

The A to Z of the Massachusetts Wage Payment Law

By C.J. Eaton

During recent years, payment of wages has been the subject of much confusion among employers in Massachusetts and has resulted in much litigation. The primary statute that governs this topic is complex and difficult to interpret, not to mention long—the first sentence contains 593 words, 41 commas, nine semicolons, and the word “and” 20 times. The questions with which employers struggle with include the following:

- What is included in wages (and what is not)?
- When are wages “earned?”
- When must wages be paid (i.e., how long after the end of the pay period)?
- How frequently must wages be paid?
- What deductions can employers make from an employee’s wages?

These questions do not always have clear answers, and the law in Massachusetts is continually evolving. This article aims to assist employers in navigating the muddy waters currently surrounding these issues.

WHAT IS A “WAGE?”

In determining whether it is in compliance with the Massachusetts wage payment laws, an employer must ascertain whether it is including all applicable sums in the amount considered “wages” for each employee. In addition to salary or hourly pay, the payment of wages statute specifically states that wages include holiday and vacation pay due under an oral or written agreement, as well as commissions that are “definitely determined” and “due and payable.” The statute does not otherwise explicitly define the term “wages.”

Massachusetts courts have interpreted the definition of wages as *excluding* contributions to deferred compensation plans,

sums deducted from pay for the purchase of stock if an employee requests the deductions, and discretionary bonuses. To be considered discretionary, the employer must have discretion to decide whether the employee receives a bonus, as well as the amount of any bonus received. Courts have issued inconsistent opinions regarding whether severance pay is wages. Although the Massachusetts Appeals Court held in 2003 that severance benefits are not wages, a trial court judge found earlier this year that such benefits may in fact be wages. While a lower court does not have the authority to overturn an appeals court decision, employees’ attorneys will likely argue that this decision heralds the inclusion of severance and other compensation, such as bonuses, in the definition of wages.

WHEN ARE WAGES “EARNED?”

The statute governs “wages earned” but does not define “earned.” Very few courts

have addressed this issue, but the few that have done so have generally held that the word “earned” reflects that the work has been performed (as opposed to, for example, a contractual right to monies for work never actually performed). With respect to commissions, they are earned when they are “definitely determined” and “due and payable.” Commissions meet these criteria if all contingencies that must occur for the employee to receive the commissions have occurred and the amount due can be precisely ascertained. Whether those criteria have been met is an oft litigated issue, and the guidance on this subject is less than clear.

HOW FREQUENTLY MUST WAGES BE PAID?

Frequency and timing are perhaps the most straightforward provisions of the payment of wage statute. In general, Massachusetts employers must pay hourly employees on a weekly or





biweekly basis. Employers who decide to switch from a weekly to biweekly pay period must provide employees with ninety days' advance written notice of that change. Employers may pay exempt and salaried non-exempt employees biweekly or semi-monthly, or at an employee's option, monthly. If a salaried employee chooses monthly payment, that choice should be in writing, and the employee can rescind that choice at any time.

WHEN MUST WAGES BE PAID?

Massachusetts law requires that both exempt and non-exempt employees be paid their wages—including overtime—within six days of the pay period in which the wages were earned. Thus, if a pay period ends on a Friday, employees must receive all wages earned during that pay period, including overtime, by the following Thursday.

While the statute does provide for payment of wages within seven days under certain circumstances, those circumstances are rare and may in fact present problems for the employer under other Massachusetts laws. For example, an employer may pay an employee within seven days of the end of the pay period if the employee worked seven days a week during the period. First, an employee would need to regularly work seven days a week in order for the employer to regularly take advantage of this law. Second, if employees are working seven days a week, the employer is likely violating the Massachusetts day of rest laws. (See "Avoiding the Massachusetts 'Blue Laws' Blues: Complying with the Complex Statutes Governing Sunday and Holiday Work," *Insights* magazine, Fall/Winter 2010.) Thus, paying employees seven days after the end of the pay period presents significant risks to employers.

The payment of wages law also specifies the timing of payment upon termination of an employee. If an employee resigns from employment, the employer must pay for all hours worked on the next regular pay day following the end of employment. When an employer discharges an employee, it must pay the employee all wages owed, including overtime for non-exempt employees, on the day of termination. Because Massachusetts includes vacation pay in the definition of wages, accrued but unused vacation pay must also be included in the final paycheck.

WHAT DEDUCTIONS MAY LAWFULLY BE TAKEN FROM AN EMPLOYEE'S WAGES?

Mandatory deductions and deductions specifically authorized by law. Both Massachusetts and federal law require mandatory deductions from employee wages for (a) income tax withholdings; and (b) contributions made in compliance with the Federal Insurance Contributions Act (FICA), including deductions for Social Security and Medicare. Massachusetts law specifically allows other deductions, such as union dues, purchase of stock pursuant to an employee stock purchase plan, and an employee's portion of health care premiums, if authorized by the employee. In addition, while an employer need not pay employees for time not worked due to tardiness, deductions may not be made from the wages of a non-exempt employee beyond the proportionate wage that would have been earned during the time lost.

The only permissible deductions from the basic minimum wage are those required by law and those allowed for lodging and meals, described below. Other deductions cannot, in any wage payment, bring an employee's pay below minimum wage for each hour worked. In addition, deductions cannot impair a garnishment or support order. Finally, for purposes of calculating overtime for non-exempt employees, an employer may not consider deductions made for meals, lodging, or uniforms. In other words, the employer must calculate overtime based on non-exempt employee wages prior to these deductions.

Massachusetts law sets forth specific provisions governing deductions for meals. Meal deductions from the minimum wage may not exceed one dollar and fifty cents for breakfast, or two dollars and twenty-five cents for lunch or dinner. In addition, the deductions may not exceed the actual cost of the meal to the employer, and the employee's written consent must be received before the employer makes any deductions. An employer may make a deduction from the basic minimum wage for:

- One meal if the employee works three or more hours
- Two meals if the employee's work entirely covers two meal periods, or the employee works for eight hours
- Three meals if the employer provides the employee with lodging, or if special permission is granted by the Director of the Massachusetts Department of Labor and Workforce Development

Employers may also make deductions from wages for lodging under certain circumstances. Employers may deduct from the basic minimum wage a sum per week for lodging provided to an employee if the lodging includes heat, potable water, and lighting. A deduction for lodging is not permitted unless the employee desires the lodging and actually uses it. Deductions shall not exceed the following rates: thirty-five dollars per week for a room occupied by one person; thirty dollars per week per employee for a room occupied by two persons; and twenty-five dollars per week per employee for a room occupied by three or more persons.

Other deductions. Beyond mandatory or specifically authorized deductions, employers are limited in the deductions they can make from employee paychecks, but due to the ambiguous wording in the statute, the parameters regarding which deductions are allowable are less than clear. Thus, this is currently a heavily litigated area of law, and a few recent court decisions have provided additional guidance regarding the limitations on deductions.

The most significant recent case, decided by the Massachusetts Supreme

Judicial Court, arose from an employee's claim that a company was deducting from its drivers' wages the costs of damage to company trucks in accordance with company policy that a worker found to be at fault in an accident with a company truck could either accept disciplinary action or agree to set off damages against his wages. The Court determined that Massachusetts law prohibits wage deductions associated with an employer's unilateral determination of an employee's fault and damages—even if the employee has authorized the deductions. The Court further explained that lawful set-offs are limited "to circumstances where there exists a clear and established debt owed to the employer by the employee," and held that an employer cannot circumvent this requirement by having an employee authorize deductions. What does this mean? The Court offered the following examples: (1) where there is proof of an undisputed loan or wage advance from the employer to the employee; (2) theft of the employer's property by the employee, as established in an "independent and unbiased proceeding" with due process protections for the employee; or (3) where the employer has obtained a judgment against the employee for the value of the employer's property. The Court opined that there are other circumstances in which a set-off would be valid, such as when pursuant to a collective bargaining agreement, but declined to provide any further guidance.

As a practical matter, the Court's decision means that employers cannot safely take deductions for theft or damage to property unless fault and value have been determined by a court of law or government agency. In addition, if an employer provides a loan or wage advance to an employee, the employer should get signed written authorization at the time the loan or advance is made that states the amount loaned or advanced and clearly sets forth the timing and amounts of any deductions that it will take from the employee's wages. While the Court did not specifically address deductions for the accidental overpayment of wages—a scenario that arises frequently—employers should follow the same procedure in those circumstances. In

other words, the employer should get a signed written authorization stating the date and amount of the overpayment and the date of specific check(s) from which the deduction(s) will occur. In any of these scenarios, the deduction cannot, in any wage payment, bring an employee's pay below minimum wage for each hour worked.

HOW MUST EMPLOYERS NOTIFY EMPLOYEES OF DEDUCTIONS?

Employers must notify employees of the amount and nature of mandatory and voluntary deductions made from wages by issuing to each employee a pay slip or check stub that includes this information. At the time new employees receive their first paychecks, employers must notify them in writing of these deductions and contributions, and employers must notify all employees in writing when any new contributions or deductions will be made from their paychecks.

CONCLUSION

In sum, employers should carefully review the types of compensation included in wages, as well as the frequency and timing of wage payments, to ensure compliance with the law. Regarding deductions, if a deduction does not fall within one of the delineated areas described above, the deduction is likely to present some risk under Massachusetts law, even if an employee authorizes the deduction. As to deductions that are allowable, employers should carefully document all such deductions in writing. ■

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