



New Dangers in Wage & Hour Law



Robert A. Fisher

Jonathan A. Keselenko

Lyndsey Kruzer

MA Wage Act: The Current Situation

- Dramatic increase in litigation; claims often brought as a class action
- More onerous than U.S. wage and hour laws
- Courts continue to interpret the statutes broadly in favor of employees
- Automatic triple damages, interest and attorneys' fees
- Individual liability for key corporate officers
- Real risk of unintentional violations
- Strict independent contractor statute creates potential for Wage Act violations

Wage Act (M.G.L. Ch. 149, § 148)

- Requires regular payment of wages, typically weekly or bi-weekly
- Generally requires payment within 6 days of when wages were earned
- Discharged employee must be paid in full on the day of discharge
- Wages include holiday or vacation pay due to an employee under an oral or written agreement
- Also covers commissions “so far as apt” when the amount of the commissions has been definitely determined and is due and payable
- Employer and employee cannot contract out of the statute

Enforcement (M.G.L. Ch. 149, § 150)

- State attorney general may bring civil or criminal action for violations
- Employee may bring a private civil suit against the employer within three years
- Can also sue the president, treasurer and any officer responsible for management of the company
- A prevailing employee is entitled to
 - Triple damages
 - Attorneys' fees and costs
 - Interest at the rate of 12% per annum
- Payment of the wages after the filing of a complaint is not a defense

- Statute applies to:
 - employees who live or work in Massachusetts, regardless of where the employer is located
 - employees living out of state if sufficient connections to Massachusetts
- Cannot override application of Wage Act to a Massachusetts employee through a choice of law clause naming another state
- Choice of law clause naming Massachusetts could mean employee living and working outside of Massachusetts has benefit of Wage Act
- Unclear whether Wage Act could apply to employees working outside of the United States

BioPharm is a company based in Florida. One of its scientists has informed the company that her spouse has been accepted for a 1 year medical fellowship at a Boston hospital. At her request, BioPharm agrees to let her work from her home in Boston, provided that she spend a week a month in Florida. BioPharm does not have operations in Massachusetts, and it accepts this arrangement as a courtesy to the employee. The employee does not want to pay MA taxes, so BioPharm continues to treat her as a Florida resident for tax purposes.

Six months into the arrangement, BioPharm decides to terminate her employment because the position cannot be performed remotely. BioPharm holds the employee's final paycheck until she returns her company laptop and other company property (about two weeks after the termination date).

Does she have a Wage Act claim?

ABC Software, a Massachusetts-based company, hires a programmer in Alexandria, Virginia. They agree that the programmer can work from his home office, rather than relocate to Massachusetts. The programmer attends an initial training program in Massachusetts and then travels to the home office about two more times before quitting 13 months later. Following Virginia law, ABC does not pay the programmer his vacation time.

Can the programmer bring a claim under the Wage Act?

Independent Contractor

- Classifying an individual as an independent contractor rather than employee is probably not an option
- Individuals are presumed to be employees, unless the employer proves that:
 - The individual is free from control and direction
 - The service is performed outside of the usual course of business of the employer AND
 - The individual has an independent trade or business
- Single biggest area of litigation
- Claim is that individuals were misclassified as independent contractors and that the employer did not pay them in accordance with the Wage Act

ABC Software engages several freelance programmers in New Hampshire to assist regular employees with a short-term project. Because it needs the programmers on a temporary basis, it treats them as contractors and pays them monthly. They physically work in New Hampshire, and ABC understands that it cannot control their work.

One of the independent contractors sues in Massachusetts, claiming that he was misclassified under MA law and that ABC violated the Wage Act. Is there a claim?

Deductions

- Only “valid” deductions are permitted from an employees’ wages
- An employer cannot deduct value of unreturned company property or dock an employee for losses
- An advance or loan can be deducted if clear agreement regarding amount owed
- Case law is attempting to discourage employer self-help

Vacation time

- No obligation to provide vacation time
- Recommend having a written policy regarding accrual and use of vacation time
- Employees are entitled to payout of unused but accrued vacation time upon termination
- Older Attorney General Advisory says an employer can have a “use-it-or-lose it” policy, but under attack
- Sick time is not covered by the statute

ABC Software has implemented a “no vacation policy” policy. Employees do not accrue vacation time and may take as much vacation time as they want, provided they get their work done. Consistent with the fact that employees do not accrue vacation time, ABC does not pay employees for any vacation time upon termination.

Is this legal?

What if ABC tells an employee that he cannot take any more vacation time because he has already taken 4 weeks of vacation?

Commissions

- Although statute says covered only “so far as apt,” courts have ignored this language
- Due and owing once arithmetically determinable
- Employer’s policy or contract generally will control terms and conditions
- But new wave of litigation over claw-backs and contingencies

Nebraska-based company has a team of outside sales people across the country. The sales people receive a base salary and commissions based on sales. The sales plan provides that the commissions are paid every calendar quarter and the employee has to be employed as of that date for payment.

A Massachusetts-based employee quits before the end of the quarter and demands payment for all commissions. Is he entitled to them?

The sales plan also provides that the company reserves the right to offset future commissions whenever it has to refund money to a customer on a deal for which the sales person has already been paid.

Is this legal under Massachusetts law?

Severance Pay and Bonuses

- Severance pay is outside of the scope of the Wage Act
- Discretionary bonuses are also not covered
- Increasing litigation over whether bonuses set by formula are covered
 - Claim is that they are akin to commissions or compensation for services performed
 - Language in some court decisions supports broad coverage
 - Nothing in the statute to suggest that legislature intended to cover bonuses

- Special rules for Wage Act claims
- To be valid, must be specifically mentioned
- May need to revise your standard severance agreements to reflect this new rule
- We assume that this is also the case for mandatory arbitration agreements

- Not a uniquely state law issue
- Growing litigation over what is working time under FLSA and state law
- Pre-liminary and post-liminary time (i.e, walking to and from time clock, changing clothes)
- Use of iPhones and Blackberries outside of work hours
- On-call time
- Travel time
 - Some guidance from the DOL on this
 - But little direction under state law

- State law generally recognizes the same exemption categories as federal law
- Duties Test
 - Executive
 - Administrative
 - Professional
- Salary Basis Test
 - Massachusetts: Must be paid on a salary basis and must earn at least \$250 per week
 - Federal: Must be paid on a salary basis and must earn at least \$23,600 per year (\$455 per week).

Gus hires Jesse as an independent contractor to develop new recipes for his chicken restaurant in Boston. They agree that Jesse, a chef by training, will work at a rate of \$50/hour for about 6 weeks, with Jesse typically working Monday through Friday, 9am to 5pm. \$50/hour is more than the going rate, but is intended to cover expenses and costs associated with being an independent contractor. For research on menu ideas, Jesse takes a trip to Albuquerque. Jesse flies there on Friday night, works Saturday and Sunday, and flies home Monday during the day. Per an agreement between Jesse and Gus, Jesse does not put in for time spent traveling to and from New Mexico.

Are there any risks for Gus and his restaurant as a result of this scenario?

Due to the growing popularity of Albuquerque, Jesse tells Gus that the cost of flying to New Mexico was too expensive and wants to be reimbursed for the airplane ticket. Gus says no way. When Jesse continues to complain about it, Gus decides to terminate the relationship two weeks early.

Is this a problem?

Summary

- Massachusetts wage and hour laws are stricter than most states and U.S. law
- Inadvertent, technical violations carry risk of triple damages
- Multi-state vacation policy or commission plan may not comply with MA law
- Companies whose employees have some nexus to Massachusetts may face liability under MA wage and hour laws
- Don't use Massachusetts as choice-of-law unless you intend it

Questions



Our contact information



Robert A. Fisher

617 832 1235

rfisher@foleyhoag.com

Jonathan A. Keselenko

617 832 1208

jkeselenko@foleyhoag.com

Lyndsey Kruzer

617 832 1248

lkruzer@foleyhoag.com

www.foleyhoag.com