



## **Mandatory treble damages for wage and hour violations cannot be applied retroactively**

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**Published:** June 1, 2009

\*This article originally appeared in the June 1, 2009 issue of Massachusetts Lawyers Weekly.

Last July, Chapter 80 of the Acts of 2008 became effective, making treble damages mandatory in all cases where an employer is found to have violated Massachusetts wage and hour laws.

This legislation, the harshest in the country (no other state has such sweeping mandatory treble damages), rejects any "good-faith" defense - whether similar to the good-faith defense available under the federal Fair Labor Standards Act or the more narrowly drawn defense proposed by Gov. Deval L. Patrick when he returned an earlier version of the bill to the Legislature for further consideration.

This amendment to the Massachusetts wage and hour laws constitutes a major departure from the former discretionary standard for multiple damages and imposes severe penalties that are unfair, especially in the vast majority of class action lawsuits.

While intentional wage and hour violations no doubt continue to occur, most class actions involve far more subtle alleged violations of ambiguous statutes, issues that have infrequently (or never) been subject to judicial analysis, and contexts that too easily allow for the second-guessing of good-faith decisions involving employee classifications and pay practices.

The Supreme Judicial Court held in *Wiedmann v. The Bradford Group, Inc.*, 444 Mass. 698 (2005), that the pre-amendment version of Chapter 149, §150 (Payment of Wages Law) did not require a judge to award treble damages because the "text of the statute" used the permissive "may" in connection with a request for

treble damages rather than the mandatory "shall." Id. at 709-710.

The court then referred to its conclusion in *Goodrow v. Lane Bryant, Inc.*, 432 Mass. 165, 178-179 (2000), that a judge should only exercise her discretion in awarding treble damages under the state's overtime law, Chapter 151, §1B, where the conduct was "outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."

Chapter 80 effectively reverses the holding in *Wiedmann* by eliminating the exercise of judicial discretion and mandating the imposition of treble "liquidated" damages for virtually any violation of this state's wage and hour laws.

Against this backdrop, many attorneys representing plaintiffs now seek to extend the application of Chapter 80 by arguing that the amendment should apply retroactively - both to filed lawsuits and alleged violations that occurred before July 13, 2008.

Retroactive application of this statutory amendment would be wrong based on the legislative history of Chapter 80, the constitutional infirmities of such application and serious public policy concerns.

### **Legislative intent**

Multiple damages first became available under Chapter 149, §150, in 1993 when the statute was amended to allow for "any damages incurred, including treble damages."

Superior Court judges differed as to whether the award of treble damages was mandatory or discretionary under the 1993 amendment to the Payment of Wages Law, but the SJC put that issue to rest with its *Wiedmann* decision.

In response to the court's holding, the plaintiffs' bar pushed hard for a further amendment to the Payment of Wages Law that would mandate treble damages.

After failing in 2006 to achieve this objective as a result of Gov. Mitt Romney's pocket veto of a predecessor bill, House 4663, the proponents of mandatory treble damages were able to obtain legislative enactment of Senate 1059 in 2008 (the bill that became Chapter 80 upon enactment), though the measure did not receive the support of Patrick.

Under Massachusetts law, a statutory amendment that affects a substantive right applies prospectively only, unless the Legislature expresses a clear intent that it apply retroactively.

The SJC ruled in *Fontaine v. Ebtac Corp.*, 415 Mass. 309, 318-21 (1993), that legislative changes to statutory damages provisions are substantive, and in *Fleet Nat'l Bank v. Comm'r of Revenue*, 448 Mass. 441, 448-50 (2007), that all statutes operate prospectively "unless an intention that they shall be retrospective appears by necessary implication from their words, context or objects."

At a minimum, therefore, the Legislature would have had to express its clear intent that Chapter 80 apply retroactively for courts to seriously consider whether retroactive application of this new law is appropriate. See also *Sentry Fed. Sav. Bank v. Co-operative Cent. Bank*, 406 Mass. 412, 414 (1990) ("Unless legislative

intent is unequivocally clear to the contrary, a statute operates prospectively, not retroactively.").

This well-grounded principle has also been forcefully articulated by the U.S. Supreme Court. See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 245 (1994) ("[T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and ... 'the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.'").

Chapter 80 contains absolutely no indication that the Legislature intended retroactive application. To the contrary, the legislative history of Senate 1059 reveals the Legislature's intention that the amendment mandating treble damages not be applied retroactively.

The Legislature initially passed and sent to the governor a version of Senate 1059 that did contain language that might have been used to argue for retroactivity. The title of that earlier version was "An Act to Clarify the Law Protecting Employee Compensation," and the final paragraph (Section 8) read: "This act is intended to clarify the existing law and to reiterate the original intention of the general court that triple damages are mandatory."

Patrick did not sign that version of the bill but returned it to the Legislature with a proposed amendment recommending that the Legislature add a good-faith defense to the imposition of treble damages. The Legislature considered, but declined to adopt, the governor's recommendation.

The Legislature, however, removed from Senate 1059 any hint that the lawmakers intended to "clarify" existing law when it changed the title of the bill to the neutral version "An Act Further Regulating Employee Compensation," which was ultimately adopted.

In addition, Section 8 was entirely deleted from the final version, eliminating the reference to the "intention" of the 1993 Legislature. In a manner similar to *Moakley v. Eastwick*, 423 Mass. 52 (1996), where the SJC held that the deletion of retroactivity language contained in a previous draft of a bill indicated the Legislature's intent that the law not be applied retroactively, here the Legislature's changes to Senate 1059 before enactment convey the same intent.

### **The better-reasoned court decision**

Consistent with this legislative history, the Superior Court ruled persuasively in *Pantano v. Artificial Life, Inc.*, No. SUCV2008-04-1879 (Mass. Super., Sept. 23, 2008, Brassard, J.) that Chapter 80 does not apply retroactively.

In reaching this decision, Judge Raymond J. Brassard carefully analyzed the factors that must be considered in determining the retroactivity of a legislative act. Consistent with established appellate precedent, the court reasoned that retroactive application is appropriate only where a statute specifically provides for it or where the context indicates that the Legislature intended it. Citing *Boston Gas Co. v. Dept. of Public Utils.*, 387 Mass. 531, 541 (1982).

Because Chapter 80 meets neither of these requirements, the court held that Chapter 80 should not be applied retroactively. The court then recognized that, under Massachusetts law, even if there were uncertainty about the retroactive application of Chapter 80, "the court should resolve that uncertainty against retroactive

application. Citing *Austin v. Boston Univ. Hosp.*, 372 Mass. 654, 657 (1977).

Recently, another decision of the Superior Court, *Rosnov v. Molloy*, No. ESCV2007-07-0740 (Mass. Super., April 10, 2009, Kern, J.), found differently, even though the parties had not addressed this issue.

In reaching this decision, Judge Leila R. Kern did not consider the two alternate requirements under Massachusetts law (as discussed in *Pantano*) for applying a statute retroactively. Instead, the judge relied solely on the fact that "violators of the Wage Act have always been subject to treble damages" in reaching her decision that Chapter 80 does not "substantially change[] parties [sic] rights and expectations."

Reliance on this argument, however, misses the point. Treble damages were added to the Wage Act by amendment in 1993, and the SJC concluded in *Wiedmann*, after closely examining the statute, that the statute only allowed the discretionary imposition of multiple damages where there existed proof of outrageous conduct.

Although, as Kern noted, this standard was not expressly articulated in the statute, that fact is irrelevant following the SJC's decision settling the prior debate on the issue.

In reaching her decision, Kern ignored the substantial change to employers' rights caused by the mandatory application of multiple damages under Chapter 80. This difference, consistent with the Supreme Court's decision in *Landgraf*, is substantive and may not be applied retroactively.

The only other decision that plaintiffs' counsel contend addresses the retroactivity issue, a brief, unpublished order issued in *Campbell v. Entergy Nuclear Operations, Inc.* (D. Mass. 05-11951, Tauro, J), is irrelevant to this debate both because of the context in which that advisory order arose and the complete lack of analysis contained in it.

### **Retroactive application unconstitutional**

Retroactive application of mandatory treble damages may implicate both the U.S. and Massachusetts constitutions. It would, at a minimum, offend due process because employers have reasonably relied on the previous damages scheme and because the treble damages provision would constitute a substantive change to the previous law.

Even where the Legislature intended an act to be retroactive, a statute can be given such effect only "in so far as the Massachusetts and Federal Constitutions permit." *St. Germaine v. Pendergast*, 416 Mass. 698, 702 (1993).

Where retroactive application of a legislative enactment might offend constitutional principles, courts have interpreted the statute to apply only prospectively. *Landgraf*, 511 U.S. at 281 (interpreting punitive damages provision to apply only prospectively where retroactive imposition of punitive damages would raise serious constitutional question).

These constitutional concerns provide further reason that courts should decline to apply the statute retroactively.

### **Serves no legitimate policy, harms state's economy**

The Legislature amended the Payment of Wages Law to allow for the imposition of treble damages in order to provide employers with further disincentive to willfully violate the law. In so doing, the Legislature rejected Patrick's more reasoned approach and imposed mandatory treble damages, "as liquidated damages," regardless of whether they are willful.

Giving retroactive status to this law would unfairly harm employers who made complicated and difficult decisions regarding employee pay before the law became effective. No legitimate public policy would be served by such a harsh result.

Employers regularly face difficult and complex decisions involving employee compensation, such as whether an employee meets one of the "white collar" overtime pay exemptions, when compensable "work" begins and ends, what activities constitute "work," and how our state's often arcane statutes governing days of rest and the ambiguous Tip Law should be interpreted and applied.

Many of these and other wage and hour laws are old, have rarely been the subject of judicial interpretation and guidance, and are open to differing good-faith interpretations by courts and the state agencies charged with the enforcement of the wage and hour laws.

Employers who have the responsibility of actually making compensation decisions do so in the vast majority of cases based on their good-faith attempts to apply these laws, often with legal counsel and regulatory guidance.

In such circumstances, they should not be subject to the onerous consequences of mandated treble damages, much less to the retroactive application of this misguided law, because a fact finder years later concludes that their decisions were incorrect.

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