

## BEST PRACTICES FOR COMPANIES THAT INVOLUNTARILY TERMINATES MASSACHUSETTS EMPLOYEES

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It is always difficult when a company is confronted with terminating or laying-off employees in these challenging economic times. However, it is necessary task that must be handled professionally and correctly to comply with the law and limit a company's exposure to legal action. While no advice can prevent future legal action, exercising a straightforward and concise plan when terminating employees will limit exposure. It is also critical that companies determine how much wages the employee earned through the date of termination because under Massachusetts law failure to pay all earned wages and all vacation and holiday time accrued mandates triple damages, plus reasonable attorney's fees and costs. This article will briefly touch on what constitutes wages under the Massachusetts Wage Act and when payment of wages must be made.

### A. Wages defined under Massachusetts law

The Wage Act defines wages to include all earned salary, whether a salaried employee or hourly, all commissions that are due and payable, and all accrued vacation and holiday time. Courts have elaborated on what commissions qualify under the Wage Act by stating those that are "arithmetically determinable". Therefore, any accrued but unused paid time off for vacation or holiday time, and all earned commissions that are determinable must be paid to an employee at the appropriate time following his or her termination. When the appropriate time is depends on whether the employee voluntarily terminates (i.e. resigns) or is involuntarily terminated (fired).

### B. The Final Paycheck

One of the most important steps necessary under Massachusetts law is to ensure that involuntarily terminated employees are paid

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all of their earned wages, earned and calculable commissions (arithmetically calculable as of the day of termination), and accrued vacation and holiday time off. First and foremost is to determine if the involuntarily terminated employee is subject to an employment agreement. If so, take great care to follow all terms promised by the company to the employee--especially any compensation provisions promised to the employee that are outside of the definition of "wages" under the Massachusetts Wage Act, such as a pro-rated sign-on bonus paid over time.

The termination date selected by the employer should be included in the pay calculus to an involuntarily terminated employee. This is all vitally important because failure to timely pay a terminated employee all of their earned wages and accrued vacation and holiday time is a per-se violation of the Wage Act. If the employee brings an action, the Wage Act mandates that a prevailing claimant be awarded triple the amount of unpaid wages as punitive damages, plus reasonable attorneys' fees, and costs. In addition to these punitive damages, the Massachusetts Attorney General may also subject the employer to administrative fines for noncompliance with the wage payment requirements.

When dealing with an employee who voluntarily leaves employment, all earned wages and accrued vacation and holiday time must be fully paid on or before the next usual pay cycle. Any further delay in payment would be considered a violation of the Wage Act.

It is important that all accrued vacation and holiday time earned through the date of termination be paid in *pro rata* share. For example, if a terminated employee earns four weeks of vacation time per year and the employee is involuntarily terminated after exactly 9 months and has not used any vacation time, the employee must be paid for three weeks of vacation time on the day of termination.

Massachusetts law does not require that employers compensate employees for unused sick or personal time. However, if an employer's policies provide for full or partial reimbursement for unused sick or personal time, then these monies must be included in the employee's final pay.

There are steps employers can take to reduce risk and limit exposure for payment of unused, accrued time off. Massachusetts law allows employers to cap the total amount of vacation or holiday time that an employee can accrue. Further, the Attorney General has also advised that so-called "use it or lose it" policies are permissible. Accordingly, employers can adopt policies that do not allow employees to carry over unused time from one year to the next, thereby reducing the number of days that need to be

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cashed out upon separation of employment. If an employer intends to change its existing policies to take advantage of the “use it or lose it” option, it may only do so prospectively, meaning employees do not lose any vacation or holiday time (or personal or sick time if company policy allowed) accrued under the previous policy.

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