

## The Massachusetts Wage Act Applied to Commissions

Is some or all of your pay in the form of commissions? Have you not received a commission payment timely, or in full? What recourse do you have? What are you owed?

Even if your employer has paid you all owed commissions timely, you **STILL** may have a legal claim to additional back wages. Keep reading to find out if this applies to you! Below are some example questions we have been asked related to commission payments. We hope you will find answers to some of your own questions below, but please call us with any other questions you might have!

*What commissions am I owed?*

The best way to start answering this question is to review the written policies your employer has provided to you about commissions and payments. These writings may be in your offer letter and/or company handbook, but could be in other written policies your employer has given you related to commission payments. These documents should explain how and when commissions are earned and paid.

For example, if you sell a product, you may get a percentage of the sale price. Your employer may not consider the commission earned until payment is received from the customer. Does the policy state whether the commission is earned if your employment ends before payment is received? If your employer terminates your employment after you make a sale but before the commission is earned, you may be able to sue your former employer for wrongful termination.

If your employer has not given you written policies that clearly show when commissions are earned and paid, speak with us about your situation.

*I know the date a commission was earned – when should I be paid?*

Payment of commissions are considered wages so payment should be consistent with the Massachusetts Wage Act. This means your employer must pay you within 7 days of the end of the pay period in which the commission is earned (potentially within 6 days depending upon how many days you work in a week). Assume your employer pays its employees every Friday. That would mean a commission you earn on a Tuesday should be paid to you the following Friday (10 days later).

If your employer terminated your employment (e.g., you were fired or laid off) you should have received all commission payments on your last date of employment.

*I earned commissions but was not paid timely. Now what?*

The simple answer here is to contact Tempus Fugit Law!

We will help you to recover the greatest amount possible under the law. Naturally, this includes the value of the commissions you were originally owed, but since your employer has violated the Massachusetts Wage Act, you are owed triple the amount of your commissions, plus reasonable attorney's fees. Your employer's failure to timely pay you \$1,000 entitles you to \$3,000, plus reasonable attorney's fees. Employers may view these statutory damages as harsh, but it gives employers incentive to pay employees the correct wages on time – and rightfully punishes employers who neglect their basic responsibilities to their workforce.

*My employer did not give me a payment which I believe is a commission. My employer says the payment would have been a bonus. Does that matter? Is it a Wage Act violation?*

**This depends on how your employer was to determine your entitlement to the payment. If the amount of the payment is to be determined by your performance, payment is likely subject to the wage act. If the payment does not depend on your performance, then your employer's failure to provide payment is likely not a violation of the Wage Act (but it still could potentially be a violation of another law or breach of contract, depending on the facts specific to your situation).**

**In the case of Suominen v. Goodman Industrial Equities, 78 Mass. App. Ct. 723 (2011), the plaintiff was promised a share of "overall profits." The plaintiff did not receive this payment and argued it should be considered a commission and therefore a violation of the Wage Act. The court disagreed, stating that it was different than a typical sales commission because it was a "profit-sharing arrangement."**

**But, if the payment is based upon your own work (e.g., a percentage of your sales figures), then the payment is a commission and subject to the Wage Act. Keep in mind that the Wage Act itself states the amount of a commission must be "definitely determined" in order to qualify as wages. In other words, there must be a set calculation method to arrive at the value of the commission.**

**Even where an employer failed to provide the severance pay a former employee was owed, that was found to be a violation of the Wage Act in 2011 by a Superior Court judge (in Juergens v. MicroGroup). This was a controversial decision by a Superior Court judge, so it is not binding on future cases, but does show the potential reach and application of the Massachusetts Wage Act.**

**If you have concerns about a payment you believe you should have received, we will review the facts with you to see if there is an actionable claim.**

*I am paid commissions and it appears I have received everything my company promised me. Should I still call Tempus Fugit Law?*

Yes - you still may be owed back wages!

In the 2019 case of *Sullivan v. Sleepy's, LLC*, the Massachusetts Supreme Judicial Court held employees paid by commission must also be paid 1.5 times the minimum wage for any hours worked beyond 40 hours. This is true regardless of the commission payments to the employee! So if you earned commissions totaling \$1,500 in a given week, and worked 50 hours, your employer would need to pay you 1.5 times the minimum wage for the 10 hours of overtime. In 2019, the minimum wage is \$12/hour, so that equals  $\$12/\text{hour} \times 1.5 \times 10 \text{ hours} = \$180$  per week. (As of 1/1/20, the Massachusetts minimum wage increases to \$12.75/hour).

If this does not sound like a significant amount of money, remember that if your employer has failed to make these payments to you in a timely manner, they have violated the Massachusetts Wage Act. That law entitles you to triple your unpaid wages (for all unpaid wages in the last three years), plus attorney's fees. This quickly adds up. If an employee is owed this amount each week over a 3 year period, this would total almost \$85k owed under the Wage Act, plus attorney's fees!

#### Takeaway

While we hope this writing gives you a better understanding of the laws governing the payment of commissions in Massachusetts, we at Tempus Fugit Law strongly encourage you to contact us if you believe you are owed any unpaid commissions or other wages. Many facts about your particular situation will determine what your employer may owe you. You can reach us at (617) 752-2371.