

## MASSACHUSETTS HIGH COURT CONFIRMS THAT EARNED VACATION PAY IS NOT SUBJECT TO FORFEITURE IN CASES OF INVOLUNTARY SEPARATION FROM EMPLOYMENT

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On June 11, 2009, the Massachusetts Supreme Judicial Court issued a decision that provides stark clarification of an employer's obligation to pay for "earned" vacation time in connection with involuntary employee terminations. The Court held that in cases where employees are involuntarily separated from employment, and have unused earned vacation time, those employees must be paid for the unused time at the time of discharge. Further, in the instant case, because the employer's written vacation policy did not provide for such payment, it was deemed to violate the Massachusetts Wage Act. ("Wage Act") G.L. c. 149, § 148.

The employer, Electronic Data Systems Corporation (EDS), had a written vacation policy that provided employees with escalating amounts of vacation time based upon length of service. Individuals employed by EDS for more than twenty (20) years accumulated five weeks of paid vacation per calendar year. The vacation policy provided that the time had to be used by December 31st of that calendar year or would be lost. The policy also stated that "vacation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time (unless otherwise required by state law)."

The plaintiff employee, Francis Tessicini, had been employed by EDS for twenty-one (21) years and had used only one day of vacation in calendar year 2005 when his employment was involuntarily terminated. In keeping with its policy, EDS did not pay him for any part of his unused vacation time. Tessicini filed a complaint with the Massachusetts Attorney General's Fair Labor Division alleging that he was owed vacation payments under the Wage Act. The Attorney General's Office issued a citation requiring payment of the remaining accrued vacation time, and

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also assessed a civil penalty of almost \$3,490.00 for intentional failure to make timely payment of wages. EDS appealed the case to Superior Court, which affirmed the order. It then appealed to the Massachusetts Supreme Judicial Court (“Court”).

On appeal, the Court considered the language of the Wage Act, which provides that “[t]he word ‘wages’ shall include any holiday or vacation payments due an employee under an oral or written agreement.” The Court noted that the Wage Act also provides that, “[n]o person shall, by a special contract with an employee or by any other means exempt himself from this section . . . (emphasis added).”

EDS argued that because vacation payments are not required of employers, and only become “due” under the terms of an oral or written employment agreement, it was permissible for the agreement to restrict or limit the employee’s rights to those payments without violating the “special contracts” clause quoted above. As its policy explicitly provided that employees leaving EDS on a voluntary or involuntary basis would not be paid for unused vacation time, no payment became “due” to Tessicini. The Massachusetts Attorney General’s Office disagreed with EDS’ position, arguing that once Tessicini had accumulated time under the vacation pay policy, it became “due” under the Act’s definition of wages, and therefore constituted “wages earned,” which should have been paid on the day of discharge in keeping with the Massachusetts law.

In rendering its decision on the appeal, the Court was influenced by an advisory on vacation policies issued by the Attorney General’s Fair Labor Division in 1999. The section entitled “No forfeiture of Vacation Time” states:

Since the Wage Act provides for the timely payment of all wages earned, an employer may not enter into an agreement with an employee in which the employee forfeits earned wages, including vacation payments. Examples of these agreements are vacation policies that condition the payment of vacation time on continuous employment or that require that employees provide notice to quit. Employee who have performed work and leave or are fired, whether for cause or not, are entitled to pay for all the time worked to the termination of their employment, including any earned, unused vacation time payments.

Advisory 99/1. While the advisory provides that employers may have policies that contain “use it or lose it” language, it also cautions that employers are still required under the policies to provide adequate notice of the policy and ensure that employees have reasonable opportunity to use accumulated vacation time

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within limits established by the employer. Otherwise, the loss of vacation time could be viewed as an illegal forfeiture of earned wages.

The Court acknowledged that EDS had no legal obligation to provide paid vacation to its employees. However, having created such an “entitlement,” that entitlement became a form of compensation. As provided by the Wage Act, the Court found that:

[I]f an employee is ‘discharged from . . . employment,’ the value of the vacation benefit earned up to that date and that would still be available if the employee remained at the job must be “paid in full on the day of his discharge.”

*Citing* G.L. c. 149, §148. The Court stated that the “special contracts” clause would have little value if, as argued by EDS, employers could exempt themselves by drafting contracts that placed compensation outside its bounds, i.e. by adopting policies providing that ‘vacation time is not earned.’

EDS argued that the Attorney General’s position in the case was inconsistent with its advisory, which allowed employers to require employee to use all of their accumulated time or lose it. The Court noted, however, that the advisory only permits loss of accrued vacation time where the employee has a reasonable opportunity to use it. The Court thus agreed with the Attorney General’s position that while it is acceptable for an employee to lose vacation time through voluntary non-use, “if an employer interferes with the employee’s ability to use it, for example by discharging the employee, the employer must pay the value of the earned vacation.”

The EDS decision is only applicable to employers who employ individuals in Massachusetts. New Hampshire employers are not required to “cash out” unused vacation time, but are required to have a written policy explaining whether or not employees will be paid for unused time.

This case serves as a reminder to employers with employees in multiple states to remain current on state and local wage payment laws, which vary widely. State governments are protective of their unique wage payment laws and are likely to come down hard on multi-state employers who are not attentive to these provisions.

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