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**An Advisory from the Attorney General's Fair Labor Division
About the Parameters for Recoupment of Inadvertent Wage Overpayments
under M.G.L. c. 149, §§ 148-150**

The Office of the Attorney General (AGO) issues the following Advisory¹ regarding M.G.L. c. 149, §§ 148-150 (commonly known as the "Wage Act"). This Advisory provides guidance with respect to the AGO's understanding of and enforcement of the law. It does not create any rights or remedies.

I. INTRODUCTION

For various reasons, such as mathematical or other clerical errors, employers may discover they have mistakenly overpaid their employees. This Advisory addresses when an employer may or may not recover such inadvertent wage overpayments from employees through wage deductions. The Attorney General takes the enforcement position that whenever there is a question about either the existence of the overpayment or the amount owed, such an overpayment cannot be subject to a wage deduction; and, if the overpayment is undisputed, the manner in which any employee may be required to make repayment must be fair and reasonable under the circumstances.

II. THE LAW

The Wage Act's primary aims are to require full and timely payment and to prevent unreasonable wage detention and forfeitures. *Wiedmann v. The Bradford Grp., Inc.*, 444 Mass. 698, 703 (2005). To accomplish these goals, among other things, the Act: A) imposes strict liability and B) puts limits on an employer's available defenses.

A. Strict Liability under the Wage Act

The Wage Act does not require proof that an employer intended to violate the law. *Somers v. Converged Access, Inc.* 454 Mass. 582, 591 (2009) ("None of the statutory criteria speaks of the employer's intent"). This means that "lack of knowledge of the law or of the fact that the law has been violated does not exonerate the person who may have unwittingly violated the statute." *Commonwealth v. Belanger*, 30 Mass. App. Ct. 31, 33 (1991) (upholding conviction for employing child in prohibited occupation, without employer's knowledge of prohibition), *rev. denied*, 409 Mass. 1103 (1991). Thus, it "is settled law" that an employer's error, even if

¹ This Advisory is not a formal opinion. Opinions of the Attorney General are formal documents rendered pursuant to specific statutory authority. M.G.L. c. 12, §§ 3, 6, and 9.

made in good faith, is no defense. *Dixon v. City of Malden*, 464 Mass. 446, 452-53 (2013), citing *Somers*, 454 Mass. at 591 (“Good faith or bad... the employer must suffer the consequences”).

B. Limited Defenses Available to Employers under M.G.L. c. 149, § 150

To further ensure that employers fully compensate employees for their earned wages, the Wage Act also significantly limits an employer’s available defenses. *Somers*, 454 Mass. at 592. Specifically, the Act provides:

On the trial [for violation of the Wage Act] no defence [sic] for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof² or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him shall be valid.

G.L. c. 149, § 150, ¶ 1.³

An employer claiming a valid attachment, assignment, or setoff bears the burden of proving its existence. *Camara v. Attorney Gen.*, 458 Mass. 756, 762 (2011). And, the law restricts the circumstances in which an employer may assert such claims. *Id.* at 763 (an employer’s defense must be rejected when “not expressly in the statute” and if contrary to the Wage Act’s purpose of protecting employees).

At issue here, a “valid setoff” allows employers to take wage deductions in some limited circumstances. In adopting the AGO’s interpretation, the Supreme Judicial Court has applied the “valid set-off” defense to situations when there is a clear and undisputed debt that the employee owes to the employer—such as a loan or wage advance—when established through a voluntary agreement between the parties or an independent process adequate to protect the employee’s

² Although paying wages in advance does not violate either the letter or spirit of the Wage Act, the law prohibits assignments of future wages when payable to the employing corporation. *Am. Mut. Liab. Ins. Co. v. Comm’r of Labor & Indus.*, 340 Mass. 144, 148-49 (1959).

³ This statutory limitation on an employer’s defenses makes no distinction between enforcement actions brought by the Attorney General and private actions brought by employees. See *Camara v. Attorney Gen.*, 458 Mass. 756, 762-63 (2011) (rejecting employer’s Section 150 defense in civil enforcement action brought by the Attorney General, on the basis that the employer unilaterally made determinations as to liability and damages, resulting in wage deductions for some employees involved in motor vehicle accidents); *Somers*, 454 Mass. at 592 (rejecting employer’s Section 150 set-off defense in private action brought by employee for misclassification as an independent contractor, on the basis that there was no evidence of an established debt owed to the employer).

right to determine both the existence and amount of the debt. *Camara*, 458 Mass. at 761-63 & n.13; *Somers*, 454 Mass. at 593.⁴

III. THE ATTORNEY GENERAL'S ENFORCEMENT POSITION

Inadvertent wage overpayments—due to an employer's mistake of fact—are commonly viewed as a type of wage advance, and therefore, may be subject to recoupment through wage deductions. *See, e.g.*, WHD Opinion Letter, 1998 WL 852662 (Mar. 20, 1998); WHD Opinion Letter FLSA2004-19NA (Oct. 8, 2004).⁵ Yet courts have had limited opportunity to provide guidance about the parameters for recoupment in these circumstances. *See generally* Jim Hawkins, *Law's Remarkable Failure to Protect Mistakenly Overpaid Employees*, 99 Minn. L. Rev. 89 (Nov. 3, 2014).

The Attorney General's position about permissible recoupment as a valid set-off is based on the interpretation of its predecessor, the former Department of Labor & Industries (DLI), which determined that an employer's right of set-off is limited: 1) to the amount of weekly wages that may be subject to attachment under M.G.L. c. 246, § 28 (i.e., either no more than 15 percent of an employee's gross earnings or 50 times the state minimum wage rate)⁶ and 2) the employer's obligation to pay at least the applicable minimum wage rate in effect for each hour of

⁴ *See also* U.S. Dep't of Labor's Field Operations Handbook (FOH), § 30c10(b) (opining that under the federal Fair Labor Standards Act (FLSA), employer loans and cash advances may be deducted from employee wages); U.S. Dep't of Labor's Wage & Hour Division (WHD) Opinion Letter FLSA2004-17NA (Oct. 6, 2004) (opining advanced paid vacation leave subject to recoupment under the FLSA if employee separates from employment prior to earning sufficient vacation time to eliminate the deficit).

⁵ Massachusetts courts may look to the FLSA and the Department of Labor's interpretative guidance when considering analogous Massachusetts wage laws. *See, e.g., Mullally v. Waste Mgmt. of Mass., Inc.*, 452 Mass. 526, 531 (2008). However, where Massachusetts law differs from the FLSA, the distinctions of the Commonwealth's law prevail, since the FLSA specifically contemplates that states may properly enact higher standards and more stringent regulations concerning the payment of wages. 29 C.F.R. § 531.26; FOH, § 30c16.

⁶ Section 284 of G.L. c. 246 provides, in relevant part:

If wages for personal labor or personal services of a defendant are attached for a debt or claim, an amount not exceeding the greater of 85 per cent of the debtor's gross wages or 50 times the greater of the federal or the Massachusetts hourly minimum wage for each week or portion thereof out of the wages then due to the defendant for labor performed or services rendered during each week for which such wages were earned but not paid shall be reserved in the hands of the trustee and shall be exempt from such attachment.

work performed. Moriearty Adkins, Rubin & Jackson, *Employment Law*, 45 Mass. Prac. Series § 14.8 (2nd ed. 2003).

Accordingly, the AGO has taken the view that an employer's recoupment cannot reduce a worker's pay below minimum wage and that wage recoupments cannot be taken from the wages of minimum wage workers.

Additionally, when an employer's mistake results in an overpayment to an employee, the Attorney General further takes the position that fundamental principles of fairness must be considered – just as in another similar context, where employees receive inadvertent overpayments of their workers' compensation benefits. In such situations, “a judge may order none, some or all of the overpayments as appropriate [be repaid].” *Home Depot v. Kardas*, 81 Mass. App. Ct. 27, 31 (2011), citing *Brown v. Highland House Apartments*, 12 Mass. Workers' Comp. Rep. 322, 326 (1998). Where substantial overpayments are involved, a “judge should apply a test of ‘fundamental fairness’” balancing “several equitable considerations including the degree of culpability of the worker, the employer's negligence, the worker's ability to repay, the hardship the worker would suffer, and the amount of the overpayment.” *Boyd v. Sciaba Constr.*, 12 Mass. Workers' Comp. Rep. 427, 429 (1998), quoting *Brown, supra* at 326 & n.7.

IV. CONCLUSION

When an employer realizes that an employee was overpaid due to the employer's clerical error or mathematical mistake the employer is well-advised to discuss the problem with the affected employee prior to seeking any self-help action. If there is any disagreement between the parties about the either the existence of a wage overpayment or the amount owed, then such disputed overpayment cannot be subject to a wage deduction.

If, however, both the existence of the overpayment and the amount are undisputed, an employer may make a recoupment as long as 1) the employer's set-off is limited to no more than 15 percent of an employee's gross earnings or 50 times the minimum wage rate, and 2) the deductions do not reduce an employee's wages below minimum wage for each hour worked during the pay period. Moreover, any wage deduction repayment plan must be fair and reasonable under the particular circumstances. Fundamental principles of fairness must take into consideration factors such as: the amount of the overpayment; the parties' relative degrees of responsibility (i.e., the nature of the employer's negligence, including the length of time that the error continued before discovery; whether, and when, the employee realized the error); and the hardship caused to the employee in light of the employee's present financial ability to repay.