

Superior Court Clarifies When Commissions Become ‘Wages’ Due Under the Massachusetts Wage Act

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A Massachusetts Superior Court recently addressed whether post-termination commissions contingent on future events qualify as “wages” under the state’s Wage Act law. In *Ford v. Vacationeer, LLC*, the court granted summary judgment for the hiring entity on the plaintiff’s Wage Act claim, holding that commissions tied to trips that had not yet occurred at the time of the travel planner’s contract termination were not “due and payable” and therefore fell outside the statute’s protection.

Background

The plaintiff, Jessica Ford, worked as a travel planner for Vacationeer, a travel company, pursuant to an independent contractor agreement (ICA). Under the ICA, she was entitled to a percentage of commissions received by Vacationeer for trips she booked. Vacationeer received commissions from vendors only when a reservation was completed, i.e., once the customer took the booked trip, but not before. If a reservation was cancelled, no commission was paid to Vacationeer.

After Vacationeer terminated Ford’s contract, she brought a lawsuit alleging, among other claims, Wage Act violations, and seeking approximately \$34,000 in unpaid commissions and \$100,000 in commission wages “she could have received but for” her termination. As a reminder, the Commonwealth’s Wage Act requires prompt payment of wages after services have been provided. Ford sought commissions for trips she had booked but which customers had not yet completed at the time of her contract’s termination.

The court’s holding

Relying on the ICA language and the Wage Act’s requirement that commissions be both “definitely determined” and “due and payable,” the court found that only those commissions Vacationeer had actually received before Ford’s contract ended qualified as wages. As the court noted, under the Wage Act, commissions become due and payable when “any contingencies relating to their entitlement have occurred.” In this case, the ICA specified that commissions would only be paid to Vacationeer after a customer completed their trip. If a reservation was cancelled, no commission would be paid. As a result, at the time Ford’s contract was terminated, the commissions for trips that had not yet occurred were not “due and payable” because those trips could still be cancelled and the commissions had not yet been earned. Notably, the court held that because Ford’s commissions were not due and payable under the Wage Act, it did not need to address the question of whether Ford was improperly classified as an independent contractor.

The court cited a similar case, *Gallant v. Boston Executive Search Associates* (D. Mass. June 12, 2015), in which the payment of commissions depended on the candidate’s continued employment at the law firm where the plaintiff, a legal recruiter, had placed the candidate. The *Gallant* court held that the commissions allegedly owed to the plaintiff were not due and payable by the search agency, because at the time her employment was terminated, the agency was not unconditionally entitled to retain the full payment from the law firm client. The *Gallant* court concluded that the commissions the plaintiff sought to recover therefore were not a wage at the time her employment was terminated.

Key takeaways for employers

The *Vacationeer* case makes clear that commissions are only considered wages under the Massachusetts Wage Act when they are “definitely determined” and “due and payable,” meaning all contingencies have been satisfied. This ruling reinforces several practical lessons when it comes to commissions issues:

- **Document commission structures clearly:** Hiring entities and employers should ensure that any applicable commissions plans, offer letters and agreements are clearly written to specify when commissions are earned and payable, including detailing any contingencies that must be satisfied before payment occurs. In *Vacationeer*, the ICA's explicit language stating that contractors would receive a percentage of gross commissions received by Vacationeer was critical to the court's determination. Similarly, payment structures should be consistently applied.
- **Review and update agreements regularly:** Commission agreements and related documents should also be regularly reviewed and updated to ensure they reflect current business practices and legal requirements.
- **Maintain accurate records:** Keeping thorough records of commission calculations, payments and the status of underlying transactions (such as completed sales or services) can help defend against potential claims.

Employers with questions regarding the Massachusetts Wage Act should contact their Cooley employment lawyer or one of the lawyers listed below.

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Key Contacts

Lyndsey M. Kruzer Boston	lkruzer@cooley.com +1 617 937 2415
Anna Matsuo New York	amatsuo@cooley.com +1 212 479 6827
Steven A. Zuckerman New York	szuckerman@cooley.com +1 212 479 6647

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