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Terminations and Settlements After Reuter: How to Avoid Paying Thrice

June 6, 2022

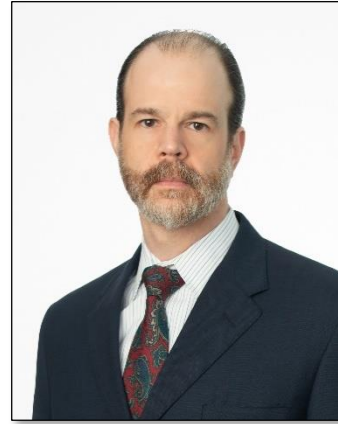
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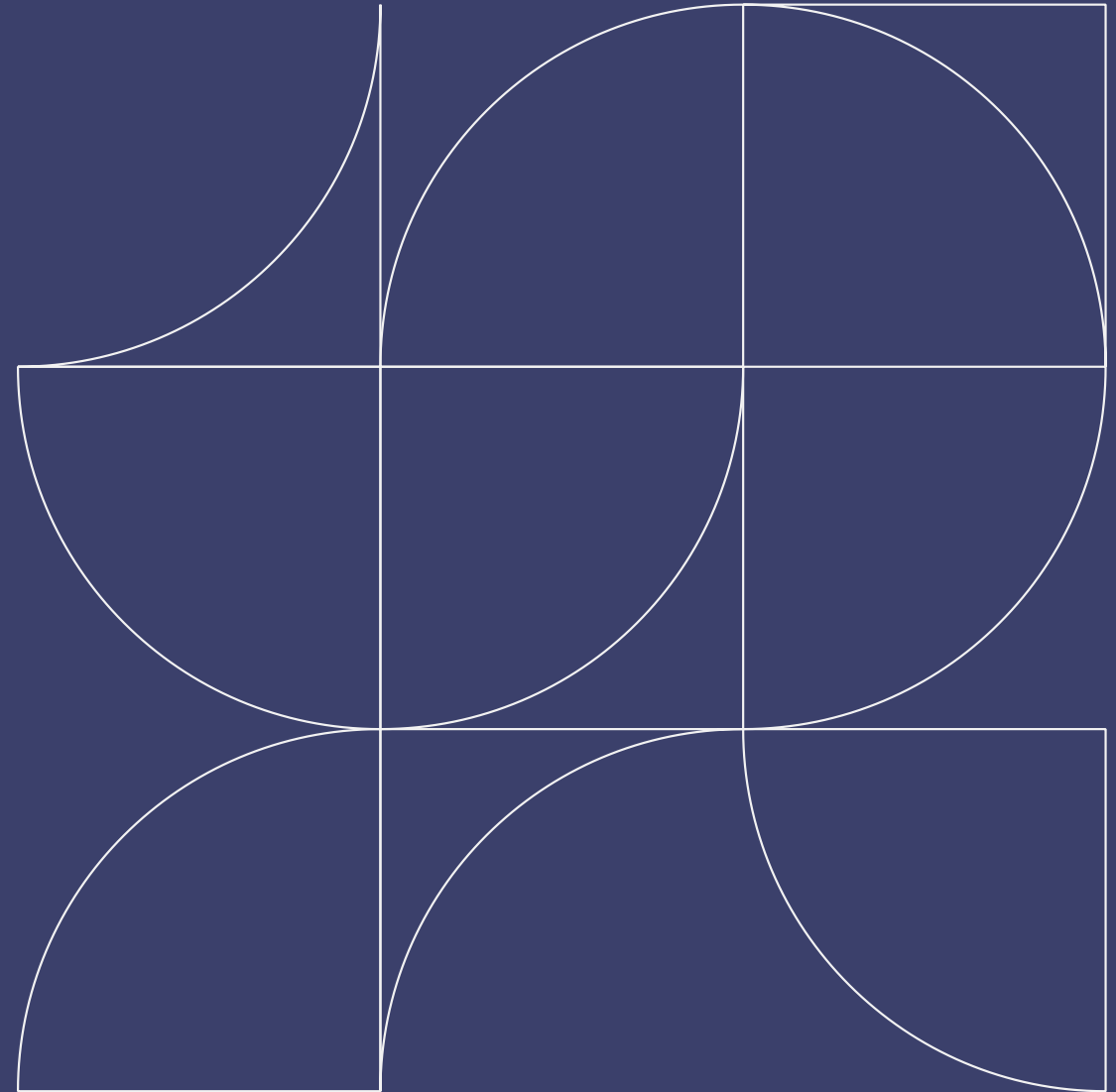
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Agenda

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- 2 / Termination / Resignation**
- 3 | Settlements**
- 4 | The Very Hard Problems**
- 5 | What Does The Future Hold?**

Introduction

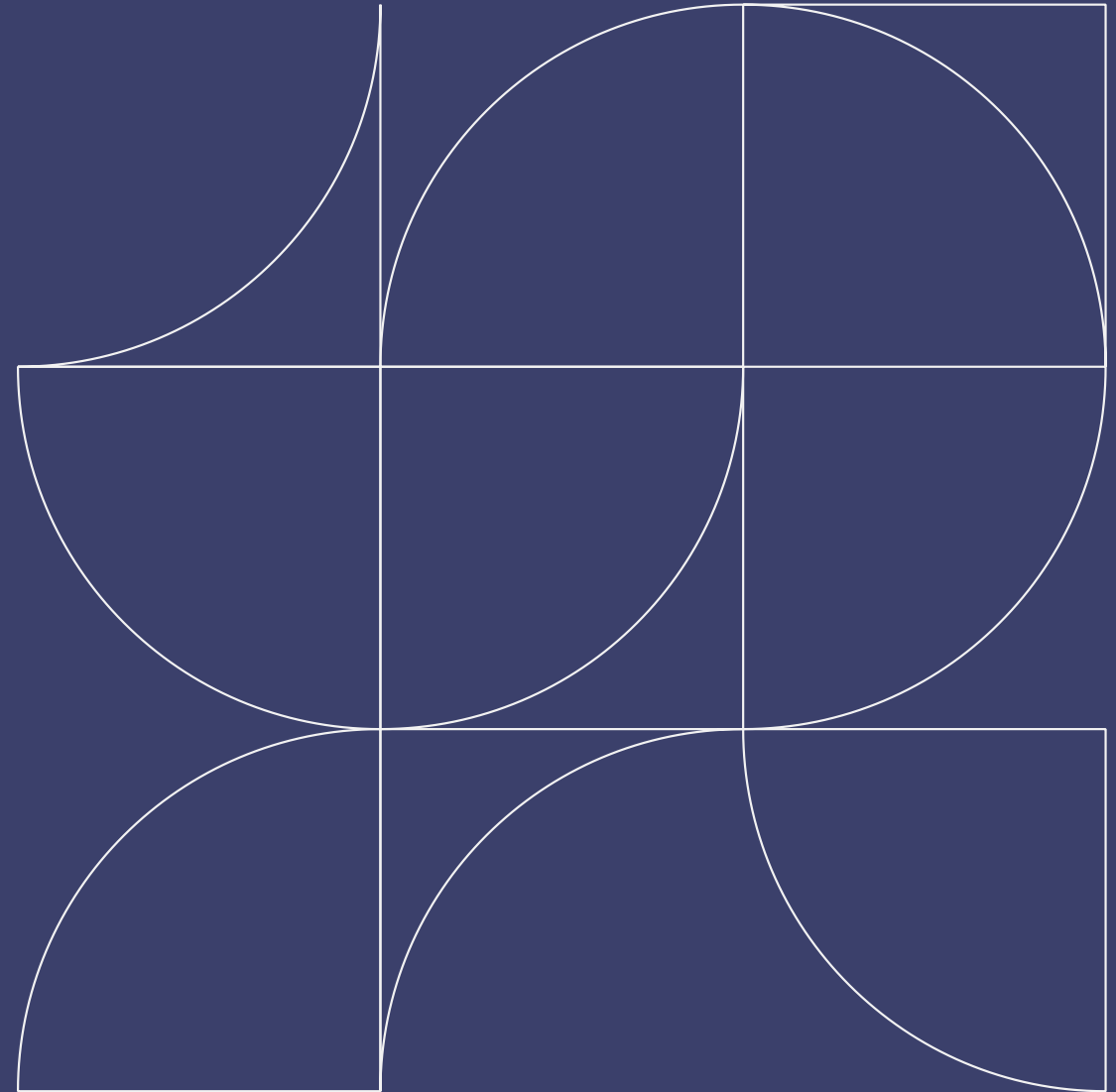




Introduction

- Today's Focus is Two-Fold:
 - Payment Upon Resignation or Termination;
 - Considerations for Settlement Agreements Involving Wage Act.
- Will Not Rehash *Reuter*, but the point remains: The post-*Reuter* world is one where any Wage Act violation, even a minor one, will result in triple damages.

Termination / Resignation





Start at the Top – What Does the Wage Act Require?

- Resignations – “any employee leaving his employment shall be paid in full on the following regular pay day, and, in the absence of a regular pay day, on the following Saturday” G.L. c. 149, § 148.
- Terminations – “any employee discharged from such employment shall be paid in full on the day of his discharge, or in Boston as soon as the laws requiring pay rolls, bills and accounts to be certified shall have been complied with” G.L. c. 149, § 148.
- Both Resignations and Terminations Can Result in Quick Turnaround Payments of Final Wages In Order to Comply With the Wage Act.



“Day of” Means Day Of

- Common practice to give discharged employees the option to choose whether to receive payment in form of a check at time of termination, or direct deposit on next regular pay day (or even electronic transfer but won't hit employee's account until next day).
- Do not give employees that choice. Already a proliferation of litigation seeking damages under *Reuter* when the employee chose direct deposit.
- If funds aren't available to the employee on the day of termination, it's a violation of the Wage Act, subject to treble damages.



So What Can We Do?

- Assess and improve payroll processes.
- Consistently update accruals for vacation / sick time / bonuses / any other compensation that needs to be paid in final paycheck.
- Ensure clean communication process for resigning employees, so that resignation is communicated in time to ensure all payments made in next pay check.



Terminations under exigent circumstances.

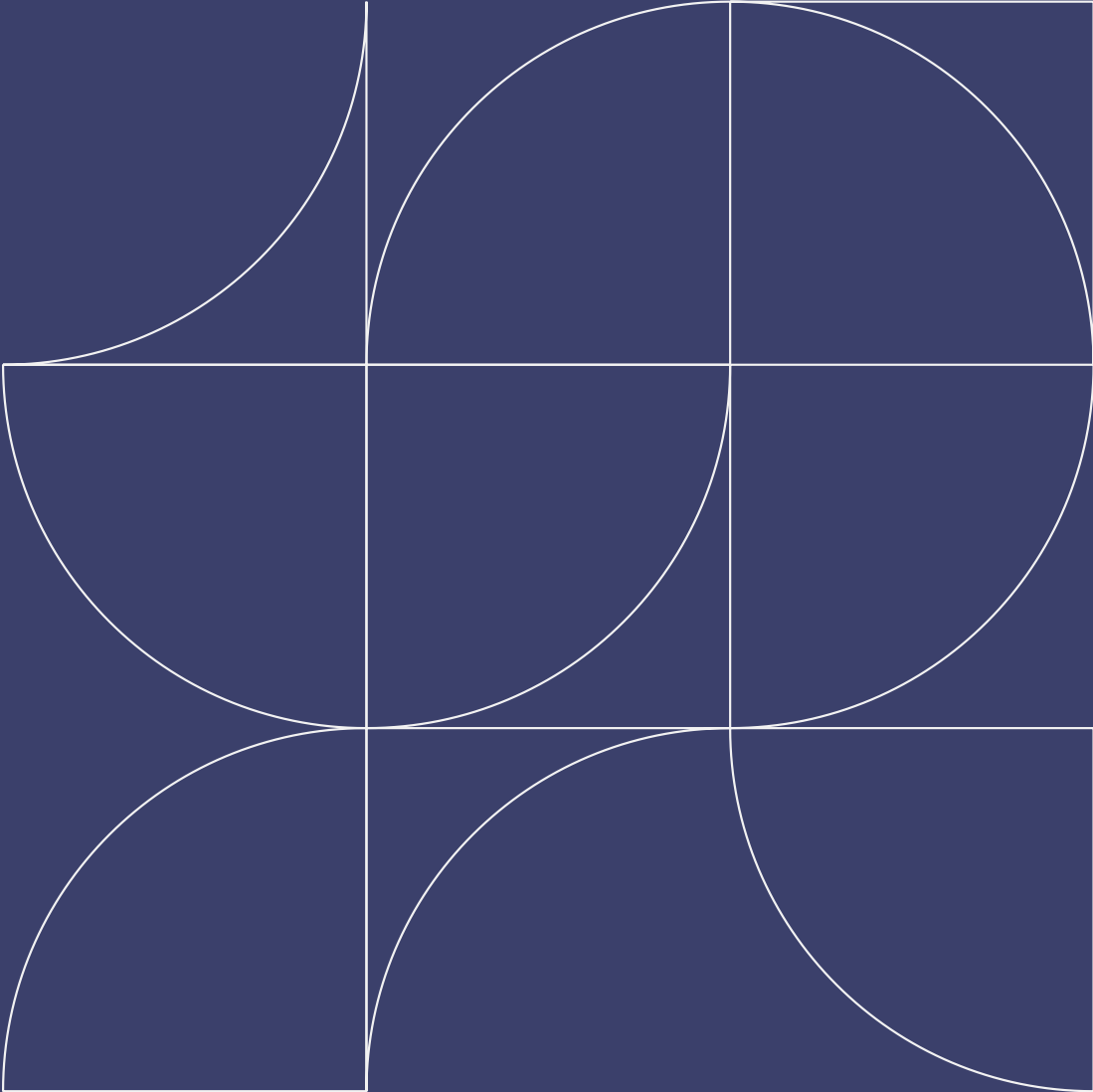
- Consider Suspension In Lieu of Immediate Termination.
 - In *Reuter*, the SJC noted that, in the context of terminating an employee:
 - “This may mean that employees who, like the plaintiff, have engaged in illegal or otherwise harmful conduct may have to be suspended rather than terminated for a short period of time until the employer can comply with § 148.” *Reuter v. City of Methuen*, 489 Mass. 465, 472 (2022).
- But suspensions may not work in all circumstances:
 - Regulated financial entities who cannot suspend someone for fraud.
 - Unionized employers must consider requirements of applicable collective bargaining agreements and/or labor law.



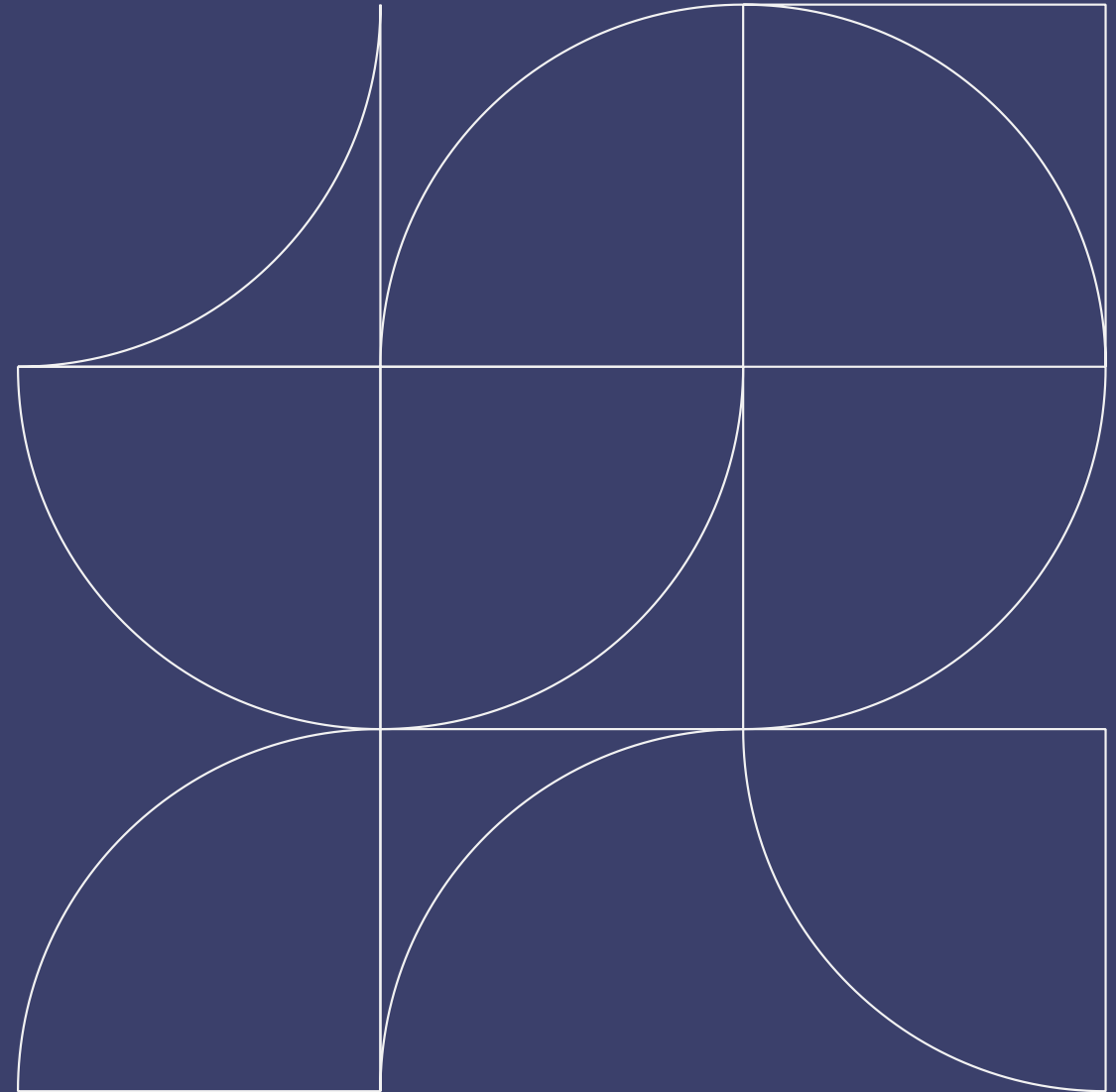
Terminations under exigent circumstances, cont.

- Have Mechanism(s) in Place for Making Immediate Payments.
 - Out-of-Payroll-Cycle Checks.
 - Have dedicated funds for end-of-termination final payments.
 - Examples:
 - If store-level employee, could pay them out of cash register.
 - Have store/location-level account which always contains sufficient funds to write a check from.
- If amounts due not known with precision, consider including a buffer amount.
- Ensure payouts are documented.
- If payroll function is outsourced, consider training someone in-house to make day-of calculations and payments.
- Create/revise last-day checklists to account for Wage Act's requirements.

CLE



Settlements





The Wage Act's Prohibition of Special Contracts

- The Wage Act explicitly prohibits employers from entering into “special contract[s]” with employees that would alter the Act’s requirements. G.L. c. 149 § 148.
- *In Crocker v. Townsend Oil*, the SJC found that a settlement agreement is not a prohibited “special contract.”
- Following *Crocker*, any settlement agreement that purports to release Wage Act claims must specifically enumerate G.L. c. 149 in the release.
 - i.e.: “[NAME] waives all claims or rights arising under the Massachusetts Payment of Wages Law, G.L. c.149.”



Are Treble Damages Claims Releasable After *Reuter*?

- *Reuter* makes clear that employees are statutorily entitled to treble damages for any late payment of wages.
- Under *Crocker*, employers should still be able to obtain a valid release of wage-related claims, but the release itself likely needs to be even more explicit.
- Employers should review settlement agreements that purport to release Massachusetts wage claims, and ensure that the release:
 - calls out as precisely as possible the wage-related claims being released;
 - explicitly references G.L. c. 149, §§ 148 *and* 150;
 - includes the release of statutory or treble damages.



Settlement Scenario #1: Clear Liability

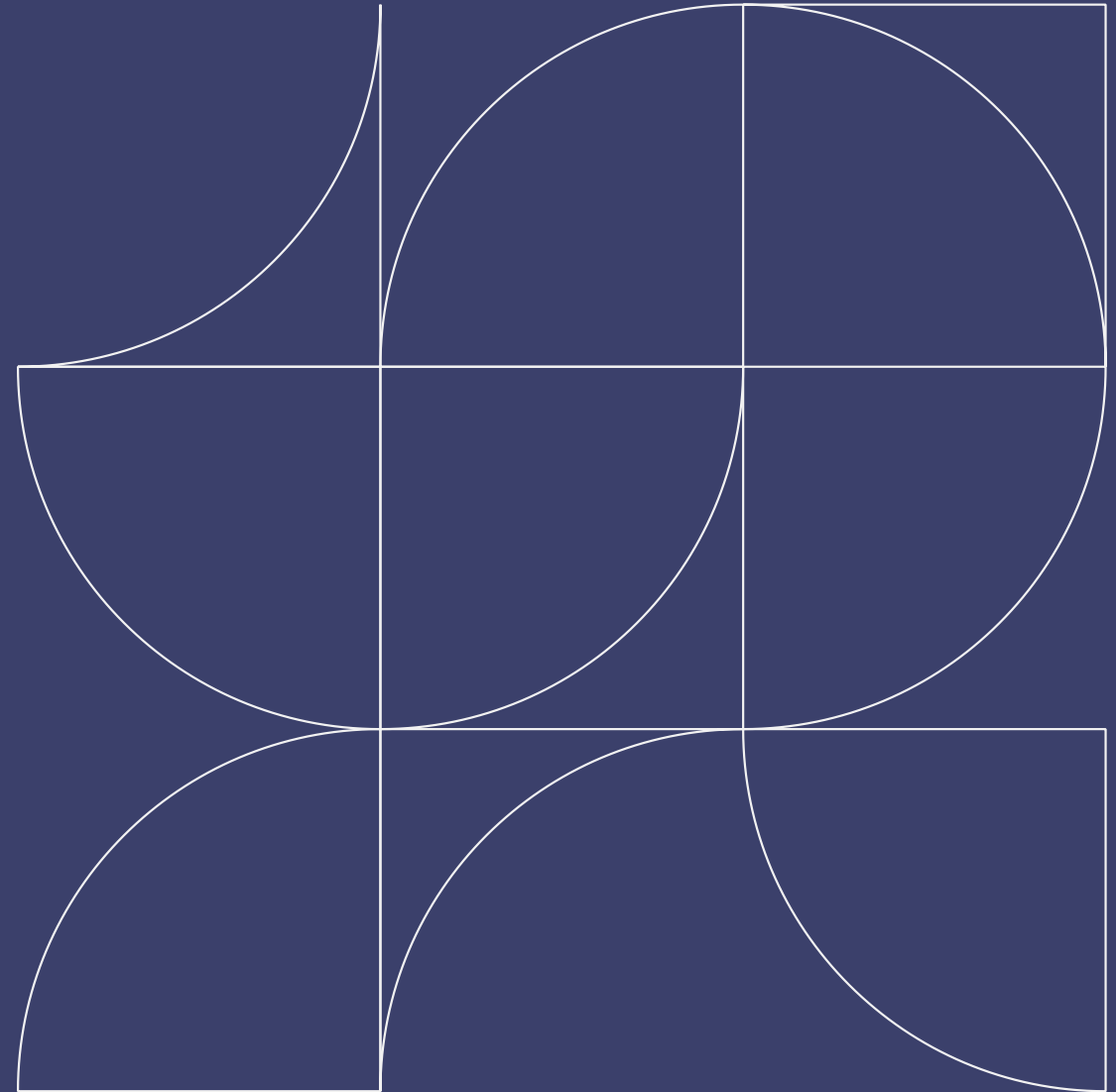
- After *Reuter*, there is and will continue to be a proliferation of litigation around late payment of wages.
- Where liability is clear and the amount of liability is definitely determinable, we expect to see represented plaintiffs reject settlement offers for anything less than full liability.
- In those situations, structure releases to be explicit that the amount being paid is 1/3 for the lost wages (subject to W-2), and 2/3 statutory damages (subject to Form 1099).
 - If the wages due have already been paid, settlement funds can be apportioned entirely as statutory damages (subject to Form 1099).



Settlement Scenario #2: Dispute as to Liability

- If there is a genuine and good faith dispute as to whether the employee is due wages at all, the amount of any settlement is still purely the product of compromise.
- Make clear in any such settlement agreement that the employer denies all liability.
 - i.e., include a “whereas” clause up front describing the claim and denying all liability.
- Apportion settlement payment, in compromised amount, as 1/3 W-2 wages, 2/3 1099 statutory damages.

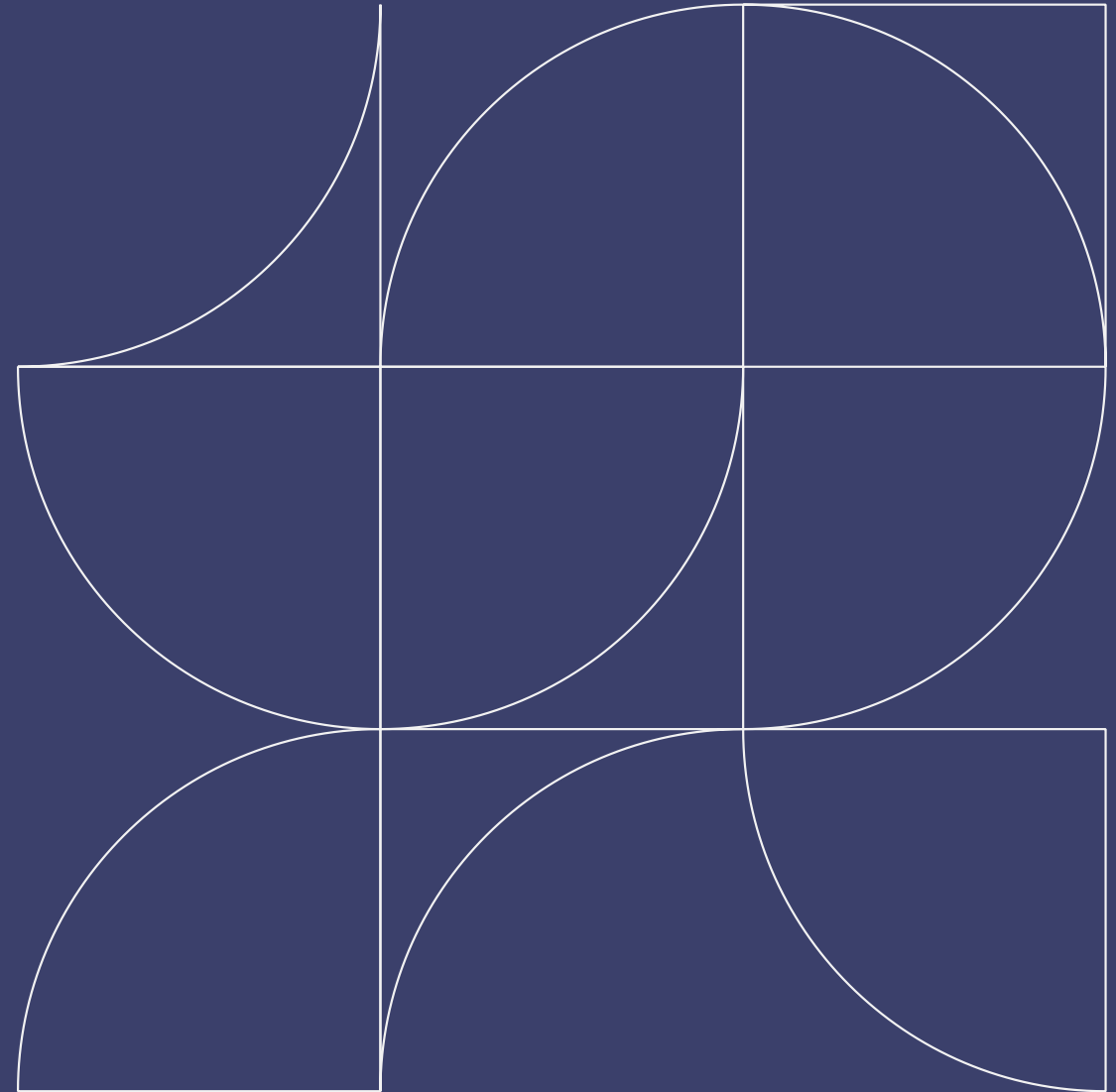
**(Some Other)
Very Hard
Problems**



What If:

- An employer has been hacked, and payroll cannot be timely completed.
- An employer discovers a systemic payroll issue.

What Does the Future Hold?





Forecast is Gloomy...

- Expansive Wage Theft Bill currently pending in Massachusetts legislature.
- There is no pending legislation that would address *Reuter*.
 - But, recent editorial in *Mass. Lawyers Weekly* calls for legislative changes to Wage Act.
- Anything You Can Do?
 - Talk to your representatives.
 - Give us a call.
 - Ensure you are up-to-date on all things Massachusetts wage and hour law.

Thank you

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