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East Coast Edition

A Littler Mendelson East Coast-specific Newsletter

Massachusetts Mandates Treble Damages for Wage Violations

By Michael Mankes

Wage and hour violations just became even more costly for Massachusetts employers as the Massachusetts legislature passed a bill mandating triple damages for all violations, regardless of employer intent. Senate Bill No. 1059 amends various provisions of the state wage statutes pertaining to damages. The new law goes into effect on July 13, 2008. As a result, wage and hour claims are now more attractive to plaintiffs' attorneys, and employers can expect to see an increase in wage and hour litigation, particularly class action litigation, in Massachusetts, ranging from claims for unpaid overtime to tip pooling violations.

Treble damages for wage violations had been allowed since 1993, but many state court judges treated them as discretionary. In 2005, the Massachusetts Supreme Judicial Court ruled in *Wiedmann v. The Bradford Group* that an award of treble damages in a wage payment case is not mandatory but, rather, in a judge's discretion. Quoting an earlier case, the court acknowledged that treble damages are "punitive in nature" and generally appropriate where conduct is "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others." The legislature drafted Senate Bill No. 1059 in response to *Wiedmann*. Notably, in passing the bill, the legislature characterized the law as a "clarification" of existing law rather than a change in the law, which will likely lead to arguments that the law should be afforded retroactive effect. We will have to wait and see how the courts receive such an argument, as retroactive application of the treble penalty may have due process implications given the Supreme Judicial Court's 2005 ruling in *Wiedmann*.

Prior to the bill's final passage, Massachusetts Governor Deval Patrick proposed an amendment that would have provided courts with discretion to award less than treble damages when an employer could show that it acted in good faith. After the state legislature enacted the law without his amendment, Governor Patrick refused to either sign or veto the bill, which allowed the bill to become law. In 2006, then Governor Mitt Romney vetoed the same bill, and the legislature could not consider an override of the veto, because it was no longer in session.

Massachusetts becomes the first state in the country to mandate treble damages for all wage violations. The Massachusetts penalty is significantly harsher than the federal Fair Labor Standard Act's penalty for wage and hour violations, which provides for double damages and allows an employer to avoid the penalty where it can demonstrate a good faith attempt to comply with the law.

The law's proponents (plaintiffs' wage and hour attorneys) successfully argued before the legislature that employers often refuse to settle meritorious wage claims unless a lawsuit is filed and, as a result, the treble damages sanction was needed to encourage timely payment

of claims without litigation. They also asserted that the large recovery would provide compensation to employees for any late bill payment fees or damage to credit ratings incurred as a result of not being paid properly. Finally, proponents asserted that the potential for significant financial loss by employers would promote better compliance with wage and hour regulations. These arguments prevailed as part of a legislative compromise to enact the treble damages law while freezing the state's unemployment insurance rates for 2008, over the objections of organized labor.

What This Means for Massachusetts Employers

The penalty for failure to comply with state wage and hour laws is now much steeper. This is especially alarming given the epidemic of class action wage and hour lawsuits filed nationwide over the last few years. Massachusetts employers are likely to see more litigation activity, as enactment of the bill will embolden plaintiffs' attorneys to seek out and assert Massachusetts wage and hour actions generally, and class actions particularly, as the potential recovery has tripled. This, of course, is in addition to recovery of attorneys' fees for a prevailing plaintiff, for which the statutes already provide.

As a result of these harsh penalties, employers must be more vigilant in ensuring compliance with complex Massachusetts wage and hour laws. Employers should consider a comprehensive audit of their wage and hour policies and practices. This includes ensuring that all employees are properly classified as exempt or nonexempt and paid overtime when appropriate. Employers also should review their pay practices, including compliance with Massachusetts' numerous minimum wage, vacation, overtime, travel and tip pooling regulations, and independent contractor relationships.

In addition, employers should consider training managers on wage and hour compliance, as managers are a company's front line with respect to ensuring compliance. Often employers have the right policies in place, but find themselves embroiled in class action litigation because managers do not have the requisite knowledge or experience to appropriately enforce company policy. For example, there have been a number of "off-the-clock" class action overtime cases where companies maintain lawful wage and hour policies, but untrained managers allow employees to work off-the-clock, *i.e.*, before clocking in or after clocking out, in order to avoid overtime obligations. Massachusetts employers should consult with experienced employment counsel for further discussion of the implications of Senate Bill No. 1059 and to discuss pay practices, wage and hour audits, and compliance training.

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