

CLIENT ALERT: Massachusetts Employers Should Review Vacation Policy Following Decision by Supreme Judicial Court

On June 11, 2009, the Supreme Judicial Court ruled that an employer's failure to pay earned, unused vacation time to an employee who is involuntarily terminated is a violation of the Massachusetts Wage Act. (M.G.L. c. 149, § 148). At issue in *Electronic Data Systems Corp. v. Attorney General*, [SJC-10260](#), was whether Electronic Data Systems Corporation's vacation policy, which did not provide for such payment, was lawful under the Wage Act.

Electronic Data Systems Corporation's ("EDS") vacation policy explicitly stated: "vacation time is not earned and does not accrue. If you leave EDS, whether voluntarily or involuntarily, you will not be paid for unused vacation time." Pursuant to its policy, EDS did not pay Francis Tessicini for any part of his unused vacation time when EDS terminated his employment. Mr. Tessicini filed a written complaint with the Attorney General's fair labor division, which issued a citation and civil penalty. EDS appealed the citation.

The Wage Act provides that the "word 'wages' shall include any holiday or vacation payments due an employee under an oral or written agreement." On appeal, EDS argued that the terms of its vacation policy should control because under the statutory definition of "wages," the only "vacation payments due an employee" are those payments "due" under the "oral or written agreement," i.e., the employer's vacation policy. The SJC disagreed, relying on an advisory by the Attorney General interpreting the Wage Act. The Court held that the Wage Act requires an employer to pay a discharged employee for any unused, earned vacation time at the time of the discharge, irrespective of the terms of its own vacation policy. However, if an employer has a "use it or lose it" policy, an employee may lose vacation pay if the employee has the opportunity to use earned vacation time and does not use it. The Court did not reach the issue of whether the Wage Act requires an employer to pay unused, earned vacation pay to an employee who leaves a job voluntarily.

In light of the Court's decision, employers doing business in Massachusetts should review their vacation policies to ensure that they comply with the law, as announced by the highest court in the Commonwealth of Massachusetts.

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