Client Alert: Wage Act Updates – Massachusetts' Highest Court Finds Limited FLSA Preemption of Wage Act Remedies and Employers Should Prepare for Potential Wage-Related Changes to Come

BY TRACY THOMAS BOLAND AND DANIELLE JUREMA LEDERMAN • MAY 9, 2022

MASSACHUSETTS SUPREME JUDICIAL COURT RULING – GOOD NEWS FOR EMPLOYERS

It has been a busy Spring for the Massachusetts Supreme Judicial Court (SJC). On April 14, 2022, on the heels of *Reuter v. City of Methuen* (see our April 7th client alert detailing that decision), the SJC issued another significant wage and hour decision in *Devaney v. Zucchini Gold, LLC*. In *Devaney*, the SJC ruled that the Massachusetts Wage Act's ("Wage Act") remedies were preempted by the federal Fair Labor Standards Act (FLSA) where employees' claims for unpaid overtime wages arose exclusively under federal law. This determination resulted in the restaurant employees being prevented from recovering the more expansive remedies available under the state Wage Act, most notably the entitlement to mandatory treble damages. The *Devaney* decision is noteworthy because it diverges significantly from how lower state courts had previously handled these types of claims.

Although similar, the Wage Act and the FLSA deviate in some important ways. For instance, under the Wage Act, certain categories of employees, including restaurant workers, are not entitled to overtime wages. Under federal law, there is no longer an exemption for restaurant workers so they are entitled to overtime under that law. In *Devaney*, multiple restaurant workers asserted unpaid overtime claims under the FLSA but could not do so under state law. Nevertheless, the employees argued that violations of the FLSA entitled them to damages under the Wage Act (under which remedies are more expansive than those available under the FLSA) for failure to timely pay wages. Such argument aligned with how lower courts had previously interpreted the broad remedial intent of the Wage Act. However, the *Devaney* decision clarified that permitting recovery of Wage Act damages for FLSA claims could cause a conflict between the two laws; therefore, the SJC concluded that the FLSA provided the exclusive remedy to employees whose claims arose solely under federal, and not state, law.

What This Means for Employers

The *Devaney* decision comes as a slight relief to those employers that may face wage and hour claims under the FLSA, where such liability does not also exist under the Wage Act. Those employers will no longer need to fear the Wage Act's mandatory treble damages. However, while *Devaney* means that employers facing these claims will not be liable for Wage Act remedies, the remedies available under the FLSA remain considerable – liquidated damages, costs, and attorney's fees. To avoid these substantial damages, employers should continue to prioritize timely paying their employees all wages owed.

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POTENTIAL CHANGES TO COME – GOOD NEWS FOR EMPLOYEES

The future may present even more substantial changes to wage and hour law. On the state level, Bill H.4681 entitled "An Act to Prevent Wage Theft, Promote Employer Accountability, and Enhance Public Enforcement" (the "Bill"), is presently pending before the Massachusetts legislature. An earlier version of the Bill was reviewed by the committee on Labor and Workforce Development, which reported favorably on the Bill on April 11, 2022. The Bill was then referred to the committee on House Ways and Means where it remains pending.

The Bill identifies certain violations of Massachusetts wage and hour law as "wage theft." The definition of wage theft includes violations of the Wage Act, as well as violations of Massachusetts law regarding minimum wage, prevailing wage, overtime, employee classification, tips, and staffing agencies.

If enacted as written, the Bill will create significant new obstacles for businesses and opportunities for employees. First and foremost, the Bill seeks to expand liability for wage theft from an employee's direct employer to include any person or entity that provides labor or services to the direct employer, as well as successor entities. Under this joint and several liability scheme, these entities may face the same Wage Act penalties that direct employers do, albeit with a shortened 120-day statute of limitations (as opposed to the three-year period that the Wage Act provides for direct employers). A timely investigation and good faith response to wage theft allegations may potentially spare these newly liable entities from the Wage Act's treble damages and attorney's fees penalties.

Next, the Bill seeks to strengthen the Wage Act's anti-retaliation provision by creating a presumption of retaliation if an employer takes an adverse action against an employee within 90 days of the employee complaining of wage theft. Such presumption may only be rebutted by an employer through clear and convincing evidence that the adverse action was taken for a permissible and legitimate purpose.

The Bill would also provide additional investigation and enforcement powers to the Office of the Attorney General. Specifically, if the Attorney General finds that wage theft has occurred, it may issue a stop work order to the violator which requires "the cessation of all business operations of the violating person or entity as to the specific place of business and employment for which the violation exists." The entity would be entitled to only five days' notice of the stop work order and the order would be in effect for 48 hours after it was served, unless a timely appeal was filed. If a stop work order was issued, a business would still be required to pay its employees at their regular rate for the duration of the order or for the first ten days an employee would have been scheduled to work, whichever is less.

In addition to enforcement by the Office of the Attorney General, the Bill would also allow for public enforcement by a "relator," i.e., a whistleblower acting on behalf of an aggrieved person, which can include current and former employees and other individuals that provide services to an employer that were not classified as employees. These public enforcement actions would also be explicitly exempt from meeting the class action certification requirements set forth in Rule 23 of the Massachusetts Rules of Civil Procedure. Should Bill H.4681 become law, it will bring about a lot of changes for businesses.

We can also expect to see developments in wage and hour law at the federal level in the near future. For instance, on May 2, 2022, the U.S. Supreme Court granted certiorari to *Helix Energy Solutions Group, Inc. v. Hewitt*, a case concerning whether a "highly compensated" supervisor is entitled to overtime pay under the FLSA. That decision may have wide-ranging implications on how employers classify their employees as exempt or non-exempt from overtime.

Employers with questions about wage and hour compliance and how recent changes may impact their business should consult with their Bowditch attorney.

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