

August 18, 2014

## Maryland Employers Can Be Liable for up to Treble Damages for Misclassification “Overtime Pay” Claims Under State Law

By Joseph Harkins and Steven Kaplan

On August 13, 2014, the Maryland Court of Appeals held in *Peters v. Early Healthcare Giver, Inc.* that employers can be held liable under the Maryland Wage Payment and Collection Law (“Wage Payment Law” or MWPCCL) for all overtime violations, including allegations of misclassification under the Fair Labor Standards Act (FLSA) and the Maryland Wage and Hour Law (MW&HL). This holding by the state’s highest court is a clear departure from current law. Accordingly, this decision has significant ramifications for Maryland businesses because: (1) it increases potential liability in that the law allows employees to receive up to treble damages, assuming no “*bona fide* dispute” exists; and (2) the court held that the burden of proving a “*bona fide* dispute” falls on the employer, and not the employee. On the other hand, the court held also that an award of up to treble damages does not mean an aggrieved employee receives the principal unpaid wages plus three times that amount, and that a fact-finder is not required to award enhanced damages, even in the absence of good faith.

To foster a complete understanding of the court’s rationale with respect to whether an employer can be held liable under this statute for misclassifying its employees, this article first sets forth a brief history of the legal controversy and then turns to the facts and evidentiary issues in the *Peters* case. This article also addresses the important lessons an employer can learn from this case in order to avoid or limit enhanced liability in Maryland.

### Brief History

#### Pre-2010 Amendment and Case Law

The Wage Payment Law provides employees with a private right of action to recover unpaid wages, including a bonus, commission, fringe benefit, or any other remuneration promised for service.<sup>1</sup> The statute’s private right of action appears to be limited by the following language:

if an employer fails to pay an employee [unpaid wages] in accordance with § 3-502 or § 3-505 of this subtitle, after 2 weeks have elapsed from the date on which the employer is required to have paid the wages, the employee may bring an action against the employer to recover the unpaid wages.<sup>2</sup>

1 Md. Code Ann., Lab. & Empl. § 3-501 (emphasis added).

2 Md. Code Ann., Lab. & Empl. § 3-507.2.

In turn, § 3-502 addresses the timing of payment, such as establishing regular pay days, and § 3-505 addresses final payments upon termination. In other words, the plain language of the private right of action provision suggests that the action is limited to violations of § 3-502 or § 3-505 only.

Based on this reading, Maryland federal courts had held that an “entitlement” to overtime pay, as with allegations of misclassification, must be asserted under the FLSA and MW&HL. The courts reasoned that neither § 3-502 nor § 3-505 addresses the complicated issues surrounding these types of claims. For example, in *McLaughlin v. Murphy*,<sup>3</sup> the issue was whether plaintiff was properly classified as an exempt outside sales employee<sup>4</sup> under the FLSA. The federal court dismissed the plaintiff’s Wage Payment Law claim because the statute:

limits the availability of treble damages, however, to violations of § 3-502 or § 3-505. Section 3-502 deals with the timing of payment, and Section 3-505 deals with payment on cessation of employment. In contrast, *McLaughlin*’s minimum wage and overtime claims are based on his entitlement to the wages themselves. He does not allege that Freedmont failed to pay him regularly, but that it failed to pay him enough; and he does not allege that Freedmont failed to pay him minimum wage and overtime due him upon his termination, but that it failed to pay him these wages at all.<sup>5</sup>

Following this decision, Maryland federal courts routinely dismissed similar claims under the Wage Payment Law because the “entitlement” to overtime pay may be brought only under the FLSA and MW&HL.<sup>6</sup>

### The Maryland General Assembly Responds to These Federal Court Decisions

In response to these federal court decisions, the Maryland General Assembly in 2010 added “overtime wages” to the definition of a “wage.” The plaintiffs’ bar believed this amendment would end the controversy by undercutting the rationale of these decisions. They were mistaken because the analysis had little to do with whether overtime pay could in fact be a “wage.” Rather, the issue was one of statutory construction. Indeed, had an employer withheld overtime pay from the paycheck of an employee who regularly and properly received overtime, a Maryland federal court would likely have allowed that overtime pay claim to proceed.

### Post-2010 Amendment Case Law

Even after the amendment, Maryland federal courts continued to hold that claims concerning the “entitlement” to overtime pay are not covered by the Wage Payment Law because they do not relate to the timing of payment. As a prime example, in *Butler v. DirectSat USA, LLC*,<sup>7</sup> plaintiffs, as service technicians and production technicians, filed a lawsuit alleging that defendants failed to pay them overtime pay to which they were entitled. Rather than file an Answer, defendants filed a motion to dismiss, arguing that the court should dismiss the Wage Payment Law count because the statute applies only to claims “that focus on the manner and timing of wage payment and does not apply to suits that focus on the underlying entitlement to overtime wages.”<sup>8</sup>

In their Opposition, plaintiffs “maintain[ed] that any prior lack of clarity regarding whether this type of claim could proceed pursuant to the MWPL was eliminated with an amendment during the 2009–2010 legislative session making explicit that unpaid overtime wages were included in the MWPL’s definition of wages.”<sup>9</sup> The court disagreed and reasoned that the amended statute:

provides for treble damages for violations of § 3-502 or § 3-505. Section 3-502 addresses the timing of wage payments and Section 3-505 addresses the payment of wages upon termination of employment. The MWPL does not specifically address payment of overtime wages or provide a cause of action directed at employer’s failure to pay overtime. For these actions, plaintiffs must look to the MWHL, Md. Code Ann., Lab. & Empl. §§ 3-415 and 3-420.

3 372 F.Supp.2d 465 (D. Md. 2004).

4 29 U.S.C. § 213.

5 *McLaughlin*, 372 F. Supp. at 474-475.

6 See, e.g., *Williams v. Maryland Office Relocators*, 485 F.Supp.2d 616, 622 (D. Md., 2007) (“Plaintiff’s claim is governed by the FLSA and the MWHL, not the MWPL.”); *Tucker v. Sys. Specialist Furniture Installation, Inc.*, No. 07-cv-1357, 2007 WL 2815985, at \*1 (D. Md. Sept. 26, 2007) (same); *Watkins v. Brown*, 173 F. Supp.2d 409, 416 (D. Md. 2001) (same).

7 800 F. Supp. 2d 662, 669-70 (D. Md. 2011).

8 *Id.*

9 *Id.*

The court continued: “Accordingly, other judges in this district have rejected plaintiffs’ attempts to state claims for violation of the MWPCPL where the parties’ core dispute is whether plaintiffs were entitled to overtime wages at all and not whether overtime wages were paid on a regular basis or upon termination.”<sup>10</sup>

### The Maryland Court of Special Appeals Agrees With the Federal Courts

On March 22, 2013, the Maryland Court of Special Appeals, in *Marshall v. Safeway, Inc.*,<sup>11</sup> considered whether § 3-503 (the unlawful deduction provision) provides a private right of action for an alleged unlawful garnishment (or deduction) of a wage. As mentioned, the private right of action section seems to state that employees may sue on violations of § 3-502 or § 3-505 only. The court agreed with the employer.

In so doing, the court compared § 3-507 (the section addressing the authority of the DLLR to enforce all provisions of the Wage Payment Law) with § 3-507.2 (the section governing private rights of action) and recognized that the statute provides DLLR with a significantly broader ability to enforce the law.<sup>12</sup> In this regard, the court stated, “[a]ny reading of the Payment Law must give meaning to the phrase ‘fails to pay an employee in accordance with § 3-502 or § 3-505’ lest this language be ‘rendered surplusage, superfluous, meaningless or nugatory.’”<sup>13</sup> The court then concluded:

it is clear that the Payment Law *only authorizes a private cause of action* by a current employee when the employer ‘failed to pay’ the employee on a set schedule (including paydays at least twice a month), or failed to pay the employee in advance when a pay fell on a non-workday.<sup>14</sup>

Notably, this analysis was in accord with the federal court’s numerous decisions. Relying on the plain language of the statute and *Marshall v. Safeway, Inc.*, a Maryland federal court dismissed an improper “tip credit” claim under § 3-503 of the Wage Payment Law. Specifically, in *Mould v. NJG Food Service Inc.*,<sup>15</sup> the plaintiff alleged that, “through the improper tip pooling and tip credit arrangements” defendant unlawfully “deducted and withheld portions of his wages in violation of § 3-503 of the MWPCPL.”<sup>16</sup> The federal court reasoned that § 3-503 does not give rise to a private right of action. The court continued: “Indeed, § 3-507.2(a), which authorizes employees to file suit under the MWPCPL, applies where ‘an employer fails to pay an employee in accordance with § 3-50[2] or § 3-505 of this subtitle.’”<sup>17</sup>

### The Maryland Court of Appeals Overturns the Court of Special Appeals’ Decision

One year later, the Maryland Court of Appeals issued the first of two decisions in 2014 concerning the broad scope of the Wage Payment Act. First, on March 26, 2014, the court reversed the intermediate appellate court’s decision in *Marshall v. Safeway*,<sup>18</sup> holding that employees may broadly sue for any violation of the statute. Rather than look at the “literal” meaning of § 3-507.2(a), as construed by the intermediate court (and federal courts), the court of appeals took a different approach to statutory construction. Specifically, the court considered the legislative history and all of the provisions together and held that the purpose of the private right of action “was to provide a meaningful remedy to the harm flowing from the refusal of employers to pay wages lawfully due” and that the “particular references to §§ 3-502 and 3-505 are understandable because those sections determine when the wages are due.”<sup>19</sup>

As a result of this decision, the Wage Payment Law’s private right of action is no longer limited to an alleged violation of § 3-502 and § 3-505. Nonetheless, this decision did not address whether an employee can sue under an “entitlement to overtime pay” theory under the Wage Payment Law.

10 See also *Caseres v. S&R Mgmt. Co.*, No. 12-cv-01358, 2013 U.S. Dist. LEXIS 401894, at \*3 (D. Md. Aug. 5, 2013) (dismissing claim under MWPCPL where core dispute was whether plaintiff entitled to overtime wages); *Jones v. Nucletron Corp.*, No. 11-cv-02953, 2013 U.S. Dist. LEXIS 25338 (D. Md. Feb. 20, 2013) (dismissing MWPCPL claim because plaintiff’s allegations concerned entitlement to overtime wages).

11 210 Md. App. 545 (2013).

12 *Id.* at 685.

13 *Id.*

14 *Id.* at 686 (emphasis added).

15 No. 13-cv-1305, 2013 U.S. Dist. LEXIS 170855 (D. Md. Dec. 4, 2013).

16 *Mould*, 2013 U.S. Dist. LEXIS at \*24. (emphasis added).

17 *Id.*

18 *Marshall v. Safeway, Inc.*, 437 Md. 542 (2014)

19 *Id.* at 561-562.

## The Instant Case—*Peters v. Early Healthcare Giver, Inc.*

*Peters v. Early Healthcare Giver, Inc.*, issued on August 13, 2014, is the second case that broadened the scope of the Wage Payment Law. Unlike *Marshall v. Safeway*, this case squarely addresses whether an employee may bring a misclassification and overtime pay claim under the Wage Payment Law.

### Facts

In *Peters*, the plaintiff worked as a certified nursing assistant for Early Healthcare Giver, Inc. (“EHG” or “company”) and consistently worked approximately 60 hours per week. Ms. Peters provided in-home care for an elderly patient from April 2008 to April 2009. EHG paid her \$12 per hour for all hours she worked, but did not pay her time-and-a-half.

At trial, the president of the company explained that she did not pay the plaintiff overtime pay because she exercised during her work hours. In addition, the president testified that the plaintiff was paid under a federal program through which Medicaid reimbursed the company no more than \$16 per hour. At trial, EHG’s counsel argued that the plaintiff was exempt from receiving overtime pay under the FLSA’s “companionship services” exemption.<sup>20</sup> Ultimately, the trial court held that federal law preempted Maryland law, and, thus, exempted EHG from paying overtime.

The plaintiff appealed the trial court’s holding and the Court of Special Appeals reversed, concluding that federal law does not preempt state wage laws. In addition, the intermediate appellate court held that the FLSA exemption did not apply and remanded for the trial court to consider whether the plaintiff was entitled to overtime pay under the FLSA and MW&HL. The company apparently went defunct shortly after the trial and ceased defending itself in this case.

On remand, the trial court awarded the plaintiff \$6,201 in unpaid overtime wages under the MW&HL, but denied her request for additional damages under the Wage Payment Law. The plaintiff appealed again and principally argued that the trial court abused its discretion by failing to award her enhanced damages under the Wage Payment Law. The Maryland Court of Appeals granted her Petition for Writ of Certiorari.

### Court’s Analysis

First, the court did not spend much time analyzing whether and to what extent an employee may recover overtime pay under an “entitlement” theory, such as allegations of misclassification, because EHG did not participate in the proceeding and no other party presented an argument to the contrary. But, the court made it clear that it hoped to put an end to the scope controversy, stating: “We echo, hopefully for the final time, that both the [MW&HL] and the [MWPCL] are vehicles for recovering overtime wages.”

Second, the plaintiff argued that EHG did not withhold the overtime as a result of a *bona fide* dispute and that she is entitled to treble damages under the statute. In this regard, the statute’s private right of action provision states that if: “a court finds that an employer withheld the wage of an employee in violation of this subtitle and not as a result of a *bona fide* dispute, the court may award the employee an amount not exceeding 3 times the wage, and reasonable counsel fees and other costs.”<sup>21</sup> Before reaching the evidentiary issue of whether EHG withheld the overtime pay “as a result of a *bona fide* dispute,” the court held that the burden is on the employer, and not the employee, to establish it has withheld payment based on a “*bona fide* dispute.” It reasoned that “the employer, as the party withholding the wages, is uniquely qualified to offer evidence about its reasons for doing so.”

The court further explained that a “*bona fide* dispute” is a “legitimate dispute over the validity of the claim or the amount that is owing.” The inquiry is concerned with the employer’s “actual, subjective belief that the party’s position is objectively and reasonably justified.”<sup>22</sup> For example, the court mentioned in a footnote that “an incorrect legal belief, such as federal preemption, may form the basis of a legitimate *bona fide* dispute.” Turning to the evidence presented, the appellate court found that EHG advanced only one argument at trial; that is, it withheld

<sup>20</sup> 29 U.S.C. §213(a)(15).

<sup>21</sup> Md. Code Ann., Lab. & Empl. § 3-507.2(b).

<sup>22</sup> *Barufaldi v. Ocean City, Md. Chamber of Commerce, Inc.*, 201 Md. App. 79, 130 fn. 42 (2011); *See also Programmers’ Consortium, Inc. v. Clark*, 976 A.2d 290, 295 (Md. 2009) (“Section 3-507.1(b) only comes into play when the basic violation is aggravated by the additional factor that the employer withheld the payment of wages without an even plausibly good reason for having done so, to wit, ‘not as a *bona fide* dispute.’”); *Friolo v. Frankel*, 819 A.2d 354 (Md. 2003) (reasonable counsel fees may be awarded only in “situations where the employer acted willfully—in the absence of a *bona fide* dispute.”).

overtime pay because the plaintiff exercised during work hours. Although EHG's counsel argued the case was preempted by federal law and the "companionship exemption," no one from EHG testified that it did not pay the employee for these reasons. Without this evidence, there was no evidence of a *bona fide* dispute.

Third, the court considered the plaintiff's request for treble damages. The plaintiff urged the court to hold that once a fact-finder finds the absence of a *bona fide* dispute, an award for enhanced damages should be "liberally" granted. Significantly, the appellate court disagreed, holding it "was not persuaded . . . that there should be a presumption in favor of granting enhanced damages." Put another way, the appellate court held, "notwithstanding a finding that there was no *bona fide* dispute," a "trier of fact has the discretion to decline any award of enhanced damages."

Lastly, the court held that the *total* damages for a private right of action are limited to three times the unpaid wage.

## Lessons Learned

There are several key takeaways from this decision. First, an employer defending a wage payment case in state court should not necessarily abandon or waive the "entitlement" defense or other arguments that the Wage Payment Law is not the proper vehicle for all overtime pay claims because neither the Maryland Court of Special Appeals nor the Court of Appeals has been squarely presented with an appellate brief and argument outlining the reasons why misclassification cases, for example, may not be actionable under the Wage Payment Law.

Second, an employer must be prepared to explain to a fact finder why it made the decision to withhold payment. The reasons could be factual, legal, or a combination thereof. For example, in this case, EHG may have met its burden to show a good faith basis by explaining it withheld overtime pay because the Medicaid payments were not enough to cover overtime pay, unless it paid the employee significantly less money, and/or it believed the Medicaid program preempted state law. Similarly, in misclassification cases, an employer should be able to satisfy its burden by articulating its rationale for the decision, even if the classification turns out to be incorrect.

Third, in a jury trial, an employer should consider a jury instruction that states that, assuming the jury finds a *bona fide* dispute, it still has discretion to find that the employer is not liable for enhanced damages.

Fourth, employers in Maryland should periodically audit positions they classify as exempt from overtime under federal and state law.

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