



# LABOR *Issues*

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## Traditional Set-Offs From Wages Put In Doubt...*Employers Beware!*

*In an effort to encourage employees to return company clothing, tools or equipment provided by employers, many companies in the construction industry have their employees sign a short-form agreement stating that the employer can deduct the cost of unreturned or lost items from employee wages (provided payment does not fall below the minimum wage).*

Based upon interpretation letters issued by the now defunct Massachusetts Department of Labor and Industries (DOLI), an employer could make a valid set-off from an employee's wages for loans, intentional wanton or willful destruction of the employer's property, or failure to return uniforms, equipment, or assigned tools to which the employee had been given exclusive control. As a practical matter, in answer to employee complaints filed with DOLI, to avoid law suits and countersuits, DOLI historically interpreted the right of employers to fairly set-off the cost of lost or unreturned tools, clothing and equipment against accrued wages.

However, on January 25, 2011, in the case **Camara and ABC Disposal Services v. Office of the Attorney General**, \_\_\_ Mass. \_\_\_, Civil Action No. 10-15-11 (2011) ("Camara") the Massachusetts Supreme Judicial Court (SJC), in reliance upon the brief filed by the Office of the Attorney General (OAG), has placed the continued legality of these traditional construction industry set-offs, whether or not supported by an executed agreement with the employee, in serious doubt.

In **Camara**, supra, the OAG sued a waste disposal employer and its

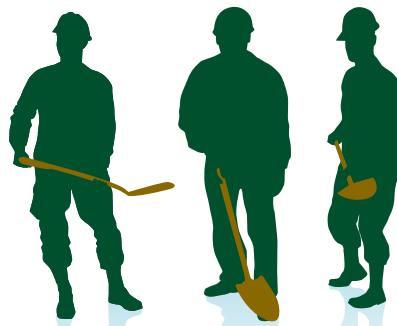
president for "failure to pay wages" arising from that employer's policy under which a worker found to be at "fault" in an accident involving a company truck could either enter a payment plan to reimburse the company for damage, or face discipline. After an investigation of the facts, "fault" was determined by the company safety officer. Employees who chose repayment had between \$10-\$30 per week deducted from their wages. Between 2003-2006, damage to company vehicles was reduced 78 percent.

After an employee complaint and OAG investigation, the OAG filed suit against Camara claiming the foregoing deductions, in lieu of discipline, violated Massachusetts wage laws, and sought repayment of \$27,000 deducted from approximately 27 employees over the 2003-2006 time period.

In deciding the case, the SJC held an OAG's reasonable interpretation of the Massachusetts Wage Acts would be entitled to deference. As to those Wage Acts, the SJC focused on MGL c.149 §148 ("§148") and §150 ("§150").

As a matter of law, Section 148 of the Wage Act requires prompt and full payment of wages due and provides in pertinent part:

*continued on page 33*



**Labor Issues** continued from page 31

"Every person having employees in his service shall pay weekly or bi-weekly each such employee the wages earned by him to within six days of the termination of the pay period during which the wages were earned if employed for five or six days in a calendar week...No person shall by a *special contract* with an employee or by any other means exempt himself from this section or from section one hundred and fifty..." (emphasis added). General Law c. 149, §150, authorizes the OAG to "make complaint" against any employer who violates §148 and limits employers' defenses as follows:

"On the trial no defence (*sic*) for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a *valid set-off* against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid" (emphasis added) §150.

In this case, the SJC focused on the OAG's interpretation of the term "special contract" in §148 and found it generally prohibited an employer from deducting, or withholding payment of, any earned wages. The OAG argued this prohibition cannot be overcome by an employee assent, because §148 makes the "special contract" prohibition unconditional and for reasons of "public policy" wage claims supercede employer property rights. In the OAG's view, regardless of an employee's agreement, there can be no deduction of wages unless the employer can demonstrate, in relation to that employee, the existence of a valid attachment, assignment or set-off as described in §150. The OAG claimed the Camara set-off policy did not create a valid set-off because there was not a prior finding of fault by a court or an otherwise similar neutral dispute resolution mechanism.

In deferring to the OAG, the SJC found its interpretation of §148 to be reasonable and con-

sistent with the statute's purpose, "to protect employees and their right to wages." The SJC held even if the foregoing arrangement was proven to be voluntary and assented to, it still represents a prohibited "special contract"; defined as "peculiar provisions that are not ordinarily found in contracts relating to the same subject matter".

The SJC further deferred to the OAG and held the §150 "set-off" defense is strictly limited to circumstances that involve both a sum certain or some form of due process to determine fault and value (i.e., why weren't the tools returned, what was their fair market value) through the court system or alternative system.

continued on page 35

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**Labor Issues** continued from page 33

In sum, the SJC held this arrangement whereby Camara served as the sole arbiter, making a unilateral assessment of liability as well as the amount of damages, with no role for an independent decision maker, much less a court, and, apparently, not even an opportunity for an employee to challenge the result within the company, did not amount to the "clear and established debt owed to the employer by the employee" within the meaning of the term set-off in §150.

In a footnote, the SJC referenced examples the OAG offered as "valid defenses or "set-offs":

" . . . where there is proof of an undisputed loan or wage advance from the employer to the employee; a theft of the employer's property by the employee, as established in an "independent and unbiased proceeding" with due process protections for the employee; or where the employer has obtained a judgment against the employee for the value of the employer's property."

The SJC further noted:

"There well may be other circumstances—for example as part of a collective bargaining agreement—in which an employer and employee enter into a set-off arrangement that does not involve formal judicial or administrative proceedings but would be valid because it can be shown that the

parties have voluntarily agreed to a set of appropriately independent procedures for determining, in a manner that adequately protects the employee's interests, both the existence and amount of the debt or obligation owed by the employee to the employer."

Whether the SJC's reference to a collective bargaining agreement also requires an arbitrator or Joint Board decision prior to taking a set-off for lost or unreturned clothing, equipment or tools is unclear.

An employee claiming a violation of §148 or §150, has three (3) years to file a claim with the OAG or bring a private right of action. In a private right of action, if the employee prevails, he or she would be entitled to "treble damages" and reasonable attorneys' fees.

In conclusion, based upon Camara, supra, and the OAG position set out in its brief, unless the sum due is fixed by prior agreement, or the employer can establish the employee had exclusive control over the things in issue and a valid means to challenge liability and damages, there may be no 'valid set-off' and the employer may be required to pay the employee's accrued wages and then bring a claim in court or a quasi-judicial forum to recover the cost of its property.

*(For a copy of the decision, please contact Richard Wayne at Hinckley Allen Snyder – rwayne@halslaw.com or 617.378.4220.)* ■



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