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State Wage Payment Laws Pose Unique Challenges

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In the past several years, the sky-rocketing number of lawsuits alleging violations of the Fair Labor Standards Act [FLSA], and the resulting seven-figure settlement and damage awards, have garnered headlines. These suits, often class actions, generally revolve around improper employee classification and wrongful denial of overtime compensation. Yet while the boom in FLSA litigation has occurred, another front on the wage-and-hour landscape has emerged: litigation arising from state wage payment statutes. As employers, employees and counsel are discovering, these statutes present their own set of unique protections, opportunities and challenges.

State wage payment statutes generally define protected "wages" and dictate the procedures associated with wage payment. The stakes for failing to comply can be very high: These statutes usually contain penalty provisions that subject an employer and select individual officers to both civil and criminal liability. Moreover, these statutes usually provide for recovery of additional damages and attorney fees. In addition, while aggrieved employees in some states are required to pursue their claims with a state agency prior to instituting a claim in court, they generally can proceed to court within a relatively short time frame.

Not surprisingly, state wage payment statutes are appearing more frequently as the basis for litigation, as plaintiffs bring claims under these statutes against both the corporate entity and individuals. As a result, corporate officers, directors and managing agents are finding themselves individually named in such complaints, and thus potentially on the hook for substantial damages awards.

Because of the increased litigation involving these statutes, the courts have been forced to analyze statutory language that often lacks specific definitions, regulatory interpretation and well-developed legal precedent. The result is an ever-growing body of state law that employers, employees and practitioners are attempting to navigate.

This article will set forth the basic parameters of the wage payment statutes in a select sampling of states-Massachusetts, California, Texas and New York-and will spotlight recent decisions of interest in each of these jurisdictions. These decisions reveal a common theme: As more employees seek the protection and benefits of state wage payment statutes, courts are grappling with, among other things, what constitutes a wage and who, other than the corporate entity, is ultimately responsible for failure to pay wages.

The Massachusetts wage statute

The Massachusetts "Weekly Payment of Wages" statute, Mass. Gen. Laws ch. 149 §[148, described by one judge as "hardly a model of legislative draftsmanship," covers an employee's wages, and also defines wages to include any holiday or vacation payments due an employee under an oral or written agreement as well as commissions, when the amount of such commissions has been definitely determined and has become due and payable to the employee. The Massachusetts wage statute, which does not specifically reference bonus payments, severance payments or other similar benefit payments as being "wages," leaves open a big question: What is a wage?

Recent cases examining what constitutes "wages" have analyzed deferred compensation, severance

and commission payments. The Massachusetts Supreme Judicial Court has ruled that tax-exempt deferred compensation contributions are not wages [see Boston Police Patrolmen's Assoc. Inc. v. City of Boston, 435 Mass. 718 [2002]], and the Appeals Court of Massachusetts has held that severance pay is not a wage. See Prozinski v. Northeast Real Estate Services LLC, 2003 Mass. App. Lexis 1099 [Oct. 16, 2003].

What type of commission constitutes "wages" for purposes of the Massachusetts wage statute, however, remains unclear. Some lower court decisions have held that commissions triggered by contingencies, which are above and beyond an employee's base salary, are not a "wage" subject to the statute's protection. Conversely, other lower courts have held that commissions that are akin to "assured compensation" do constitute wages under the Massachusetts wage statute. This expanding and sometimes conflicting body of case law appears ripe for determination by a higher court and, until resolved, will constitute an ongoing litigation battleground.

The Massachusetts wage statute dictates both the frequency and timing with which employers must pay their employees' wages. In addition, the statute controls the timing of wage payment upon voluntary and involuntary terminations. An employer must pay an employee who leaves employment voluntarily in full on the next regular payday, or on the Saturday following the resignation. An employer must pay an employee who is involuntarily terminated in full on the day of discharge.

No waivers allowed

Moreover, as one rueful employer recently discovered, the Massachusetts wage statute specifically prohibits the waiver or opting out of its protections-even when an employee agrees. The statute states that no one shall "by a special contract with an employee or by any other means exempt himself" from the statute. Mass. Gen. Laws ch. 149 §[148. This language was the focal point of a recent case, Dobin v. CIOview Corp., No. 2001-00108 [Mass. Super. Ct. Oct. 29, 2003]. In that case, the employee of the defendant start-up company agreed with the company's president that she would defer her monthly salary until the company could afford to pay her salary as well as its utility bills. After several months of not receiving her salary, the employee filed a complaint with the attorney general's office and notified her employer that she had learned that their agreement violated the Massachusetts wage statute.

Despite the undisputed agreement and the fact that the employer paid the employee's back wages before the employee filed suit, the court ruled in favor of the employee and awarded treble damages on the interest she lost from the delay in paying her wages, as well as her attorney fees and costs. The court recognized the adverse effect that provisions of the Massachusetts wage statute might have on start-up companies attempting to reach financial viability, but found that the clarity of the statute's language in this instance mandated such a damages award.

Making mistakes-even unintentional mistakes-can be costly. Like many state wage payment statutes, the Massachusetts wage statute provides for both civil and criminal penalties for employer violations. The statute defines an employer to include not only the entity, but also the president and treasurer of a corporation and any officers or managing agents of a corporation. The criminal penalties range from fines of up to $10,000 and/or six months in jail for a first nonwillful offense, to fines of up to $25,000 and/or up to one year in jail for a first willful or intentional offense. In addition, the statute provides for treble damages and attorney fees to a prevailing plaintiff, making it a plaintiff favorite.

The California Wage Statute

Wages in California, as defined by Cal. Lab. Code §[200 et. seq. [the California Wage Statute], include all amounts for labor, work or service performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or other method of calculation. The California Wage Statute does not specifically mention bonus payments, severance payments or other benefits. However, the California Wage Statute has been interpreted broadly and may encompass these additional forms of compensation. See Ware v. Merrill Lynch, Pierce, Fenner & Smith Inc., 24 Cal. App. 3d 35 [1972]. In addition, the California Wage Statute includes vacation pay as a wage if provided for by contract or employer policy. Further, the statute requires that employers pay wages twice per month, on predesignated paydays. Employers may pay employees who are considered "exempt" under the FLSA once per month.

Employers in California also face criminal and civil liability for failure to comply with the wage statute. Employers that willfully fail to pay wages on time are liable for the wages due through the time of termination as well as up to an additional 30 days of an employee's pay. Moreover, failure to pay wages due or withholding part of a wage is a misdemeanor. Although the California Wage Statute does not contain an explicit definition of "employer," the criminal penalty section does specifically reference "any person, or the agent, manager, superintendent or officer thereof."

The question of individual liability for corporate officers and directors or other managing agents of an employer currently is under review by the California Supreme Court. In Reynolds v. Bement, 107 Cal. App. 4th 738 [2003], the employee claimed that his employer had, among other things, failed to pay overtime compensation, failed to pay wages at the time of termination, unlawfully deducted from his wages and converted employee wages. The California Court of Appeal found that while an individual "person" could be liable for civil fines and misdemeanor penalties, responsibility for compliance with the wage and hour laws was limited to the actual "employer."

In so holding, the court refused to broaden the definition of "employer" and to leave "virtually any management employee open to civil liability for violation of wage and hour laws." If this decision is upheld, it will produce the bizarre result of individual officers and directors remaining liable for penalties and fines but escaping individual liability for actual unpaid wages or wages due.

The Texas Payday Act

The Texas payment of wages statute, Tex. Lab. Code §[61.001 et seq. [the Texas Payday Act], defines wages as compensation owed for services rendered by an employee whether computed on a time, task, piece, commission or other basis. This broad definition also includes vacation pay, holiday pay, sick leave pay, parental leave pay and sever-

ance pay that an employer owes to an employee under a written agreement or written policy. The Texas Payday Act does not cover expense reimbursements, gratuities or gifts.

The Texas Payday Act requires that employers pay employees exempt from the overtime provisions of the FLSA their wages at least once a month and nonexempt employees at least twice a month.

As is the case under most state wage payment statutes, the Texas Payday Act prohibits an employer from making deductions from earned wages unless ordered to do so by a court of competent jurisdiction, unless authorized to do so by state or federal law or unless authorized by the employee in writing to deduct for a lawful purpose. Employers should be very careful to obtain a proper written authorization before making an unauthorized payroll deduction.

Texas employers may be liable for both fines as well as administrative penalties of the lesser of the amount of wages claimed or $1,000. If, at the time of hiring, an employer intends to avoid payment of wages and, after demand, fails to pay such wages, the employer is guilty of a felony in the third degree. Similar to the Massachusetts wage statute, the Texas Payday Act defines "employer" to include a person who employs one or more individuals or acts directly or indirectly in the interest of an employer in relation to an employee.

As a recent ruling in Texas showed, Texas courts, like the California courts, are wrestling with the issue of when an individual can be held liable. One ruling addressed the issue of individual liability in a case in which an employee of a corporation that was unable to make its payroll sued a director who was one of the corporation's five largest shareholders.

In denying the director's motion for summary judgment in Goetz v. Synthesys Technologies Inc., 2003 WL 22299991, at 1 [W.D. Texas Sept. 25, 2003], the court found that there was a genuine issue of material fact as to whether the director had sufficient control and authority to be held personally liable under both the FLSA and the Texas Payday Act. The court examined the director's general control over company operations, personnel matters and financial issues. Although the evidence showed some involvement in the company's day-to-day operations, the court found critical the director's "significant financial control" and involvement in deciding to keep a failing business operational when he may have known that the company was out of money.

The New York wage law

The New York Payment of Wages Law, N.Y. Lab. Law §[190 et. seq., defines wages to include the earnings of an employee for labor or services rendered, regardless of whether the amount of earnings is determined on a time, piece, commission or other basis. Under certain circumstances, the definition also includes benefits and wage supplements, such as reimbursement for expenses; health, welfare and retirement benefits; and vacation, separation or holiday pay. In addition, the statute dictates the required frequency with which an employer must pay wages to employees, depending upon the type of job the employee performs. An employer must pay an employee who is separated from employment for any reason on or before the next regular payday.

The Payment of Wages Law provides for both civil and criminal liability. An employer that fails to pay wages is liable to the state for $500 for each violation. An employee who prevails on a wage claim may be entitled to recover $50 worth of costs, as well as attorney fees and, if a violation is willful, an additional amount of liquidated damages equal to 25% of the total amount of wages due. Finally, employers-including officers and agents of a corporation who knowingly permit the corporation to violate the statute-face criminal sanctions ranging from a misdemeanor conviction and fines between $500 and $20,000 and/or imprisonment for not more than one year.

An employer guilty of a second offense within six years may be charged with a felony. Furthermore, under a separate New York statute, N.Y. Bus. Corp. Law §[630, the 10 largest shareholders of a private corporation are jointly and severally liable for all debts of the corporation, including wages or salaries due to any employee.

The Payment of Wages Law also prohibits certain deductions from an employee's wages. Specifically, the statute provides that employers shall not make any deductions from an employee's wages except if made in accordance with law, rule or regulation, or if expressly authorized in writing by the employee and for the employee's benefit. See N.Y. Lab. Law §[193. This section of the statute was at issue in the recent case of Marsh v. Prudential Securities Inc., 2003 N.Y. Lexis 3967 [Nov. 24, 2003].

The holding in 'Marsh'

In Marsh, the New York Court of Appeals considered whether an employee benefit plan that provided for employees to elect to have a certain percentage of earnings deducted for the purposes of buying shares in an index fund violated the Payment of Wages Law. The plan provided for a three-year holding period before the employee could access the purchased shares. If an employee left employment or was terminated during that three-year period, the entire balance would be forfeited to the employer.

The U.S. District Court for the District of New Jersey-where the case was removed from a New Jersey state court-determined that the deductions were permissible because the program benefited employees by providing favorable tax consequences. On appeal, the 3d U.S. Circuit Court of Appeals certified the question to the New York Court of Appeals, which affirmed, holding that the program did not violate the statute, as the deductions were for the employees' benefit.

The court recognized that the provision was a "golden handcuff," but found that the employees received sufficient notice and that the program was available only to sophisticated employees. However, this provision might not withstand scrutiny under the wage payment statutes in California, Massachusetts, Texas and elsewhere. This type of issue requires a state-by-state analysis, and failure to do such an analysis can have serious consequences.

While this article has focused on wage payment statutes and case law involving those statutes in only four states, this sampling highlights the types of issues presented by these often ill-defined statutes, as well as the issues courts frequently are confronting. If representing an employee, it is critical that counsel become familiar with the law in the

state in which the employee works to explore whether the employee has legal rights to wages. Similarly, counsel representing employers must be fluent with the specifics of these statutes in order to advise employers of various pitfalls. While "one size fits all" wage practices may promote efficiency, such practices can carry with them significant legal risks.