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## W A G E A N D H O U R

### Lurking in the Shadows: Pa.'s Wage Payment and Collection Law

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*Special to the Legal*

Recently, the U.S. District Court for the Eastern District of Pennsylvania in *O'Donnell v. Passport Health Communications*, 2013 U.S. Dist. LEXIS 51432 (E.D. Pa. Apr. 10, 2013), provided a not-so-gentle reminder to employers of the potential pitfalls of Pennsylvania's Wage Payment and Collection Law (WPCL). The WPCL is conceptually different from the Fair Labor Standards Act, and its Pennsylvania counterpart, the Pennsylvania Minimum Wage Act, because it does not create a substantive right to compensation. Rather, it provides employees with a statutory vehicle to assert contract-based rights, while simultaneously providing additional remedies (such as liquidated damages and attorney fees) to employees seeking to enforce those rights. The WPCL defines wages broadly in 43 P.S. § 260.2.1 to include "all earnings of an employee" and "fringe benefits or wage supplements."

In *O'Donnell*, the plaintiff asserted a claim under the WPCL for allegedly earned, but unpaid, sales commissions



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as well as accrued paid time off (PTO). The case arose under familiar circumstances for many employers. An employee, Helene O'Donnell, was leaving her employment (in this case, it was a termination), which triggered the provision of the WPCL dealing with employees separated from the payroll. That section of the WPCL requires that "wages or compensation earned shall become due and payable not later than the next regular payday of his employer on which such wages would otherwise be due and payable." The compensation plan document at issue in *O'Donnell* provided that "employees must be employed at the time of payment to receive commissions." Importantly, the plan nowhere defined when commissions were earned by the employee. The court found

there to be a factual dispute as to whether O'Donnell had earned the commission-based wages prior to her termination, and as a result permitted O'Donnell's claim for commissions to go to trial.

In allowing the claim for allegedly earned but unpaid commissions to go to trial, the district court noted the WPCL's prohibition of private contracts that "in any way contravene" the WPCL. In addition to holding that there was a fact question as to whether O'Donnell had in fact earned the commissions, the district court found that "the question still remains as to whether the provision of the plan requiring that the employee be employed on the date of distribution constitutes a forfeiture clause that is invalid under the WPCL."

Notably, the commission plan at issue in *O'Donnell* specifically contained a provision that "it is not intended to be, nor should it be construed as, a contract between Passport and any Passport employee." Yet in spite of this provision, the district court still allowed the commission-based WPCL claim to go to trial. This decision is a cautionary tale to employers that

any documents that set forth wage payment or benefit information (such as offer letters, employee handbooks and compensation/commission plans), even if they contain disclaimers, according to the *O'Donnell* court, could form the basis of a WPCL claim.

As with the commission-based WPCL claim, the district court also permitted O'Donnell's claim that she was entitled to be paid for accrued but unused PTO to go to trial. In support of her claim, O'Donnell cited to the provision in the employee handbook permitting accrual of 120 hours of PTO each year, and harkened this accrual to the earning of paid time off. Construing the facts and inferences in the light most favorable to the plaintiff, the district court found a material issue of fact precluded summary judgment as to O'Donnell's claim for PTO.

The *O'Donnell* decision poses challenges for employers. The good news that employers can take from this decision is that employers are the masters of their own fate under the WPCL. Unlike other laws, employers have the ability to define the scope of their legal obligations under the WPCL. Employers should seize upon the opportunity to delineate the contours of those obligations and assess their documents for potential risks under the WPCL. The bad news for employers is that, according to the district court in *O'Donnell*, all of the technical requirements for a valid contract may not be necessary for employees to state WPCL claims for

unpaid commissions, PTO, or other wages or benefits. This means that in addition to looking at contracts such as employment or commission agreements, employers also should review offer letters, employee handbooks and other documents that contain disclaimers that they are not contracts with a critical eye toward mitigating against the risk that certain wages may be construed as having been earned by employees when that may not have been the intention.

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One particularly notable example of a provision in an employee handbook that got an employer into hot water can be found in *Braun v. Wal-Mart Stores*, 24 A.3d 875 (Pa. Super. Ct. 2011), which was decided by the Superior Court of Pennsylvania in 2011. The plaintiffs in *Braun* had asserted a WPCL claim due to Wal-Mart's alleged failure to provide employees with paid rest breaks, as provided by policy. The Superior Court found that by allegedly not providing the paid rest breaks described in the employee handbook, Wal-Mart was violating both its "agreement" to provide paid

rest breaks as well as the WPCL. The court reasoned "that the employee is not entitled to extra pay for a missed or shortened rest break does not negate the employer's contractual obligation to provide a paid rest break and WPCL obligation to pay the employee for taking that agreed-upon rest break." In effect, according to the court, Wal-Mart had agreed to pay employees for seven-and-a-half hours of work, but was in reality receiving eight hours of work from employees who were not receiving their paid rest breaks, in violation of the WPCL.

So what is an employer to do? It may be time to dust off the employee handbook, template offer letter, compensation plan and other foundational documents, and consider their contents anew with an eye toward whether a court, in line with *O'Donnell* and *Braun*, might find any of the language contained therein to create contractual and WPCL obligations. Employers have the power to win the WPCL race; they should pick up the baton and run with it. •