due pursuant to section 625-B(1)(H) and (2).

Finally, with respect to all employees defendant argues that if it is liable for severance pay, the liability extends only for years worked after 1975 when the severance pay statute achieved what is essentially its present form. The important time period in the statute is the number of years the employee worked at a "covered establishment" before termination. Although this time period may extend back beyond the 1975 amendment and although defendant will be liable to employees for years the employees worked at the "covered establishment" before defendant acquired the Winslow plant, this result is perfectly consistent with the purpose of the statute. In this case, the State seeks to apply the statute only to a termination occurring after the statute's enactment and amendments. There is no problem with retroactive application of the statute.

Accordingly, judgment is entered against defendant and in favor of the State for the benefit of the individual named em-

ployees in the following amounts together with interest and costs:

Robert Cummings	$1,874.85
Harold Hubbard	4,428.96
Larry Hubbard	2,222.57
Wilfred Morey	1,700.10
Edgar Pooler	748.62
Robert Richardson	1,982.54
Winslow Tobey	2,289.28
Lawrence Roy	4,518.24
William Bird	1,428.95
Durwood Dow	750.60
Edison Hubbard	826.71
Arthur Simpson	8,347.43
Norris Willette	4,482.75
Larry Corbin	5,041.92
David Gagnon	4,400.00
Fernando Roderique	5,972.95
Trene Boucher	1,300.90
Michael Aglio	3,395.79
Edwin Daigle	3,686.41
Erwin Emery	1,017.68
Eugene Bourgoin	8,667.60
Mary Cummings	648.92
Alice Gurney	4,391.28
Sharon Hutting	1,307.52
Nelsom Frappier	1,665.28
Raymond Bourgoin	6,562.08
Owen Wentworth	981.76
Ernest Willette	3,791.90
Michael Willette	747.87
Carrol Carey	5,870.18
Raymond Cayouette	6,547.44

May 2, 1985—Judgment and Order of the Superior Court for Kennebec County, Maine

Dorothy Dyer	$4,667.00
Bronnick Kibbin	2,830.62
Regional Pooler	6,378.69
Leo Giguere	5,495.04
Frank Bickford	7,006.44
Jerry Grivois	580.44
Lucien Bard	2,247.96
Alfred Landry	2,197.56
Norman Madore	708.28
Allen Mullen	889.65
Robert Myers	840.70
Dana Nelson	1,028.60
Clarence Hachey	3,977.76
Steven Harrison	784.04
Gregory Ivory	841.25
Larry Allen	1,450.72
Gary Gagnon	719.60
Rita York	2,114.88
Warren York	2,142.60
George McAdoo	1,026.24
Rhonda Porter	649.80
Joan Hudson	3,886.54
Elizabeth Kelly	1,113.21
Deborah Lamontagne	1,091.23
Sally Goguen	702.44
Arlene Grandmaison	520.47
Rebecca Greene	2,652.00
Laura Grivois	885.10
Mavis Hanning	856.25
Norma Frappier	1,068.78
Joan Gagnon	3,113.89
Darhlene Crain	832.20
Dorothy Fields	526.86

May 2, 1985—Judgment and Order of the Superior Court for Kennebec County, Maine

Rolande Folsom	$4,174.73
Bertha Knowles	1,364.40
Charles Anderson	4,964.96
Sylvia Anderson	3,890.64
Lawrence Belanger	3,563.70
Carol Sawtelle	674.35
Jacqueline Vashon	810.30
Muriel Vigue	1,818.30
Ruth Poulin	493.77
Jean Bard	3,027.96
Mary Berube	1,875.25
David Breton	1,413.96
Nancy Duplissee	490.26
Rose Giguere	3,854.57
John Thomas	2,936.16
Audrey Tyler	3,767.10
Roland Grenier	8,680.36
Charlene Sweet	1,592.03
Bruce Tibbetts	1,820.06
Clyde Young	7,164.82
Jeannie Labbe	495.51

Dated: May 2, 1985.

DANIEL E. WATHEN
Justice, Superior Court