Employment Law Advisor: The Wage Act

Complying with the Massachusetts Wage Act as the Law's Reach and Impact Continue to Expand

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The Massachusetts "Payment of Wages" statute, M.G.L. c.149, §148 (the "Wage Act"), governs with specificity when and how frequently an employee must be paid. Compliance with the Wage Act is important for any business, since violations can carry a high price and are subject to mandatory treble (triple) damages and attorney's fees, even when employers act in good faith. See Employment Law Advisor, July 2008. Not only can Wage Act violations result in treble damages but they may also result in both criminal penalties and civil liability for the corporate entity as well as the president, treasurer, and individual "officers and agents" of the corporate entity.

Because the cost of non-compliance can be so high, it is important to track the evolution of the Wage Act's coverage and applicability. In recent months, Massachusetts courts have issued several decisions which continue a general trend towards an expansion of the Wage Act's reach. For example, the Wage Act has recently been enlarged to include non-Massachusetts employees who have significant contact with Massachusetts. See Employment Law Alert, November 2011. Further, as discussed in this Advisory, the definition of wages has been expanded to include retirement deductions made by private employers, the Wage Act's coverage has been expanded by limiting the type of permissible pay-check deductions an employer may make, and courts have reiterated that commissions qualify as wages under the Wage Act. A lone outlier to this expansive trend is a Superior Court ruling, whose applicability is likely to be short lived, which holds that officers and agents of Limited Liability Corporations ("LLC") are not individually liable under the Wage Act.

Superior Court Expands Definition of Wages to Include Retirement Deductions

The Massachusetts Superior Court continued the trend towards an expansive view of the Wage Act in *Pacheco v. H.N. Gorin, Inc.*, (Mass. Sup. Ct., No. 09-1946, May 2, 2011), when it expanded the definition of "wages" to include employee contributions to a private employer's deferred compensation plan and held that the payment and deposit of any such contributions into an employer-provided retirement account must be made in compliance with the Wage Act, which requires that payment of wages be made within six days of the end of the pay period during which the wages were earned.

The plaintiff, Timothy Pacheco, was hired by Gorin Associates in 2004 as a mechanic. Soon after his hire, Pacheco took Gorin up on an offer to participate in a Salary Reduction Simplified Employee Pension Plan (SARSEP) deferred compensation plan, and Gorin began deducting $82.40 from each of Pacheco's paychecks. By the end of Pacheco's employment, Gorin had deducted a total of $8,504.00. Pacheco expected that those deductions would be deposited into an account with a brokerage firm. Gorin, however, never set up an account with Fidelity on behalf of Pacheco, and instead retained the $8,504.00 which it had deducted from Pacheco's checks. Whenever Pacheco inquired into the status of his retirement account, Gorin's employees stated that they were "working on it." Finally, Pacheco and his wife contacted the brokerage firm and learned that there was no record of any account for Pacheco.

Pacheco brought suit and alleged, among other claims, that Gorin's failure to deposit the withheld funds into a retirement account within six days of the pay period in which they were due violated the Wage Act. The Superior Court agreed, and granted Pacheco summary judgment on his Wage Act claim. In doing so, the court held as a matter of first impression that employee contributions to a private employer's deferred compensation plan are considered wages under the Massachusetts Wage Act and, as such, Gorin's failure to pay them in a timely manner constituted a violation of the Wage Act.

In order to reach its decision, the Superior Court had to distinguish an earlier Wage Act case, *Boston Patrolmen's Assoc. v. City of Boston*, 435 Mass. 718 (2002), in which the Supreme Judicial Court ("SJC") ruled that paycheck deductions from City of Boston employees were not "wages" for purposes of the Wage Act. The SJC reached this earlier decision based mainly on the fact that the contributions in question were deposited into the City of Boston's public-employee plan created in accordance with the Internal Revenue Code, 26 U.S.C. § 457(b)(6), which provides that, under a municipal deferred compensation program, employee contributions "should remain (until made available to the participant or other beneficiary) solely the property and rights of the employer. . . ." Thus, under a municipal plan, the employee contributions remain the legal property of the employer until they are disbursed. However, the Internal Revenue Code treats deferred compensation plans created by private employers differently. Contributions to a SARSEP or "408(k) plan" like the one Pacheco believed he was contributing to become the property of the employee immediately upon transfer into the account.

So, because Pacheco's deductions should have been deposited into a private-employer account, where they would have been immediately considered his property, they qualified as "wages" under the Wage Act. Gorin's failure to deposit the deducted funds within six days of the termination of the pay period during which those wages were earned was thus a violation of the Wage Act, and Pacheco was entitled to treble damages in the amount of $25,814.40.

It is worth noting that many private-employer deferred compensation plans are covered by the Federal Employee Retirement Income Security Act of 1974 ("ERISA"), and that this decision did not address the issue of whether a claim for unpaid retirement deductions might be subject to ERISA's broad preemption provision.

PRACTICE TIP: Private employers should set up employee retirement accounts promptly and disburse paycheck deductions into retirement accounts within six days of the paycheck.

SJC Narrows Types of Deductions Employers Can Take From Employee Pay

In January 2011, the Massachusetts Supreme Judicial Court accepted the Attorney General's narrow interpretation regarding what types of deductions (or set-offs) from an employee's pay for damaged (or unreturned) property or for money owed by the employee are permissible.

In *Camera v. ABC Disposal Service, Inc.* the SJC ruled that the employer violated the Wage Act by making deductions from the pay of employees who had caused damage to the employer's trucks, even though the employees had agreed the employer could make such deductions.

The defendant employer, ABC, had a policy regarding damage to its trucks or property belonging to third parties. When ABC determined that a driver was at fault for an accident which caused property damage, the driver could either accept discipline for the accident or agree to pay for the damage over time through deductions from his pay. In response to an employee complaint, the Massachusetts Attorney General's Office audited ABC and determined that the company had deducted over $21,000 from employee wages under the policy. It issued a citation demanding that ABC pay affected employees all amounts deducted and also pay a civil penalty of over $9,000.

ABC successfully challenged the Attorney General's citation in Superior Court. However, on appeal, the SJC deferred to the Attorney General's "reasonable interpretation" of the Wage Act. Although the Wage Act permits employers to make "valid set-offs" from employee pay, the SJC stated that lawful set-offs are limited "to circumstances where there exists a clear and established debt owed to the employer by the employee." According to the Court, "[a]n arrangement whereby ABC serves as the sole arbiter, making a unilateral assessment of liability as well as amount of damages with no role for an independent decision maker, much less a court, and, apparently, not even an opportunity for an employee to challenge the result within the company" does not amount to "a clear and established debt owed to the employer by the employee." The SJC noted that the option ABC afforded employees "to choose 'voluntarily' to accept either wage deductions or discipline offers them only unpalatable choices."

What, then, are "valid set-offs?" The Attorney General offered the following examples: "[i] where there is proof of an undisputed loan or wage advance from the employer to the employee; [ii] a theft of the employer's property by the employee, as established in an 'independent and unbiased proceeding' with due process protections for the employee; or [iii] where the employer has obtained a judgment against the employee for the value of the employer's property." The SJC stated that there are other circumstances in which a set-off would be valid, such as part of the collective bargaining agreement, but the Court declined to provide any more examples or guidance.

PRACTICE TIP: Employers need to be very careful before making any deductions from employee pay not required by law (e.g., tax withholdings) or not expressly authorized by the employee under an employee benefit plan. In Massachusetts, employer deductions to recover for damaged or unreturned property are very dangerous. Deductions for other types of "debts," such as deductions made at termination for vacation advances or employer-paid tuitions, should be handled carefully and with appropriate documentation, signed by employees.

Individual Liability Under the Wage Act Not Applied to Officers or Agents of Limited Liability Corporations

In *Cook v. Patient EDU, LLC, et al.*, C.A. No. 10-00810 (Mass. Superior Ct. May 24, 2011), the Superior Court dismissed claims seeking to hold the employer's President and manager individually liable for unpaid wages under the Massachusetts Wage Act, and ruled that defendant managers and officers of an LLC cannot be held individually liable under the Wage Act because an LLC is not a corporation and only "officers or agents having the management of [a] corporation" can be found individually liable under the Act.

The Wage Act provides that "[t]he president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation. . . ." G.L. c. 149 § 148. Accordingly, corporate individuals may be personally liable for violations of the Wage Act. However, in *Cook*, the court ruled that this individual liability does not apply to individuals involved in the management of a limited liability company, since an LLC is not a "corporation" within the strictest sense. The court found that the language of the Wage Act was unambiguous, and that it was therefore bound in its decision by the plain meaning of the statute.

Although *Cook* is a Superior Court decision and thus not binding on other courts, it does represent a departure from Massachusetts courts' recent expansive reading of the Wage Act, and unless or until it is no longer good law, may be cited by LLCs facing Wage Act claims.

PRACTICE TIP: Employers organized as LLCs should continue to comply with the Wage Act. The Superior Court is a trial court, and therefore the holding reached in *Cook* could be over-ruled by a Massachusetts appellate court in a future case, and the decision is not binding on other courts. Moreover, the court in *Cook* noted that the Wage Act could be amended by the legislature to

include individual liability for officers and managers of LLCs since "it is possible that the Legislature's failure to include individual officers and managers of LLCs in the definition of employer is an unfortunate oversight." Further, *Cook* does not change the liability which an LLC as a corporate entity faces. Therefore, all employers, regardless of their corporate form, should continue to comply with the Wage Act's requirements.

Commissions are Wages under the Wage Act

A recent case out of the United States District Court, District of Massachusetts, *Micciche v. N.R.I. Data and Business Products, Inc.*, C.A. No. 09-11661-GO (D. Mass. September 27, 2011), serves as a reminder that the Wage Act can apply to wages paid in the form of commissions, but only where the commissions meet the requirements set forth by the Act. The Wage Act applies only to commissions that are "definitely determined" and have become "due and payable to such employee." Mass. Gen. Laws ch. 149 § 148.

In *Micciche*, the plaintiff had been employed by the defendant as an account executive responsible for making sales of computer products and services to the pharmaceutical and healthcare industries. The plaintiff's compensation was made up of both a base salary and a commission, but his commission was contingent and only payable if a sale met a number of requirements, including prompt payment by the client and a minimum amount of sales in a month by the plaintiff. Further, the plaintiff's commission was paid only on the sale's gross profit, which was determined by a formula using the cost of the product sold.

Micciche was fired at the end of 2008. At the time of his discharge, he was presented with a check which amounted to payment for the base salary owed to him, and the balance of his accrued vacation days. However, Micciche alleged that he was also due unpaid commissions under the Wage Act.

The Wage Act applies only to commissions that are "definitely determined" and have become "due and payable to such employee." Mass. Gen. Laws ch.149 § 148. To determine whether Micciche was owed commissions, the court first examined whether Micciche had met the conditions on which payment of a commission were contingent under the terms of his agreement with his employer. For at least two sales, the court found that he had met the conditions, and therefore "earned" a commission. However, the court found that they had not been "definitely determined," *i.e.*, were not capable of being precisely ascertained so as to make their payment come within the Wage Act. Because the amount of commissions was determined using a formula which required the cost of the product, and because evidence of cost was insufficient, the court ruled that it was unable to "definitely determine" the amount of commission earned by Micciche. Accordingly, the court found the employer did not owe Micciche unpaid wages since the commissions were not "definitely determined" and therefore not within the Wage Act.

PRACTICE TIP: This case serves as a reminder to employers that commissions are due to a discharged employer as soon as they become "due and payable" under compensation schemes, and as soon as they are "definitely determined." The question of when a commission has been "definitely determined" and has become due and payable will be answered by the terms of the commission agreement, which, if carefully drafted, can be an important part of managing an employer's obligations to an employee at termination.

Please contact any member of Morse's Employment Law Group for more information.