

## **Alert** | Labor & Employment



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### **Retention Bonus Not a ‘Wage’ Under Massachusetts Law**

Does a retention bonus constitute a “wage” under the Massachusetts Wage Act? On Sept. 6, 2024, the Appellate Division of the Massachusetts District Court ruled that it does not.

The decision, *Nunez v. Syncsort Inc.*, provides clarity for Massachusetts employers on “contingent compensation” – discretionary pay made contingent on the employee satisfying certain requirements. The court found that contingent payments, with the sole exception of commissions, are beyond the scope of the Wage Act.

If the court had concluded otherwise, the untimely payment of a retention bonus would be equivalent to the untimely payment of a wage, triggering strict liability and treble damages under the Wage Act.

#### **Retention Bonus Agreement**

The plaintiff sued his employer, alleging that the employer violated the Wage Act by failing to pay a retention bonus on the date of his termination. Under the terms of the retention bonus agreement, plaintiff was to be paid in installments, with the final installment payable on his termination date, provided it was without cause.

Subsequently, the employer terminated the plaintiff without cause as part of a reduction in force. Plaintiff filed a complaint when the employer failed to pay the final installment of the retention bonus on the termination date.

### Decision Based on Plain Language of Wage Act

The sole issue before the court was whether the bonus should be considered a “wage.” The Wage Act requires employers to pay involuntarily terminated employees “all wages or salary earned” on the date of termination.

In examining the plain language of the Wage Act, the court noted that the statute does include within the definition of “wages” other types of compensation, including holiday and vacation pay as well as commissions that are “definitely determined and ... due and payable.” However, other than the reference to commissions, the Wage Act does not include any other types of contingent compensation.

The court also looked to the Massachusetts Supreme Judicial Court (SJC)’s prior rulings on similar categories of pay. In *Mui v. Massachusetts Port Authority*, the SJC ruled that compensation provided to terminated employees under a sick-pay policy, where payment was contingent on being employed for two years and not being terminated for cause, was *not* wages. The court noted that “[t]he retention bonus here is quite like the contingent compensation in *Mui*, as it was to be paid by [the employer] if certain conditions were met.” The court also noted the extensive line of appellate precedent where the Massachusetts courts have “never broadly construed the Wage Act to include any types of contingent compensation other than commissions.”

Finding that the retention bonus at issue was subject to contingencies, the court held that the bonus was not a wage under the Wage Act.

### Implications

Although the *Nunez* case may be subject to further appellate review, the case suggests where Massachusetts courts may draw the line on what compensation falls within the Wage Act’s strict liability standard. The court’s analysis reiterates that simply labeling a payment a “bonus” is not determinative as to whether such compensation is a “wage.” Rather, courts may evaluate the discretionary and contingent nature of the compensation at issue in reaching the ultimate determination under the Wage Act.

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