

How New Bill May Affect Enforcement Of Mass. Wage Laws

By **Barry Miller, Alison Silveira and Molly Mooney** (May 17, 2022, 2:26 PM EDT)

Employers that operate in Massachusetts are no strangers to the commonwealth's wage and hour laws, which are among the most employee-friendly laws in the nation, and make operating a business in the Bay State a potentially risky proposition.

Since 2008, the state has imposed mandatory treble damages and attorney fees on employers for any violation of those laws, with no leniency for good faith errors. Last month, the Massachusetts Supreme Judicial Court doubled down on this enforcement regime in *Reuter v. City of Methuen*,^[1] finding that such treble damages and fees are mandatory even where the violation is remediated voluntarily by the employer, without the need for litigation.

No other state in the country has adopted such a stringent approach to enforcement of wage and hour laws. But the Massachusetts Legislature is not content to stop there.

In January 2021, the House introduced a bill titled An Act to Prevent Wage Theft, Promote Employer Accountability, and Enhance Public Enforcement, H.B. 1959. The bill was referred to the Committee on Labor and Workforce Development.

Following a public hearing last summer, the committee favorably reported the bill on April 4. The revised bill, H.B. 4681, is now pending before the House Committee on Ways and Means, and is currently being cosponsored by 125 state senators and representatives across both parties, along with the state's current attorney general.

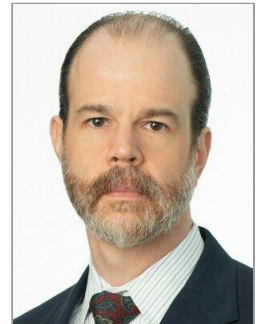
Absent significant alterations, its potential impact on employers and businesses across the commonwealth would be difficult to overstate.

Wage Theft and Employer Accountability

The primary focus of the pending bill is to define any violation of the commonwealth's wage payment laws — including the Prevailing Wage Statute, the Wage Act, the Independent Contractor Statute, the Tip Statute, and the Minimum Fair Wage Law — as wage theft, and expand liability for such wage theft well beyond direct employers.

Under the bill, once wage theft has occurred, penalties are not limited to the employer responsible for any unpaid wages, but may also extend to any other entity to which that employer provides labor or services, irrespective of their involvement in, knowledge of or control over the employer's wage payment practices.

For example, if a local bakery — Company A — contracts with an independent delivery company — Company B — and Company B does not comply with the commonwealth's wage laws in any way, Company A may find itself liable for the unpaid wages of Company B's employees.



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The language of the bill suggests that this may be true even if an underpaid employee of Company B did not deliver any products on behalf of Company A. In effect, the bill could create a statutory definition of joint employer that plaintiffs may attempt to use to circumvent the economic realities test for joint employer status recently announced by the Supreme Judicial Court of Massachusetts in December 2021 in *Jinks v. Credico (USA) LLC*.^[2]

This test requires an examination of the totality of a business relationship, including whether a putative joint employer (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.

The bill does include some limitations on the liability of businesses that rely on partners or subcontractors to supply labor or services. Vicarious liability for wage violations created by such business partners is limited to a period of 120 days, as opposed to three years for direct liability under the Wage Act.

Further, a prompt investigation and response may alleviate those businesses of the added burdens of treble damages and attorney fees. That investigation must include

i) an acknowledgment and reasonably prompt action upon receiving notice; ii) adopting and implementing reasonable standards for the prompt investigation; iii) conducting a reasonable investigation based upon all available information; iv) issuing prompt, fair and equitable settlement of wage theft violation claims in which liability has become reasonably clear; and v) provid[ing] the claimant or its designee with a record of the investigation and the results of the investigation.

Notably, if investigation reveals a reasonably clear wage violation, the business partner must make a payment to the claimant of the wages owed, in the place of the claimant's direct employer. A prompt investigation simply alleviates the business partner of the added burdens of treble damages and attorney fees, as the bill is currently drafted.

Expanded monetary liability is far from the only enforcement mechanism that the bill provides for wage theft. The bill also provides a powerful new enforcement mechanism to the Massachusetts Attorney General's Office. If the attorney general finds evidence of wage theft, the bill authorizes it to issue a stop-work order requiring cessation of all business operations at the specific place of employment where the violation occurred on just five days' notice.

The bill contains an avenue for a business to appeal from the stop-work order, but the business must act promptly to appeal in order to avoid a facility shut down. In the event that a stop-work order takes effect, impacted workers must be paid — even though they are performing no work — at their regular rate of pay for the period of the stop-work order or the first 10 business days when they would have been scheduled to work, whichever is less.

Enhanced Public Enforceability and Private Attorneys General

The bill would also amend the Massachusetts Wage Act to add a public enforcement provision, similar to California's Private Attorneys General Act.

As currently drafted, the bill would permit not only an "aggrieved person" but also a "relator" — defined to include not just current and former employees, but any vendor or client of the employer defendant with knowledge of the alleged violations — to bring an enforcement action relating to any alleged violation of the commonwealth's wage laws.

While PAGA requires that the person bringing the action be personally aggrieved by at least one violation of the California wage laws, the bill proposes that a relator can bring an action, even if someone has not personally suffered from any violation of the Massachusetts wage laws, and may recover their attorney fees in full for doing so.

Under the proposed bill, any aggrieved person or relator must first give 60 days' notice to the attorney general of their intent to file a public enforcement action, before someone may institute such a claim. If successful, the defendant employer would be required to pay the full treble damages

provided under the wage laws.

Unlike in a single-plaintiff wage action in which the aggrieved individual personally recovers three times their allegedly unpaid wages, in a relator action the aggrieved individuals will only personally recover the actual out-of-pocket damages that someone suffered — i.e., one-third of the damages award. The remaining two-thirds of the damages award in a relator action will be distributed 50% to a state Community Outreach and Labor Education Fund, and 50% to the attorney general's office.

Notably, the bill's public enforcement actions are expressly excepted from the stringent rules for certification of a class action under Rule 23 of the Massachusetts Rules of Civil Procedure, potentially exposing employers to large-scale wage disputes without the due process protections that typically apply in such actions.

Finally, the proposed bill contains a prohibition against special contracts that would prohibit an individual from bringing a public enforcement action, which raises questions about how the law may impact settlement agreements or the enforceability of an arbitration agreement.

And More

As if the proposed changes to scope and enforceability of the commonwealth's wage statutes were not enough, the bill also contains two additional expansions of the Wage Act.

First, it proposes to amend the Wage Act's anti-retaliation provision to include a rebuttable presumption of prohibited retaliation any time an employer takes any adverse action against an individual who has exercised any rights under the minimum wage and overtime laws within the preceding 90 days.

An employer would only be allowed to rebut that presumption with a showing of "clear and convincing evidence that the action was taken for a permissible purpose and that it would have been taken in the absence of the protected activity."

Such a provision places a heavy burden on an employer to prove that its personnel decisions were not motivated by an unlawful purpose and is much more stringent than retaliation provisions that have typically accompanied employment laws.

Finally, the bill proposes to revise the scope of individual liability under the Wage Act, to make clear an employing entity's president and treasurer are only personally liable for Wage Act violations if they "have knowledge or should have knowledge of general operations" of the business that lead to the violation.

As a result, an individual who holds the title of president or treasurer but is not personally involved in the wage-related operations of the business may be able to avoid liability under the Wage Act. This is a relaxation of the existing standard under the Wage Act, which makes such officers liable for wage violations by virtue of their title alone.

However, the broad language currently proposed, including its reference to information that senior officers should have about their businesses, may continue to leave many executives personally exposed to such claims.

Likely Trajectory of the Bill

As discussed above, the proposed bill is pending before the House Committee on Ways and Means, and still faces several rounds of debate and potential revisions before it is presented to the governor for enactment.

While it's impossible to predict what the Legislature will do, it is clear that the bill has many supporters. At the same time, the number of legislative steps remaining in the process, including pending internal legal review, provide ample opportunity for the bill to be revised before it is presented for a final vote.

For example, the expansive and unclear definitions in the bill make for substantial ambiguity as to

which entities may be liable for wage theft, and the presumption of retaliatory intent could face due process challenges. That the definition of relator is even broader than PAGA, and would allow an individual to pursue a claim despite a lack of Article III standing to pursue any wage violation in their individual capacity, is likewise ripe for legal challenge.

Even if the bill is revised before it is passed, any version of the legislation that is enacted will have significant impacts on any employer operating in Massachusetts. Employers would be well served to continue to monitor the progress of the bill and review their wage payment practices to ensure they are as compliant as possible before a harsh new penalty regime is put into place.


While many employers across the commonwealth are already undertaking this effort internally in the wake of Reuter, that review should include a dialogue with business partners to ensure they are undertaking the same effort. Employers that may be deemed joint employers or labor contractors also may benefit from a review of indemnification provisions in their contracts with their business partners to ensure that those contracts clearly dictate which entity is responsible for any wage violations that may be deemed to have occurred.

Finally, businesses may want to consider whether there are tasks currently outsourced to business partners that could instead be completed internally in order to minimize potential exposure under the proposed bill.

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Disclosure: The authors represented Credico in Jinks v. Credico. Additionally, Miller and Mooney filed an amicus brief in Reuter on behalf of Northeast Human Resources Inc.

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[1] [Reuter v. City of Methuen](#) , No. SJC-13121 (Mass. Apr. 4, 2022).

[2] [Jinks v. Credico \(USA\) LLC](#) , 488 Mass. 691, 703 (2021).