

Unpaid Future Commissions Can Be Trebled under Massachusetts Wage Act, SJC Rules

Written by Jonathan A. Keselenko, Christopher Feudo, James Fullmer

February 25, 2020

In Massachusetts, a commission is a wage subject to the Wage Act when the amount of the commission “has been definitely determined and has become due and payable.” Accordingly, an employer’s failure to pay a commission which had not yet become due and payable generally does not implicate the Wage Act, and employers cannot be held liable for treble damages stemming from the failure to pay such a future commission. However, last week in *Parker v. EnerNOC, Inc.*, the Supreme Judicial Court created an exception to this rule, holding that an employee is entitled to treble damages on an unpaid future commission as lost wages where the employer’s unlawful retaliation was the reason the commission did not become due and payable.

Parker concerned an employee’s Wage Act claims based upon her prior employer’s failure to pay her certain commissions. The employee earned commissions on software sales contracts she secured for her employer. As a result of a particular contract, the employee earned two different commissions – one payable when the sales contract first became guaranteed and another when the time period for the client to opt out of the contract had passed. After the deal became guaranteed, the employee complained that she had not been paid the full amount of the first commission to which she was entitled. After the employee complained, the employer terminated her employment. After the termination, the opt-out period passed. Had the employee remained employed with the employer, she would have been entitled to the second commission. The employee sued, alleging that she had been terminated in retaliation for her complaints and that she had been denied her commissions in violation of the Wage Act. She ultimately prevailed. The trial court judge granted the employee treble damages on the first commission, but not on the second, on the basis that the second commission had not “become due and payable” as of the employee’s last day of employment.

The SJC reversed the trial court, ruling that the employee was entitled to treble damages on the unpaid portions of both commissions. According to the SJC, nothing in the Wage Act required a commission to be due and payable *as of the date of termination* to be subject to the Wage Act. Because the Wage Act prohibits retaliation against employees raising Wage Act claims, the SJC ruled, “commissions that are not yet due to be paid may nonetheless constitute lost wages if the employer’s violations of the act prevent payment of those commissions.” As such, the employee was entitled to treble damages on those lost wages as a remedy for the employer’s retaliation prohibited by the Act, regardless of whether the commission was due and payable.

In light of the decision in *Parker*, employers should exercise caution when terminating employees who have earned commissions that have not yet been paid. *Parker* makes clear that unpaid commissions – even if they are not due and payable at the time to termination – constitute lost wages under the antiretaliation provisions of the Act, and employees are entitled to treble damages on future commissions where an employee can show that the commissions did not become due and payable as a result of an employer’s unlawful retaliation.

RELATED PRACTICES

- [Labor & Employment](#)
- [Wage & Hour](#)

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.