

# Employment Law Advisor: Final Wages Upon Termination

## The Obligation To Pay Final Wages Upon Termination

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The current economic downturn has resulted in a staggering number of employment terminations. Yet, despite the volume of terminations, some employers in Massachusetts remain unaware of the termination pay requirements contained in the Massachusetts Payment of Wages Act, M.G.L. c. 149, §148 (the "Wage Act"). Given that wage claims are on the rise and penalties for non-compliance can be substantial, including mandatory triple damages, employers should understand their obligations under the Wage Act. This Employment Law Advisor summarizes some of the more common compliance problems faced by employers.

In summary, under the Wage Act:

- Employees who are terminated from employment must be paid in full on their last day of employment.
- Employees who quit must be paid in full on the next regular payday.
- Accrued but unused vacation time must be paid to departing employees at the same time as other compensation.
- Any deferred payment plan must include the current payment of minimum wages; the validity of any deferral plan has been called into question.
- Commission payments fall within the coverage of the Wage Act; severance payments do not.
- The President, Treasurer and other officers of a corporation can be held personally liable for violations.
- Penalties for even a minor or technical violation include mandatory treble damages and attorneys' fees and may constitute a violation of criminal law.

### **TIMING OF PAYMENT OF WAGES UPON TERMINATION**

The Wage Act provides that any employee discharged from employment must be paid his or her wages in full on the date of discharge. This may create a problem even for employers who are aware of this provision, as it can be difficult to generate a final paycheck quickly when employees are discharged with little or no notice. Despite this difficulty, employers should make every effort to comply with this provision. It is a violation of the Wage Act to delay payment of a final paycheck because of administrative reasons, or until deductions for amounts possibly owed by the employee (such as telephone or other personal charges) have been determined. Even when payments are delayed by only a few days, there is a technical violation of the Wage Act which may result in treble damages, an award of attorneys' fees, and personal liability of corporate officers. Employees increasingly are asserting Wage Act claims, often along with other causes of action.

In contrast to an involuntary termination, when an employee leaves employment voluntarily, he or she must be paid by the next regular payday.

It is important to understand that any accrued but unused vacation pay must be paid out at the same time as other compensation. Because of this requirement, it is critical that vacation policies clearly set forth when vacation is accrued (for example, a policy may provide that no vacation accrues until the employee has worked a certain number of months, and thereafter vacation accrues at a particular number of days per month). If the policy is not clear as to when vacation accrues, it could be interpreted to provide for the immediate accrual of all vacation time at the outset of the year. Similarly, a clear, written policy is needed to clarify whether an employee can carry over unused vacation from one year to the next. If there is no clear “use it or lose it” policy, departing employees may be entitled to payment for many weeks of unused vacation accrued over each year they have been employed.

#### **Practical Tip**

One strategy that many employers use to avoid a violation of the Wage Act is as follows: instead of discharging an employee effective immediately, delay the effective date of discharge until such time as an accurate paycheck can be cut, or until his or her next regular payday. An employer can tell an employee of his or her discharge and relieve the employee of his or her duties on Wednesday, but also tell the employee that the discharge will be effective on Friday and that he or she will be paid through that date. This is a particularly useful practice if the employee owes money to the employer which requires time to reconcile, or if vacation payments need to be determined.

#### **SET-OFFS**

The existence of a “valid” set-off is a defense to a claim for failure to pay wages. However, employers should be warned that the Attorney General’s office takes a very narrow view of what set-offs are “valid.” As a threshold matter, no deduction to an employee’s wages may be made if it reduces the employee’s compensation below the minimum wage. Further, deductions will likely be valid only if an objective amount is at issue. For this reason, it is a good practice to put in writing any agreement with an employee concerning the items and amounts which will be subject to deduction from wages (such as the amount charged for a lost cell phone, unreturned laptop, or cash register shortages).

#### **NON-PAYMENT OR DEFERRAL OF WAGES**

At times an employer, especially a start-up or emerging company, may want to postpone all or part of an employee’s wages until the employer’s cash flow improves. This practice presents several problems. First, every employee who is “permitted to work” must be paid the minimum wage; therefore, an employee must be paid at least \$8.00 an hour (the minimum wage in Massachusetts), even if some compensation is deferred or is in the form of equity. Second, such deferral plans are often a cause for dispute between the parties. For this reason, any agreement to defer, postpone, or adjust wages should be put in writing and signed by the employee at the outset of the relationship. Third, deferral arrangements can create significant tax issues unless structured properly.

Additionally, employers should be aware that when employees are subject to a deferred payment plan, the balance of monies owed to an employee must be paid upon the employee’s departure, pursuant to the Wage Act. This can be an unwelcome surprise if an employee quits voluntarily, triggering a payment of what may be a substantial sum as of the next payday.

#### **COMMISSIONS AND SEVERANCE**

The Wage Act applies to the payment of commissions “when the amount of such commissions has been definitely determined and has become due and payable” to an employee. 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. For example, if an agreement requires that customer payment must be received by the employer before the commission on a sale becomes due and payable to the employee, the employer only need determine whether in fact such payment has been received in order to calculate

commissions owed.

Regarding severance, the Massachusetts Appeals Court has found that severance payments are not covered under the Wage Act. Although employers may be obligated by contract to pay severance to particular employees, employees cannot seek the penalties provided under the Wage Act for the alleged nonpayment of severance, nor is the timing of severance payments governed by the Wage Act.

#### **INDIVIDUAL LIABILITY AND PENALTIES**

A violation of the Wage Act may result in both criminal penalties and civil liability for the corporate entity as well as the President, Treasurer, and individual “officers and agents.” The Wage Act includes a private civil right of action for injunctive relief and damages, including treble damages for loss of wages and other benefits, as well as attorneys’ fees and litigation costs. An action against an employer may be pursued by the Massachusetts Attorney General’s Fair Labor and Business Practices Division, including the award of penalties against individuals. Note that the Wage Act also imposes penalties against employers for retaliation against any person who complains to the Attorney General or who participates in any Wage Act investigation.

For more information, please contact a member of our [Employment Law Group](#).