

Commissions Under Massachusetts Payment of Wages Law

Employers are often surprised to learn of the rather specific requirements of the Massachusetts “Weekly Payment of Wages” statute, M.G.L. c. 149, §148 (the “Wage Act”). Unfortunately, noncompliance with the Wage Act can be costly. The Wage Act’s applicability to commission payments presents some special problems. This edition of the *Employment Law Advisor* focuses on the “commissions as wages” issue, and reviews what employers need to do to comply with the Wage Act.

The Wage Act: An Overview

The Wage Act governs when and how frequently an employee must be paid. It states that an employer shall pay each employee “weekly or bi-weekly.” It also states that wages must be paid “within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week, or to within seven days of the termination of the pay period during which the wages were earned if such employee is employed seven days in a calendar week.” However, a salaried employee engaged in a bona fide executive, administrative or professional capacity may be paid semi-monthly or monthly (if “such employee elects at his own option to be paid monthly”).

Salaried or not, when an employee is terminated from employment involuntarily he must “be paid in full on the day of his discharge.” An employee who resigns may be paid on the next pay date in the employer’s normal payroll cycle. Owed wages include pay for any unused accrued vacation time. Severance pay is not considered to be wages under the Wage Act. As discussed below, commissions are considered wages when the amount of such commissions has been “definitely determined” and has become “due and payable” to an employee.

Violations of the Wage Act can result in criminal penalties and civil liability for the employer, as well as individual liability for its president, treasurer and other officers

Do you want to:

- ✓ Understand the requirements of the Massachusetts Payment of Wages Law?
- ✓ Learn how the law applies to commissions?
- ✓ Avoid violations of the law and potential civil and criminal liability?

Read on for details ...

and agents with management control over the affairs of the business. The Wage Act includes a private civil right of action in court for injunctive relief and damages, including potential treble (triple) damages for unpaid wages and other benefits, and attorney’s fees and litigation costs. The Massachusetts Attorney General also may bring civil or criminal actions under the Wage Act against employers and their officers and managing agents.

Commissions as Wages

The Wage Act states that it applies to “the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee.” In other words, unless commissions are both (i) definitely determined and (ii) due and payable under the terms of the commission agreement or plan, an employer does not have to pay such commissions on a weekly, bi-weekly, semi-monthly or monthly basis, or at the time of discharge.

Because commission arrangements often vary significantly from employer to employer, when commissions are definitely determined and due and payable depends on the terms of the commission agreement or plan and the circumstances of the situation. A recent case before the Massachusetts Appeals Court illustrates the uncertainties and risks for employers. In *DeSantis v. Commonwealth Energy System*, 68 Mass.

App. Ct. 759 (2007), the plaintiff, Nicholas DeSantis, worked as a sales representative for the defendant employer, COM/Energy Marketing, Inc. (“CEM Co.”), and earned commissions for securing supply contracts for the sale of natural gas. A dispute arose as to when his commissions were due and payable and how they should be calculated.

Before commencing employment, DeSantis had received an offer letter stating that, in addition to his base salary, he would be paid “a commission equal to 20% of gross margins earned on sales of natural gas commodity.” Although he sold over seventy supply contracts, he received only three commission payments. After leaving CEM Co., DeSantis brought suit claiming, among other things, that the company violated the Wage Act by not paying him commissions.

DeSantis contended that the language in his offer letter indicated that he would earn commissions upon the sale of a supply contract, and that the commissions were to be paid “up front,” based on the gross margin determined at the beginning of the supply contract. CEM Co.’s position was that commissions could not be calculated until customer invoices and payments could be examined, and that commissions were to be paid only so long as DeSantis remained employed.



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At trial, in addition to the offer letter, there was evidence that a gross margin of profit could be determined at the beginning of the supply contract, and that the contracts had an “intrinsic value” which was “booked” in CEM Co.’s financial records and treated as an asset. A jury awarded DeSantis about \$80,000 in commissions and the judge, concluding that the Wage Act had been violated by the failure to pay commissions, tripled the damages to about \$240,000. The judge also awarded DeSantis about \$210,000 in lost pension benefits (resulting from the unpaid commissions) and about \$63,000 in costs and attorney’s fees.

On appeal, CEM Co. argued that the trial judge’s trebling of damages was improper. The Appeals Court, however, affirmed the treble damages award, noting that CEM Co.’s business plan placed a priority on its own cash flow rather than the timely payment of employee commissions, and showed a reckless indifference to DeSantis’s rights.

What Should Employers Do?

Be Clear on Method of Calculation, Timing of Payment, and Any Contingencies

The *DeSantis* case illustrates a common problem with commission arrangements: a lack of clarity as to how commissions are to be calculated and when they are to be paid. Since commissions become “wages” under the Wage Act when the amount of such commissions “has been definitely determined and has become due and payable to such employee,” employers should strive to avoid ambiguities. Commission plans and schedules should answer these questions: Are commissions to be based upon amounts billed, or revenue received? What is the formula for calculating commissions? What deductions are to be made? When are payments due? Are there contingencies to payment? By accurately and unambiguously setting out all of the essential terms of the commission arrangement in a written document, an employer can eliminate future areas of dispute, uncertainty and potential legal liability.

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Be Careful When Imposing Contingencies Unrelated to the Completion of Sales

Generally, an employer may withhold commission payments until a clearly stated contingency (e.g., receipt of payment) has been satisfied on the grounds that the commission is not yet definitely determined and/or due and payable. However, if an employer imposes a contingency that is unrelated to the completion of the sale, there is a risk that the Massachusetts Attorney General or a court would find the contingency to be invalid. For example, an employer might require that a person be employed at the time the commission would otherwise be paid. Assuming the employee had completed all work necessary to earn the commission, such a “must be employed at the time commissions are to be paid” contingency might be viewed as an arbitrary condition to payment, and not a valid defense to a non-payment of wages claim. This area of the law is unsettled and employers should be careful when imposing such contingencies. Employers should avoid any appearance of bad faith when terminating an employee who, but for the termination, would be receiving future commissions for past services.

Avoid Unreasonable Conduct That May Result in Treble Damages

The potential that a court may award treble damages (tripling the amount of unpaid commissions) makes Wage Act claims particularly dangerous. Until recently, many judges viewed such awards as mandatory and to be awarded whenever a violation of the law occurs. In *Wiedmann v. The Bradford Group, Inc.*, 444 Mass. 698 (2005), the Massachusetts Supreme Judicial Court ruled that treble damages are not mandatory, but rather are “in a judge’s discretion.” The Court stated further that because such damages are punitive in nature they should generally only be awarded when an employer’s conduct is “outrageous, because of the [employer’s] evil motive or [its] reckless indifference to the rights of others.”

The *DeSantis* case suggests that this “outrageous standard” may be easier to meet than one might expect. As noted above, the court in *DeSantis* found treble damages appropriate because, in its view, CEM Co.’s business plan placed a priority on its own cash flow rather than the timely payment of employee commissions, and showed a

reckless indifference to DeSantis’s rights. The lesson to be learned for employers is to avoid conduct that may appear unreasonable or unfair. In establishing and applying commission arrangements, employers should treat employees fairly and be conscious of how employer communications and actions may be viewed by a judge or jury in the event of a dispute.

Retain Appropriate Documentation

Massachusetts law requires that employers of twenty or more employees retain an employee’s “personnel record” for three years after termination of employment. M.G.L. c. 149, §52C. An employee’s personnel record includes documents regarding the employee’s “rate of pay and other compensation.” In the *Wiedmann* case, the trial court ruled that the defendants could not challenge the plaintiff’s calculation of commissions owed because the employer had failed to retain commission statements and worksheets used to calculate commissions. In affirming the trial court’s ruling, the Supreme Judicial Court noted that judges have broad discretion to impose such sanctions against a defendant who breaches a statutory duty (in this case, the duty to retain employment records).

Beyond the statutory duty to retain employment records and the risk of sanctions for failing to do so, it is generally in an employer’s best interest to retain all documents that will help it establish its commission arrangements with employees, how commissions were calculated, and when payments were made.

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