Michigan Administrative Hearings and Rules
Mike Zimmer, Chief Deputy Director

WAGE HOUR DIGEST

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PREFACE

The Payment of Wages and Fringe Benefits Act, 1978 PA 390, as amended, (Act 390) created a procedure for employees to file complaints against their employers with the Department of Energy, Labor, and Economic Growth (formerly Department of Labor). The Act requires the Department to investigate these complaints and issue a Determination Order. This Order may be appealed by the employer or employee. Appeals are heard by Administrative Law Judges (ALJs) in the Licensing and Regulatory Affairs (LARA, formerly State Office of Administrative Hearings and Rules).

This Wage Hour Digest is a research tool created to help litigants. The Digest contains subject and general entry indexes, a glossary of terms, a table of cases and digest entries for substantive ALJ Decisions and court reviews from 1978 through 2010, our most recent update. Updates are prepared periodically for new decisions and to report on court review of prior ALJ decisions. Digest entries show the result of court review where available. A copy of Act 390 and Administrative Rules used for hearings and the Wage Hour Division's Procedural Rules are also included.

The full text of any indexed decision may be obtained at Freedom of Information rates by contacting Michigan Administrative Hearing System, 611 W. Ottawa Street, P.O. Box 30695, Lansing, Michigan 48909, Telephone (517) 335-2484, FAX (517) 335-6696. Decisions after 1998 and before 2013 are available on the LARA website at http://www.dleg.state.mi.us/ham/boh/pdf/sr_bhear.asp

ACKNOWLEDGMENTS

The Wage Hour Digest began as a project of the Office of Hearings' court reporters, and is now compiled by SOAHR. Court reporters Robert Davis, Dorothy Ransom, Tamara Lott, Brenda Bailey, Timothy Sturgis, and law students Todd Jex, Deborah Comini, Daphne Johnson, Jonathan Blume, Joshua Gladstone, and Joshua Greene contributed to this volume. The efforts of these individuals are acknowledged and appreciated. I am sure all who use this research tool will benefit from their efforts.

J. Andre Friedlis
Administrative Law Judge Manager
Licensing and Regulatory Affairs

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DEDICATION

The Wage Hour Digest is dedicated to our friend and coworker, Tamara Lott, who passed away on November 21, 1995. Tammy was a court reporter in the Office of Hearings from 1983 to 1995. She was devoted to her court reporting duties and worked on the WH Digest with enthusiasm. Her ideas, smile and effort continue to be missed.

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General Entries

I FRINGE BENEFITS
Must Be in Writing to Be Enforced

WRITTEN CONTRACT
Fringe Benefits

WRITTEN POLICY
Fringe Benefits

General Entry For Fringe Benefits Not Contained in Written Policy

EE filed a claim for fringe benefits (vacation, expenses, holiday, sick leave payments, bonuses, authorized expenses, and contributions made on behalf of EE). See Payment of Wages and Fringe Benefits Act 390 of 1978 Section 1(e), MCL 408.471(e) (hereinafter, citations to Act 390 are referred to solely by section and MCL number). The claim was denied, as it was not in accordance with a written contract or policy.

In claims where benefits were paid in accordance with a written contract or policy, the ALJ could also conclude based on interpretation of the contract or policy that the EE was entitled to more.

Section 3, MCL 408.473 can only be used to enforce payment of fringe benefits according to the terms of ER's written contract or policy. There is no legal requirement that an ER have fringe benefits placed in a written document. Act 390 cannot be used to enforce payment of a fringe benefit not found in a written contract or policy, or create "missing language" in a policy. See *Carpenter v Flint School District*, 115 Mich App 683 (1982). An EE may pursue a fringe benefit claim in a District Court action where a written policy is not a requirement.

Where a written policy exists and EE has notice of the policy, EE's working constitutes agreement with the policy. Unless otherwise agreed, ER may change or modify the policy and EE's continued working constitutes agreement with the new policy. ER may not retroactively change the policy with respect to fringe benefits already accrued without EE's explicit consent.

II APPEALS
Good Cause Not Found
DO Not Received
Presumption of Receipt

The Appellant's appeal was not received within 14 days as required Section 11(4), MCL 408.481(4). After either a hearing or review of a written explanation, good cause for the late filing was not found. Good cause is that which would prevent a reasonably prudent person from the performance of an important

obligation. It does not include conduct that shows carelessness, negligence, or a lack of reasonable diligence.

A common argument for late appeals is that the Department's DO was not received. Claiming nonreceipt of the DO does not establish good cause. DO was mailed to Appellant's last known address. The legal presumption is that a properly mailed DO is received. Appellant failed to rebut the presumption of receipt, see *Stacy* v *Sankovich*, 19 Mich App 688; 173 NW2d 225 (1996). Also see *Merchants National Bank* v *Detroit Trust Co*, 258 Mich App 526; 242 NW 739 (1932); *Sargent* v *Robert Lee Hardison, Jr* (1996), &1091; *Ingels* v *I & H Engineering Systems*, WH 96-464 (1996), &1099; and *Boverhof-Poggi* v *Sienna Models*, WH 99-217 (1999), &1471.

III DEDUCTIONS

Written Consent

Section 7, MCL 408.477 requires written authorization from EE before taking deductions from EE's wage for ER's benefit, unless required or expressly permitted by law or a collective bargaining agreement. Section 4, MCL 408.474 requires written authorization from EE before taking deductions from EE's fringe benefits. EE's authorization must be voluntarily given to be valid.

ER deductions from EE wages or fringe benefits for theft, poor work performance, property damage, negligence, loans made to EE, advances, or EE actions in opposition to ER interests, are self-help measures prohibited under Sections 7 and 4. ER owes wages agreed upon or minimum wage, as long as ER permits EE to work. See Section 1, MCL 408.471. An EE must be paid wages for hours worked, not for quality of work. Appropriate ER remedies include discharging EE or initiating legal action. Deductions made pursuant to a court order are permitted under the Act. See General Entries VI and XIII.

IV REHEARING

Denied

The Michigan Administrative Procedures Act of 1969, Section 87(2) (as amended), MCL 24.287(2) requires a rehearing where the record is inadequate for purposes of judicial review. In all other cases, granting a rehearing is discretionary. Section 87(3), MCL 24.287(3) requires that a rehearing request be filed within 60 days after delivery or mailing notice of the decision. The record pertaining to dismissal of Appellant's appeal was adequate for purposes of judicial review, or the rehearing request was not received within the statutory timeframe. Appellant's request for rehearing was denied.

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General Entries

V CLAIMS

Twelve-Month Statute of Limitations

JURISDICTION

Statute of Limitations

General Entry for Statute of Limitations

EE's claim was not filed within 12 months after the alleged violation as required by Section 11(1), MCL 408.481(1). It is a general principle of administrative law that an agency may not exceed the authority delegated to it by a statute. *GMC* v *Detroit*, 141 Mich App 630 (1985). The Department has no authority to invalidate, change or enlarge Section 11(1).

VI COURT ACTIONS

Judgment to Offset Amount Due Complainant

ER obtained a Court judgment regarding money owed by EE. A court judgment is a deduction expressly permitted by law. See Section 7, MCL 408.477.

There is no violation of the Act for deductions made pursuant to Court Order if the Court judgment was obtained before the deduction. If the judgment was obtained after the deduction, the Section 7 violation is affirmed and the amount due the EE reduced or eliminated based on the court offset.

VII EMPLOYMENT RELATIONSHIP

Economic Reality Test

JURISDICTION

Over State EEs

FAIR LABOR STANDARDS ACT (FLSA)

Section 1, MCL 408.471 defines an EE as "an individual employed by an employer." Employ is defined as "to engage or permit to work."

"Employer" is defined in Section 1(d) as follows:

> Employer means an individual, sole proprietorship, partnership, association, or corporation, public or private, this state or an agency of this state; a city, county, village, township, school district, or intermediate school district; an institution of higher education; or an individual acting directly or indirectly in the interest of an employer who employs one or more individuals.

As noted in the case of *Askew* v *Macomber*, 398 Mich 212 (1978), there are several tests to determine whether an EE/ER relationship exists:

1. Control of worker's duties;
2. Payment of wages;
3. The right to hire and fire and the right to discipline;
4. The performance of the duties as an integral part of ER's business toward accomplishment of a common goal.

It has been held in federal FLSA cases that stockholders, directors, and officers may be liable for the wages of a corporation's EEs where the individuals exercised pervasive control over the corporation's business and financial affairs and acted in the interest of the corporation in relation to its EEs.

VIII MINIMUM WAGE

Deductions

Section 7, MCL 408.477 requires ER to obtain written consent from EE for each wage payment subject to a deduction benefiting ER. The cumulative amount of the deductions may not reduce the gross wages paid below the minimum wage rate.

IX WAGES

Act 390 requires an ER to pay wages to an EE. Wages include commissions, as defined in Section 1(f), MCL 408.471(f). Section 2, MCL 408.472 requires wages to be paid in a regular and periodic manner. Section 5, MCL 408.475 requires a separating EE (quit or fired) be paid all wages due as soon as the amount can be determined. Section 6, MCL 408.476 requires wages to be paid in United States currency or negotiable check or draft.

Wages are determined by the verbal or written contract between the parties, past practice, or minimum wage based on MCL 408.381 *et seq*. Overtime rates are determined by MCL 408.384a(1). Travel time required as part of employment is considered time worked for wage determinations. Mileage, meal, and travel expenses are fringe benefits which must be in writing to be enforced. See General Entries I and XVIII.

Commissions due at separation can be determined by oral agreement or written contract between the parties. An EE is entitled to commissions due if EE’s efforts were the procuring cause of the sale, regardless of whether EE actually completed the sale. *Butterfield v. Metal Flow Corp*., 185 Mich. App. 630 (1990). When there is no express agreement, EE is entitled to commissions based on the procuring cause doctrine. *Reed v. Kurdziel*, 352 Mich. 287 (1958).

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General Entries

X BURDEN OF PROOF

Burden Sustained

Records

Testimony

Unrebutted Testimony

TESTIMONY

Believable

Unrebutted

Administrative Rule R 408.22969 places the burden of proof on the Appellant to prove the truth of the matter asserted in the appeal. In this case, Appellant met the burden of proof with unrebutted, believable testimony and records. In many cases, this evidence was unrebutted because Appellee did not attend the hearing.

XI BURDEN OF PROOF

Appellant

Burden Not Sustained

Administrative Rule R 408.22969 places the burden of proof on the Appellant to prove the truth of the matter asserted in the appeal. The Appellant did not meet the burden of proof by a preponderance of the evidence (greater weight and believability).

XII APPEALS

Only Issues Raised by Appellant May Be Considered

The Appellee (the party against whom the appeal is taken) is bound by the DO of the Wage Hour Division. Only issues raised by the Appellant (party appealing) may be considered by the ALJ at hearing.

XIII ADVANCES

Deductions

ER deducted an advance from EE's wages. ER cannot engage in self-help to pay back wage advances. The proper course is a lawsuit in district court. This process gives ER the opportunity to have the court review any claims against EE. ER may become a judgment creditor and collect a debt from EE by any available process. A court procedure also protects EE from an unexpected withholding of wages counted on for necessary expenses such as food, rent and utilities. See General Entry III.

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XIV EMPLOYEE

One Who Is Permitted to Work

Section 1, MCL 408.471 defines "employ" as to engage or permit to work. Once permitted to work, EE must be paid for time worked. See General Entry IX. ER is responsible for setting hours and regulating employment. Dissatisfaction with EE work does not authorize ER to take a deduction from EE's wages. See General Entry III.

Note: Prior to July 2010, General Entry XIV involved deductions taken for theft. This entry is now a part of General Entry III. For references to General Entry XIV prior to 2010, see General Entry III.

XV ATTORNEY GENERAL OPINION

Preemption

The Federal Labor Management Relations Act of 1947, Section 301(a) preempts the Department of Labor, now the Department of Energy, Labor and Economic Growth, Wage Hour Division, from determining Act 390 claims for wages and fringe benefits where enforcement of the claim would require interpretation of a Collective Bargaining Agreement (CBA).

The Labor Management Act excludes from coverage the state and any political subdivision of the state. Accordingly, the CBA of public employers is subject to interpretation to determine wages and fringe benefits under Act 390. Opinion No. 6649 - 7/11/90

XVI APPELLANT

Did Not Appear at Scheduled Hearing

HEARING

Appellant

Did Not Appear at Scheduled Hearing

Appellant failed to attend a scheduled hearing. The appeal was dismissed based on Administrative Rule R 408.22966.

XVII RECORDKEEPING

Not Maintained

Section 9

Civil Penalty

Section 9, MCL 408.479 requires an employer to maintain records for three years

and to provide them to the Department's representative upon request. Administrative Rule R 408.9033(5) requires a civil penalty of $300 for failing to maintain or provide records as required by Section 9.

XVIII FRINGE BENEFITS

Section 3, MCL 408.473 requires fringe benefits - vacation, expenses, holiday, sick leave, bonuses, authorized expenses, and contributions made on behalf of the EE - to be paid in accordance with the terms set forth in a written contract or policy. In this case the ALJ found a fringe benefit due based on ER's written contract or policy. Unless otherwise agreed, ER may change or modify written policy. However, ER may not retroactively change fringe benefits already accrued by EE.

XIX ER/EE RELATIONSHIP FOUND

Act 390 requires an EE/ER relationship before a violation can be found. As noted in the case of *Askew* v *Macomber*, 398 Mich 212 (1978), there are several tests to determine whether an EE/ER relationship exists:

1. Control of worker's duties;
2. Payment of wages;
3. The right to hire and fire and the right to discipline;
4. The performance of the duties as an integral part of ER's business toward accomplishment of a common goal.

In finding an ER/EE relationship rather than an independent contractor relationship, factors considered may include:

1. EE was paid by the hour, not by the project;
2. Both ER/EE kept track of work hours;
3. Wages were paid on a regular, recurring basis;
4. ER supervised EE's work;
5. EE was hired, fired and paid by ER;
6. Taxes were taken from EE's pay;
7. EE supplied facilities and/or equipment.

The fact that EE may have worked independently does not outweigh the above factors.

XX EXEMPLARY DAMAGES

Section 18(2), MCL 408.488(2) allows the Department to assess exemplary damages for not more than twice the amount found due if the employer violates Sections 2, 3, 4, 5, 6, 7 or 8 in a flagrant or repeated manner. Administrative Rule R408.9034 directs the Department to order exemplary damages paid to the

employee:

(a) If the employer was previously found to have violated the same section of the Act against the same employee at any time within 12 months before the occurrence of the violation.

(b) If the Department determines that the Act was deliberately and knowingly violated.

XXI EMPLOYMENT RELATIONSHIP

EE/ER Relationship Not Found

Act 390 requires an EE/ER relationship before a violation of the Act can be found. The facts do not establish an EE/ER relationship. Usually this is because ER was not in fact the ER, or EE was an independent contractor. The complaint against Respondent may be filed in District Court.

As noted in the case of *Askew* v *Macomber*, 398 Mich 212 (1978), there are several tests to determine whether an EE/ER relationship exists:

1. Control of worker's duties;
2. Payment of wages;
3. The right to hire and fire and the right to discipline;
4. The performance of the duties as an integral part of ER's business toward accomplishment of a common goal.

In determining whether EE was an independent contractor, factors considered include:

1. Respondent supplied equipment;
2. Complainant worked without supervision;
3. Respondent did not set work hours;
4. Respondent did not withhold taxes;
5. Complainant was hired as an independent contractor;
6. Complainant was paid for representing Respondent. With each payment, Complainant signed a receipt stating that the payment was for claimant's representation;
7. Complainant signed a statement agreeing that Complainant was an independent contractor.

XXII ACT 390

Exclusive Remedy

EXCLUSIVE REMEDY

From time to time, EEs must decide where to file a claim. The general rule is

that where the EE claims a common law contract violation, the claim may be filed either in court or with the Department as an Act 390 complaint. If the claim relates to a claim not present at common law, e.g. discrimination, Section 13, the claim must be filed as an Act 390 claim. See *Cockels* v *International Business Expositions*, 159 Mich App 30; 406 NW2d 465 (1987), app lv den, 428 Mich 914 (1987) and *Murphy* v *Sears, Roebuck & Company*, 190 Mich App 384; 476 NW2d 639 (1991).

XXIII ATTORNEY FEES

Section 18(3) of Act 390, MCL 408.388(3) provides that an EE's attorney costs, hearing costs, and transcript costs may be ordered against an ER found in violation of sections 2, 3, 4, 5, 6, 7, or 8 of the Act. These costs are awarded at the ALJ's discretion. This section does not authorize payment of an ER's attorney costs, hearing costs, or transcript costs.

XXIV BANKRUPCY

Cases where ER files for bankruptcy are stayed in accordance with the Bankruptcy Act, 11 U.S.C. 362(a). Act 390 appeals may not proceed once ER has filed for bankruptcy.

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