

## Wage Act — Earned Wages.

PLF has sued [DFT employer] [and individual DFTs] for violating the Massachusetts Wage Act by [failing to pay wages earned by PLF] [and/or other claims – retaliation, misclassification, etc.] The Wage Act is a state law that requires an employer to pay its employees all of the wages that the employer has agreed to pay for the work the employees have performed [as well as any other wages required by law; fill in relevant issue such as overtime, on-call time, etc.]. The Wage Act requires that wages must be paid promptly after they are earned.<sup>1</sup>

To prove [his/her] Wage Act Claim for unpaid wages, PLF must show that three [four] things are more probably true than not true:

- < *Only if this is a live issue* > 1. PLF was an employee of [DFT employer].
1. PLF earned wages according to the terms of [his/her] employment.
  2. [DFT employer] failed to pay PLF wages owed.
  3. the amount of the wages owed that [DFT employer] failed to pay PLF.

I will discuss each of these items in a little more detail.

---

<sup>1</sup> G.L. c. 149, § 148.

### (a) Employee

[< *If necessary*:> First, PLF must prove that [he/she] was an employee of [DFT employer] ]. An employee is one who provides services for an employer for wages or other compensation.<sup>2</sup>

< *If DFT employer claims that PLF was an independent contractor, see the instructions concerning Wage Act misclassification.*>

### (b) Earned Wages

First [Second], PLF must prove that [he/she] earned wages. “Wages” can be hourly pay or salary, and can also include benefits. The law applies regardless of the amount of the employee’s wages.

[If PLF was an executive, administrative, or professional employee:] The Wage Act protects the wages of all employees, including those who are “executive, administrative, or professional” employees.

### (c) Failure to Pay Wages

Second [Third], PLF must prove that [DFT employer] failed to pay [him/her] the agreed-upon wages for [his/her] work.

< *If the employer is claiming inadequate work performance*:> If [DFT employer] failed to pay wages, it does not matter that DFT employer claims that PLF’s work was inadequate. If it was, then [DFT employer] was free to discipline PLF, or to fire PLF, but [DFT employer] was not allowed to withhold PLF’s earned wages.

< *If the employer is claiming mistake*:> If [DFT employer] failed to pay wages, it does not matter whether it did so by mistake or on purpose or even because of a good-faith belief that it did not owe the wages.

---

<sup>2</sup> There is no definition of “employee” in G.L. c. 149, § 148 itself, so this is a slightly streamlined version of the definition in G.L. c. 149, § 148C(a), which concerns payment of wages for earned sick time, and was added to the Wage Act in 2015.

< *If there is an issue concerning a contract:*> An employer cannot legally agree with an employee to avoid the Wage Act. For example, an employer cannot enforce an agreement to pay its employee on a schedule that violates the Wage Act's schedule.

#### (d) Amount of Unpaid Wages

Third [fourth], PLF must prove the amount of agreed-upon wages that [DFT employer] failed to pay [him/her]. The agreement between the employee and the employer determines what the employee's wages are. The agreement can be in writing, but it does not have to be. In considering what PLF's wages were, you can consider evidence about what the parties agreed to, including evidence of what [employer DFT] paid PLF during the employment relationship.

< *If other remuneration is claimed, add, as applicable:*> The Wage Act applies not only to regular wages, but also to any holiday or vacation payments that the employer agreed to pay the employee. The Wage Act also covers commissions, but only after the amount of the commission has been determined and the commission has become payable under the agreement between employer and employee. The Wage Act also covers other types of employment benefits,<sup>3</sup> but only if the amount has been determined and has become due to the employee under [his/her] agreement with the employer.

Sometimes there is an element of uncertainty in proving the amount of unpaid wages. That does not necessarily prevent you from awarding full

---

<sup>3</sup> *Fernandes v. Attleboro Housing Authority*, 470 Mass. 117, 126 (2014) ("[a]n employee claiming to be aggrieved by a violation of G.L. c. 149, §§ 148 or 148A, may bring a private civil action ... for injunctive relief, damages, and any lost wages *and other benefits*") (emphasis added); *Somers v. Converged Access, Inc.*, 454 Mass. 582, 594 (2009) (an employee may sue under the Wage Act for "any wages and benefits the plaintiff proves he was denied ... including the holiday pay, vacation pay, *and other benefits* that he would have been entitled to" as an employee) (emphasis added). But see *Mui v. Massachusetts Port Authority*, 478 Mass. 710, 712 (2018) (holding that "wages" do not include sick pay that employees were allowed to cash in at the time of retirement).

and fair compensation, as long as the evidence makes it possible for you to determine the amount in a reasonable manner. We leave that amount to your judgment, as members of the jury. You may not determine PLF's unpaid wages by mere guesswork, but it is enough if the evidence allows you to draw fair and reasonable conclusions about the extent of the unpaid wages.

### **Wage Act — Liability of Individual Defendants < if any >**

In addition to suing [DFT employer], PLF has also sued certain people associated with [DFT employer]. If you find that PLF [was an employee of DFT employer]; that PLF earned wages; that [DFT employer] failed to pay those wages; and that PLF has proved the amount of the unpaid wages, then you may have to determine whether those individual [DFTs] are liable to PLF along with [DFT employer].

< ***President and/or Treasurer Defendants:*** > In this case, PLF has also sued [Pres/Treas DFT] for payment of unpaid wages. The Wage Act automatically makes the company's president and its treasurer personally liable to pay those wages to PLF. [If applicable: [Pres/Treas DFTs] are liable for wages that [employer] failed to pay even though PLF has not sued [employer] itself.]. So, if you find [DFT employer] failed to pay wages earned by PLF, then [Pres/Treas DFTs] will [also] be liable to PLF for the unpaid wages. Because they are automatically liable, there is nothing for you to decide, and the jury verdict slip will not ask you about their liability. Instead, the clerk will enter judgment against them, as well as against [DFT employer], in the amount of wages that you find were earned but not paid.

< ***Officer/Agent Defendants:*** > In addition, if the employer fails to pay wages, the Wage Act also makes liable "any officers or agents having the management of" the employer. That phrase refers to people whose significant management responsibilities are similar to those of a corporate president or treasurer, particularly in regard to the control of the employer's

finances or the payment of wages.<sup>4</sup> [If applicable: [Officer/Agent DFTs] are liable for wages that [employer] failed to pay even if PLF has not sued [employer] itself.]

In this case, PLF has also sued [Officer/Agent DFT] for payment of unpaid wages. If you find that PLF was an employee of [DFT employer], that PLF earned wages, and that [DFT employer] failed to pay those wages, you will then be asked to decide if [Officer/Agent DFT] had significant management responsibilities at [DFT employer] similar to those performed by a corporate president or treasurer, particularly in regard to the control of the employer's finances or the payment of wages. If you decide that [Officer/Agent DFT] had such responsibilities, then [Officer/Agent DFT] will also be liable to PLF for the unpaid wages.

< ***Board Member Defendant*** > [Bd Member DFT] was a member of the Board of Directors of [DFT employer] at the relevant time. A director is not liable for unpaid wages simply because [he/she] is a director. Furthermore, the Board of Directors' collective powers to control management and set policy do not by themselves make the directors liable for unpaid wages. But if you decide that [Board Member] had taken on significant management responsibilities over [DFT employer] similar to those performed by a corporate president or treasurer, particularly in regard to the control of finances or the payment of wages, then [Bd Member DFT] will also be liable for the unpaid wages.<sup>5</sup>

< ***Investor Defendants*** > [Investor DFT] was an investor in [DFT employer] at the relevant time. An investor, acting in [his/her] capacity as an investor, is not liable for unpaid wages simply because [he/she] is an investor. Furthermore, the investor's exercise of ordinary financial control over an investment does not by itself make the investor liable for unpaid wages. But if you decide that the investor had taken on significant management

---

<sup>4</sup> *Segal v. Genitrix*, 478 Mass. 551, 570 (2017).

<sup>5</sup> See *id.* at 570–571.

responsibilities over [DFT employer] similar to those performed by a corporate president or treasurer, particularly in regard to the control of finances or the payment of wages, then [Investor DFT] will also be liable for the unpaid wages.<sup>6</sup>

---

<sup>6</sup> See *id.* at 571.