

OPINION

‘Making it in Massachusetts’ becoming harder under new anti-business statute



By Kenneth M. Bello

Senate Bill No. 1059 is arguably the most profound anti-business employment legislation passed into law in the last 50 years.

Enacted on April 14 without the signature of Gov. Deval L. Patrick, the law requires the automatic trebling of damages for violation of any of Massachusetts’ wage-hour laws, including

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(among others) the payment of wages law (which addresses wages, commissions, vacation and holiday pay) and overtime.

This statute effectively eviscerates two decisions by the Supreme Judicial Court ruling that the former statutory language authorizing treble damages was not mandatory, but rather within the discretion of the reviewing court.

The new law reflects a shocking ignorance or indifference to the realities of running a business and belies any notion that the Legislature or governor want to encourage businesses to “make it in Massachusetts.”

As a management employment counsel for nearly 30 years, and counsel for the employer in the case of *Goodrow v. Lane Bryant, Inc.*, 432 Mass 165 (2000), I am intimately familiar

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with the complexities and ambiguities of the wage and hour laws.

In *Goodrow*, the SJC rejected the argument that G.L.c. 151, §1B — which provides a remedy for violation of the overtime laws — mandated treble damages without regard to the good faith of the employer.

The court ruled that the existing language did not mandate treble damages, noting that “multiple damages such as the treble damages at issue here ‘are essentially punitive in nature.’”

In 2005, the SJC applied *Goodrow* to a similar provision applicable to violations of G.L.c. 149, §148, requiring timely payment of wages and commissions. *Wiedmann v. The Bradford Group*, 444 Mass. 698 (2005).

Indeed, even though the employer in *Wiedmann* conceded the applicability of treble damages, the SJC on its own reached out

and made clear that such damages were not mandated based on the “plain language of the statute ...”

Citing favorably to *Goodrow*, the court ruled that treble damages are “allowed only where authorized by statute, and appropriate where conduct is outrageous, because of defendant’s evil motive or his reckless indifference to the rights of others.”

Following the *Goodrow* and *Wiedmann* decisions, the Legislature passed a bill that would have mandated treble damages. That bill was vetoed and no further action was taken — until now.

Let me be clear: No responsible employer quarrels with the requirement that it comply with obligations to pay wages on a timely basis, including commissions, vacation and holiday, or to pay overtime to individuals who are not exempt.

The reality, however, is that these obligations are far from black and white and are subject to substantial interpretation and ambiguity. This ambiguity cuts across a swath of issues: whether an individual meets a test for an overtime exemption; when a commission is earned; how much commission is due; and whether an individual is properly treated as an independent contractor rather than an employee, just to name a few.

Many of these issues are dependent on the terms of informal documents — such as commission and sales plans or vacation policies — that often are not drafted by legal counsel, but rather by non-legal personnel such as those in human resources and finance.

Indeed, another section of the wage laws (G.L.c. 149, §148A) makes it nearly impossible for any employer to engage independent contractors without violating the law.

In order to be exempt under both the Massachusetts overtime law and the corresponding Federal Fair Labor Standards Act, an individual must be paid on a “salaried basis.” Independent contractors, however, almost always are paid on an hourly basis.

Consequently, employers who permit even highly paid consultants to work more than 40 hours per week without paying overtime could be subject to mandatory treble damages.

It is not an overstatement to predict that this statute will spur hundreds of new wage and hour cases, costing employers millions of dollars in legal fees and settlements, even though employers in good faith attempted to comply with these inherently ambiguous wage laws.

A cottage legal industry already exists that seeks to file class and collective actions against businesses for violation of Massachusetts wage laws. Every week brings another article in *The Boston Globe* or the *Boston Herald* about a new class action lawsuit seeking millions of dollars for an alleged violation of the law. While these highly publicized cases often involve lower wage earners, it will not be long before claims are filed involving highly paid individuals and classes of individuals.

The pharmaceutical industry is the subject of dozens of lawsuits around the country attacking the exempt status of its outside sales force, members of which regularly earn six-figure incomes. With mandated treble damages and attorneys’ fees, these cases become not a matter of public policy, but a profit center for plaintiffs’ lawyers.

The new law is unique. I am unaware of any other state in the country having a similar requirement. The federal Fair Labor Standards Act provides for a doubling of damages as liquidated damages; however, the award of such damages is left to the discretion of the court.

Any employer evaluating whether to locate in Massachusetts, or to expand here, has to give serious consideration to the risks imposed by this law. In the end, this law may cost the state thousands of tax-generating jobs. The costs in terms of business credibility and jobs in the commonwealth are likely to be enormous, all to the long-term detriment of the Massachusetts economy.

All is not lost. Forgotten in the debate is the clear signal by the SJC in *Goodrow* and

Wiedmann that a punitive-damage law like the one here implicates constitutional issues.

In *Goodrow*, the court stated that multiple or punitive damages are “ordinarily applied by the Legislature ‘against those defendants with a higher degree of culpability than that sufficient to ground simple liability.’”

Most importantly, the SJC noted that to impose punitive damages “*absent evidence of heightened culpability would very likely constitute an arbitrary or irrational taking of property ... and thus would be constitutionally impermissible.*”

The ultimate determination of the enforceability of the law thus is hardly over.

Unfortunately, it likely will be years before one of these cases wends its way up to the SJC. In the meantime, employers and employer organizations should strongly encourage their representatives to reconsider and revoke this law.

Employers also should audit their contracts, policies, practices and procedures relating to payment of wages, commissions, vacation and holidays. They also must review their classification of exempt versus non-exempt positions, and even should consider revising their methods of pay in a manner that ultimately degrades salaried employees to hourly.

Organizations that use independent contractors and consultants — which include virtually every business in the commonwealth — also must revisit their practices in this regard.

In an environment where the plaintiffs’ bar no doubt will be going on the offensive, the best short-term action for any employer may be to substantially fortify the defenses. **MLW**