



---

## ***COURT CLARIFIES RESTRICTIONS ON EMPLOYER VACATION PAY POLICIES***

The thicket of Massachusetts law concerning the payment of wages (the Wage Act) is dangerous territory. Violations are punishable by the severe sanction of mandatory triple damages and attorneys' fees, and personal liability can be imposed on officers and certain others who help to run a business. Uncertainty compounds the severity of the sanctions, because there has been relatively little guidance from Massachusetts courts regarding the application of the substantive provisions of the Wage Act. Consequently, a recent decision by the Supreme Judicial Court of Massachusetts (SJC), the state's highest court, is particularly notable.

In that decision (Electronic Data Systems Corp. v. Attorney General, June 11, 2009), the SJC clarified an aspect of the Wage Act dealing with vacation pay. The employer, Electronic Data Systems Corp. (EDS), laid off an employee and, pursuant to its written policy, did not pay the employee for unused vacation time from the current year. The SJC determined that this was a violation of the Wage Act, even though it was undisputed that EDS was acting in accordance with its own policy.

By way of background, the Wage Act requires that any employee discharged from employment be paid all wages on the last day of employment. While there is no requirement that an employer provide for paid vacations, when an employer chooses to provide this benefit, the Wage Act requires that it be treated like any other form of wages. Consequently, when an employee's employment ends, the Wage Act dictates that an employee be paid for any "accrued" but as yet unused vacation.

EDS, the employer in the recent SJC decision, had declared in its written vacation policy that "vacation time is not earned and does not accrue" and that if "you

leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time . . ." The Massachusetts Attorney General, which enforces the Wage Act, determined that EDS's policy violated the Wage Act's prohibition against "special contracts" to avoid the requirements of the Wage Act. Further, the Attorney General took the position that when an employee is entitled to vacation pay, it becomes due day by day as the employee performs his or her duties. (This position is consistent with an advisory concerning vacation policies that the Attorney General issued in 1999, a copy of which can be found at [www.mass.gov/ag](http://www.mass.gov/ag), under the Wage and Hour link.). Ultimately, the SJC agreed with the Attorney General's interpretation, at least with respect to an employee who is involuntarily terminated, reasoning that the Wage Act, which is intended to protect employees and their right to wages, would have little value if employers could craft policies attempting to exempt vacation pay from its requirements.<sup>1</sup>

While the SJC left for another day its position when an employee leaves voluntarily, employers are encouraged to review their policies regarding vacation pay to ensure that there is no provision that "forfeits" accrued vacation upon the termination of an employee's employment, regardless of the reason for termination. The risks are simply too great.

---

<sup>1</sup> This is distinguished from so-called "use it or lose it" policies, which provide that unused vacation time cannot be carried over from year to year. According to the Attorney General, this type of policy, where an employee loses the right to certain vacation pay through nonuse, is generally permissible. Although the SJC did not definitively address the legality of such a policy, it hinted strongly that it found the Attorney General's interpretation to be reasonable, and that "use it or lose it" policies do not violate the Wage Act. This has been the generally accepted wisdom, as long as the policy is articulated clearly and timely to employees, and employees have a reasonable opportunity to use the accumulated vacation time.

*If you wish to inquire further about our Employment Law Group or this advisory, please contact **Ronald M. Jacobs** or your **Conn Kavanaugh attorney at (617) 482-8200**.*

*The information contained in this Advisory may be considered advertising by Rule 3:07 of the Supreme Judicial Court of Massachusetts. This Advisory contains material intended for informational purposes only, and should not be considered as legal advice by Conn Kavanaugh Rosenthal Peisch & Ford, LLP. Your use of this Advisory does not create an attorney-client relationship. Please do not send or share with us any confidential information about you or any specific legal problem without the express authorization of an attorney at Conn Kavanaugh Rosenthal Peisch & Ford, LLP*