

TRAP FOR THE UNWARY IN MASSACHUSETTS: TRIPLE DAMAGES FOR FAILING TO PAY TERMINATED EMPLOYEES TIMELY

By: *Anthony Augeri*
Email: aaugeri@devinemillimet.com
Phone: 978.475.9100

MARCH 20, 2009

As is often the case with employment law issues, what appears to be a straightforward issue can become a complicated problem requiring precious time and resources to address. Take for example the situation of terminating employees. An unfortunate result of the current economic downturn is a sharp increase in employee terminations. Just over one year ago the Massachusetts legislature took action to amend the Massachusetts Wage Act making triple damages for all wage and hour violations mandatory instead of discretionary. Combining the current economic climate with this major recent change in the Wage Act means employers are operating in a perfect storm when it comes to litigation cost risk. The issue of when to pay terminated employees can, if not properly handled, lead to these mandatory punitive damages against the company. And it can also require the company to pay the terminated employee's attorney's fees on top of the amount of wages and benefits determined to be unpaid. It is important employers understand the Massachusetts Wage Act to avoid these pitfalls.

A brief summary of the Massachusetts Wage Act will provide some guidance. Massachusetts General Laws, chapter 149, section 148, requires all employers to pay their employees either on a weekly or a bi-weekly basis. Those who qualify as executive, administrative or professional employees may be paid semi-monthly or, at the employees election, monthly. The Act further requires employers to pay employees who work five days in a calendar week all wages earned within six days of the end of that week. Employees terminated from employment are required to be paid in full on the day of discharge. Note that there are exceptions for employees of the City of Boston and the Commonwealth of Massachusetts that this alert does not address.

Labor, Employment & Employee Benefits

Mark Broth, Chair
603.695.8558
mbroth@devinemillimet.com

Aaron Gilman
978.475.9100
agilman@devinemillimet.com

Newton Kershaw
603.695.8571
nkershaw@devinemillimet.com

Karen Levchuk
603.695.8618
klevchuk@devinemillimet.com

Patricia McGrath
603.695.8537
pmcgrath@devinemillimet.com

Anthony Augeri
978.475.9100
aaugeri@devinemillimet.com

Margaret O'Brien
603.695.8631
mobrien@devinemillimet.com

Anne Scheer
603.410.1708
ascheer@devinemillimet.com

Laurel Van Buskirk
603.695.8565
lvanbuskirk@devinemillimet.com

Anne Trevethick
603.695.8725
atrevethick@devinemillimet.com

DEVINEMILLIMET.COM

EMPLOYMENT@DEVINEMILLIMET.COM

The Act defines “wages” to include any holiday or vacation payments, and also includes commissions when the amount of commissions and the fact commissions are due can be determined. It also makes void any contract that seeks to exempt an employee from any terms of the Act.

The mandatory penalty provisions of the Act found in chapter 149, section 150 are the cause for most employer concerns. Section 150 of the Wage Act states that an employee claiming lost wages and other benefits who prevails in a civil action shall be awarded triple the award as liquidated damages for any lost wages and other benefits, and shall also be awarded the costs of the litigation and reasonable attorneys’ fees.

Taking this altogether, there are an almost endless number of scenarios where an employer could be found to be in violation of the Act for seemingly innocent mistakes. For example, the employer issues a check for all wages and commissions to an employee on the day of termination, but does not include one day of vacation time the employee accrued. Even prompt action is taken to correct the mistake, the employer could still be sued for the delay in making the payment and be liable for all of the aggrieved employees’ attorney’s fees. Another scenario might involve an innocent misreading of the company’s commission plan resulting in a missed commission payment on the date of termination. Even with prompt corrective action, the employer could face liability for treble damages and be responsible for the employee’s attorney’s fees.

These examples illustrate how missteps in terminating employees can result in large punitive damages, payment of opposing counsel’s attorney’s fees, and the bad external and internal publicity such matters naturally generate. What is an employer to do? Here are some recommendations:

- Review your own policies. While this may sound simplistic, it is amazing how many employers have not reviewed or updated their policies on payment of wages, payment for accrued vacation time, or, for example, accrual of vacation time, or who are unfamiliar with their commission payment structure. This alone can avoid many problems later when terminating employees.
- Give yourself time before terminations. Of course there are instances where swift and immediate termination of an employee is appropriate. But in instances of planned layoffs/ restructurings it is advisable to do just that--plan. Ensure all records are complete and all wages, commissions, unreimbursed expenses, and accrued time off are accurately calculated before termination.

Office Locations:

111 Amherst Street
Manchester, NH 03101
T 603.669.1000
F 603.669.8547

300 Brickstone Square
Andover, MA 01810
T 978.475.9100
F 978.470.0618

43 North Main Street
Concord, NH 03301
T 603.226.1000
F 603.226.1001



- Double check employee records after termination, and immediately correct any errors discovered. Mistakes happen. And while under the Act those mistakes mandate recovery of treble damages and attorney's fees, a terminated employee may not consider a lawsuit if you swiftly correct an error and pay wages missed when you cut the "final" check. Even those that would consider suing will think twice when there are no unpaid wages or unreimbursed accrued time off at the time of such consideration.

The Devine, Millimet & Branch Labor, Employment and Employee Benefits Group offers this free Friday E-Mail Alert service to provide information on recent developments in labor, employment and employee benefits law. If you have any questions about this e-mail, or if you know of anyone else who may be interested in receiving these alerts, please send us an e-mail at employment@devinemillimet.com.

"This is not a legal document nor is it intended to serve as legal advice or a legal opinion. Devine, Millimet & Branch, P.A. makes no representations that this is a complete or final description or procedure that would ensure legal compliance and does not intend that any reader should rely on it as such."

