



JONES DAY  
**COMMENTARY**

## THE RISING STAKES IN MASSACHUSETTS WAGE LITIGATION

The steady stream of wage and hour litigation in Massachusetts state and federal courts continues unabated. As employees and employers present a variety of claims and defenses, the courts respond with one clear message: employee wages will receive broad protection. The recent decisions not only emphasize the expansive reach of the Massachusetts Wage Act (“MWA”) but also contain additional developments that will raise the stakes. Recently, courts have reexamined statutory provisions that had been interpreted reliably in favor of employers. Despite unambiguous statutes of limitation, courts have allowed plaintiffs to reach back more than three years to recover unpaid wages. And, in one case, plaintiffs combined state and federal causes of action to sidestep a seemingly valid employer defense. Employers beware: these decisions may lead to additional recordkeeping and discovery burdens, increased damage exposure, and decreased settlement leverage.

### LOWERING THE “ADMINISTRATIVE EXHAUSTION” HURDLE

The MWA describes the process for a worker to bring a claim for unpaid wages. G.L. c. 149, §§ 148, 150. The statute provides that the worker must file a complaint with the Office of the Massachusetts Attorney General (“AG”). Specifically, section 150 states that an employee:

may, 90 days after the filing of a complaint with the attorney general, or sooner if the attorney general assents in writing ... institute and prosecute ... a civil action....

Previously, courts had interpreted this language literally, to mean that an employee must exhaust all administrative remedies by first filing a complaint with the AG and then bringing a private lawsuit (“the AG filing provision”). For example, in *Joyce v. The Upper Crust, LLC*, 2012 WL 3028459, at \*6 (D. Mass. 2012) and *Norceide v. Cambridge Health Alliance*,

814 F. Supp. 2d 17, 27 (D. Mass. 2011), the courts dismissed the plaintiffs' MWA claims because they had not fulfilled the "condition" of reporting alleged wage violations to the AG. See *Swanson v. Lord & Taylor, LLC*, 278 F.R.D. 36, 40 (D. Mass. 2011) ("The exhaustion requirement is mandatory, and operates as a bar to suit if it is not fulfilled.")

Recently, Massachusetts courts have adopted a more lenient, and even directly contradictory, position. In *Depianti v. Jan-Pro Franchising Int'l, Inc.*, the Supreme Judicial Court ("SJC") held that the lower court had jurisdiction over a wage claim, even though the plaintiff had not filed a complaint with the AG prior to filing suit. 465 Mass. 607, 611 (2013). The SJC acknowledged that the MWA "requires" a worker to file a complaint with the AG but characterized that "requirement" as "intended simply to ensure that the Attorney General receives notice of the alleged violations, so that she may investigate and prosecute such violations at her discretion." *Id.* at 612. The court distinguished the AG filing provision from a similar provision under the anti-discrimination law, G.L. c. 151B. The court explained that c. 151B's "comprehensive remedial process" includes a prompt investigation by the Massachusetts Commission Against Discrimination, preliminary evaluation of probable cause, and a conciliation program, all designed to resolve individual claims of discrimination. Allowing a claimant to proceed directly to a judicial forum would thwart that purpose. *Id.* at 612–613. According to the court in *Depianti*, the process under the MWA has a different purpose, and the AG filing provision is not jurisdictional. Therefore, the plaintiff could notify the AG during the litigation. *Id.* at 610 n.8, 613–614. The decision is a reminder that courts interpret the remedial laws governing wages, tips, independent contractor status, and overtime liberally, "with some imagination of the purposes which lie behind them." *Id.* at 620.

Similarly, in *Schwann v. FedEx Ground Package Sys., Inc.*, 2013 WL 3353776 (D. Mass. 2013), former delivery drivers who worked as independent contractors filed suit for wages. FedEx objected because not all plaintiffs had complied with the AG filing provision. Citing *Depianti*, the court held that the "administrative notice" requirement was satisfied because the AG had previously issued citations to FedEx

and was aware of the matter. *Id.* at \* 6–7. Moreover, because one plaintiff had been authorized to file suit on behalf of similarly situated workers, other plaintiffs did not need to obtain individualized permission to sue. *Id.*

An employer's ability under prior case law to insist on strict compliance with the AG filing provision might not have materially affected its overall liability—but might have created an opportunity to assert a statute of limitations defense to some claims when the complaint was refiled. The recent decisions reflect an unwillingness by the courts to impose technical barriers to recovery for unpaid wages.

## REACHING BEYOND THE STATUTE OF LIMITATIONS

The Massachusetts Overtime Law, G.L. c. 151, §1A, requires an employer to pay compensation at time and one-half the regular rate ("premium rate") for all hours worked over 40 hours per week. An aggrieved employee must file a claim within two years. *Id.* § 20A. The SJC recently allowed recovery for a longer period of time, viewing plaintiffs' claims through the lens of the MWA instead of the Overtime Law. *Crocker v. Townsend Oil Co., Inc.*, 464 Mass. 1, 6–8 (2012).

In *Crocker*, the plaintiffs worked as truckdrivers. More than two years after their independent contractor agreements ended, plaintiffs sued for unpaid overtime compensation under the MWA, which has a three-year statute of limitations. The defendant argued that any claim for unpaid overtime has a two-year statute of limitations, even if filed under the MWA. The court agreed that the two-year statute of limitations barred plaintiffs' claims for compensation at the premium rate. However, the SJC allowed recovery for up to one additional year, at a straight-time rate, under the MWA. *Id.* at 7. The court in *Crocker* provided some comfort when it held that plaintiffs could not rely on the continuing violation theory to assert statutory violations older than three years. *Id.* at 8–12. However, as discussed below, employers might have exposure beyond even the three-year period recognized in *Crocker*.

## RECOVERY UNDER COMMON LAW CLAIMS

Plaintiffs often include in a wage complaint claims for breach of contract, quantum meruit, unjust enrichment, conversion, or similar claims. In many cases, the common law claims cover the same time period and are based on the same facts underlying the alleged statutory violation. See, e.g., *Schwann*, 2013 WL 3353776, at \*6 (unjust enrichment claim dismissed as duplicative); see *Feygina v. Hallmark Health Sys., Inc.*, 2013 WL 3776929, at \*8 (Mass. Super. Ct. 2013) (plaintiff “cannot recover twice for the same consequential damages, merely because she has asserted separate claims for breach of contract and violation of the [MWA].”) In effect, the MWA has been the primary means to recover unpaid compensation.

In *Lipsitt v. Plaud*, however, the court directly addressed the issue of whether the MWA is the exclusive remedy to recover unpaid wages. 466 Mass. 240 (2013). The decision could have significant consequences.

In *Lipsitt*, a museum director sued for unpaid compensation that was more than three years overdue. The plaintiff dismissed his time-barred MWA claims but pursued breach of contract and other common law claims, reaching back six years. *Id.* at 243-244. The defendant argued that the MWA, as the exclusive remedy, preempted the common law claims. The lower court agreed. However, the SJC concluded that adoption of legislation does not, by itself, preempt common law, and that the legislature had not expressly or impliedly established the MWA as the exclusive remedy. *Id.* at 247. The court acknowledged that plaintiffs may prefer to bring claims under the MWA, with its enhanced penalties and fees, despite the shorter statute of limitations. However, “[i]t does not upset this balance to continue to subject employers to normal contract liability for the full six-year statute of limitations period applicable to contracts generally.” *Id.* at 250-251.

In a different case where relief under the MWA was unavailable for other reasons, a federal court similarly allowed plaintiffs to pursue common law claims. In *Manning v. Boston Med. Ctr. Corp.*, the plaintiff’s statutory claims were dismissed because the hospital was exempt from the MWA. 725 F.3d 34, 55 (1st Cir. 2013). Defendants argued that the

MWA preempted contract claims based on the same facts. The court disagreed, holding that the MWA did not displace common law claims either explicitly or implicitly. *Id.* at 56-57.

The decisions in *Lipsitt* and *Manning* portend further expansion of employer liability, inviting employees to reach back an additional three years under a variety of circumstances. First, as in *Lipsitt*, a plaintiff who did not earn wages in the prior three years may be able to recover unpaid wages from four, five, and six years earlier. Second, as in *Manning*, a plaintiff who cannot assert a statutory claim for whatever reason might still bring common law claims reaching back six years. Third, plaintiffs might combine claims under both the MWA, for three years of unpaid compensation plus attorneys’ fees and liquidated damages, and then for another three years of unpaid wages, at straight time, based on common law. It is unclear that the strategy would succeed because the holding in *Lipsitt* applied “[p]articularly where an employee’s Wage Act claims are time barred” and because such a maneuver would upset the “balance” that allows enhanced penalties under the MWA in exchange for a shorter statute of limitations.

Nevertheless, employers should review their recordkeeping practices, as it appears increasingly prudent to retain wage records for longer than statutorily required. G.L. c. 149, §52C (retention for three years after termination); G.L. c. 151, §15 (retention for two years after creation of a record). The opportunity to reach back six years also affects the discovery process, encompassing documents that are more likely to be missing, archived, or incomplete. The scope of discovery could expand because contract defenses that are not available under the MWA may now be relevant. Moreover, the pool of potential defendants could also grow. For example, employers who changed pay practices more than three years ago might now be subject to suit for long-abandoned policies. The increased scope of potential damages could affect an employer’s settlement leverage.

## RECOVERY UNDER SELECTIVE STATE AND FEDERAL LAWS

Finally, employers should be aware of a decision in which a plaintiff sidestepped state overtime exemption provisions

to recover the maximum liquidated damages under state law. *Carroca v. All Star Enters. & Collision Ctr., Inc.*, 2013 WL 3496537 (D. Mass. 2013).

The *Carroca* case involved an employee who worked as an auto body repairman. The court concluded that he was not exempt under the Fair Labor Standards Act and was entitled to overtime compensation, plus an equal amount as liquidated damages. However, the plaintiff claimed that the failure to pay overtime under federal law was, itself, a violation of the MWA's obligation to pay wages in a timely manner and sought treble damages. Because the plaintiff was not asserting a violation of the Overtime Law, the defendant's reliance on a state law overtime exemption was irrelevant. *Id.* at \*3. As a result, the MWA's treble damages provision applied. *Id.* at \*4. A more aggressive defense might have prevented this result, particularly because the cases cited by the court to justify the award of treble damages involved situations where both state and federal overtime laws applied. In *Carroca*, a state exemption might have barred recovery under state law. The case presents a cautionary example of a plaintiff maximizing recovery by cherry-picking state and federal laws.

## CONCLUSION

The number of wage actions filed in the Massachusetts courts continues to grow, due in part to publicity about sizeable damage awards, including mandatory treble damages. Recent case law may provide further incentive for plaintiffs as the courts continue to clarify the breadth of the MWA's coverage, relax administrative requirements, and permit alternative common law claims. The practical impact on employers, particularly with regard to recordkeeping, discovery burdens, and settlement leverage, could be significant.

## LAWYER CONTACT

For further information, please contact your principal Firm representative or the lawyer listed below. General email messages may be sent using our "Contact Us" form, which can be found at [www.jonesday.com](http://www.jonesday.com).

**Karen A. Whitley**

Boston

+1.617.449.6894

[kwhitley@jonesday.com](mailto:kwhitley@jonesday.com)

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