

## Sick Time Not Subject to Massachusetts Wage Act

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On January 29, 2018, the Massachusetts Supreme Judicial Court (SJC) held that accrued, unused sick time does not qualify as “wages” under the Massachusetts Wage Act. As a result, employees cannot maintain Wage Act claims against their employers based on the failure to pay employees for unused sick time.

The Massachusetts Earned Sick Time law does not require that employers pay employees for their accrued, unused sick time. However, that law, which took effect in 2015, raised a new question: where an employer promises to pay out employee sick leave banks, either at the end of the year or upon the termination of employment, does the failure to fulfill such a promise violate the Wage Act? The SJC’s decision in *Mui v. Massachusetts Port Authority* stemmed from such a promise. At issue in *Mui* was a Massport policy providing that long-term employees would receive a partial payout of their accrued, unused sick time upon termination, provided they were not terminated for cause. The plaintiff in *Mui*, a former Massport employee, did not receive such a payment for over a year after his retirement date due to an ongoing grievance procedure. He sued, claiming that the failure to pay him for his unused, accrued sick time violated the Wage Act, exposing Massport to treble damages. After the Superior Court ruled in the employee’s favor, Massport appealed, and the SJC transferred the case on its own initiative from the Appeals Court.

On appeal, the SJC determined that sick pay does not constitute “wages” governed by the Wage Act. Because the Wage Act neither explicitly includes nor excludes sick time from the definition of “wages,” the court looked to how comparable benefits are treated under the Wage Act. The SJC distinguished vacation time, which is covered by the Wage Act, from sick time, which can only be used for a particular purpose—usually, illness. In other words, sick time is contingent upon certain circumstances occurring, while vacation time is not contingent. Relying on this distinction, the SJC concluded that Massport’s partial payout of unused, accrued sick time at the time of termination to an employee is properly classified as a “contingent bonus,” rather than a wage payment, because it is awarded only if an employee does not use all of their sick time and has not been terminated for cause. Because this type of contingent compensation is not covered by the Wage Act, the SJC ruled for the employer and held broadly that sick pay is not covered by the Wage Act.

The decision is an important one for employers who have agreed to pay out employees for unused sick time. Because successful Wage Act plaintiffs are entitled to recover treble damages and attorneys’ fees in addition to any unpaid wages they are owed, the decision greatly narrows an employer’s potential liability to employees. However, it is important to note that an aggrieved employee could still bring a contract claim against an employer seeking to recover payment. As such, employers should be careful in adopting policies that pay out employees for their accrued, unused sick time.

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