



BONUS PAYMENTS DON'T ALWAYS COUNT AS WAGES

Discretionary compensation can fall outside of state law

By DAVID S. POPPICK

In its June 2010 decision in *Ziotas v. Reardon Law Firm P.C.*, the Supreme Court analyzed whether the payment of a bonus is a “wage” subject to the Connecticut General Statutes § 31-71a if the bonus is contractually required, but the amount of the bonus is within the employer’s discretion. The Supreme Court ruled that when the bonus amount is discretionary and not readily ascertainable by applying a formula, the bonus does not constitute a “wage” under the state’s wage statute.

What constitutes a “wage” provides context to the *Ziotas* holding. “Wage” means compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation. Compensation can be paid to employees in various forms, such as salary, profit sharing, stock, commissions, and bonuses of different sorts. However, not all compensation is a “wage” subject to the wage statute.

What the compensation is called (such as a bonus) does not determine whether that compensation qualifies as a wage. The characteristic and reason for the payment, the employee’s performance or efforts for the compensation, and the employer’s discretion whether to pay are determinative. Salary is a wage. Severance pay is not. Incentive payments or bonuses may or may not be wages depending upon whether they are for the individual’s “labor or services rendered” and whether they are paid solely at the discretion of

the employer regardless of, or with no relation to, the actual services performed by the employee, such as year-end discretionary bonuses based solely upon the financial success of the employer.

Whether compensation is a wage and the method for calculating the amount are derived from the employee-employer agreement or contract. *Harty v. Cantor Fitzgerald and Co.*, 275 Conn. 72, 102 (2005); *Mytych v. May Department Stores Co.*, 260 Conn. 152, 159 (2002). The state’s wage statute does not set forth a specific formula by which the wages must be calculated or determined, or how the wage is earned. It provides remedial protections for those cases where the wage agreement is violated. In *Harty*, the court ruled that the state’s wage statute is entitled to liberal construction in favor of those whom the legislature intended to benefit and recognizing the public policy in Connecticut of ensuring that employees are paid wages.

Fundamental Fairness

In *Ziotas*, the Court cited three reasons for its holding. First, discretionary additional remuneration falls outside the protection of the statute because it depends on factors other than the employee’s performance. Second, a review of other statutes shows when the legislature intends for a statutory scheme to apply broadly to all forms of remuneration, and it knows how to make the intention clear.

Third, although the state’s wage statute is remedial, a violation gives rise to substantial criminal and civil penalties. An interpretation of the term “wages” that allows penal-

ties when the amount of the bonus is indeterminate and discretionary would raise serious questions of fundamental fairness and due process.

Ziotas expounds upon the court’s prior ruling in *Weems v.*

Citigroup Inc., 289 Conn. 769 (2008), which analyzed whether a bonus that was discretionary and based on the employer’s performance and profitability came within the statute. The court looked to the contract, which tied the payment to subjective factors not entirely predictable or within the control of the specific employee. It ruled that payments that are based solely on the employer’s discretion and that are not linked to the ascertainable efforts of the particular employee are not wages under Connecticut General Statutes § 31-71a(3).

Weems turns on whether the payment is tied solely to the employer’s discretion. The payment is likely a wage if it is based on the employee’s performance or efforts and not other factors beyond the employee’s control, such as the employer’s sole discretion. The court ruled: “[B]onuses that are awarded *solely* on a discretionary basis, and are not linked *solely* to the ascertainable efforts of the particular employee, are not wages under § 31-71a(3).” (Emphasis added.)

In *Weems*, the court cited and analyzed the New York Court of Appeals decision in



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Truelove v. Northeast Capital & Advisory Inc., 95 N.Y.2d 220 (2000), as highly persuasive and as consistent with Connecticut trial court cases, including *Mangio co v. McKelvey*, a 2005 Superior Court case in which the trial court held that a bonus could constitute a wage since plaintiffs alleged a “connection between additional services performed, and the promised bonus” — namely, continuing to work at the corporation for a significant time despite learning that the factory was going to close.

Similarly, in *State of Connecticut Commission of Labor v. Fireman's Fund Insurance Co.*,

the Superior Court ruled this past February that a bonus is not a wage if it is tied solely to the employer's discretion regardless of the employee's efforts, or if it is not linked solely to the employee's performance.

Double Damages

When an employer fails to pay an employee wages in accordance with Connecticut General Statutes § 31-71a, the employee may recover twice the full amount of wages, with costs and reasonable attorney's fees, as may be allowed by the court. The employer may be fined up to \$5,000 or imprisoned

up to five years, or both under Conn. Gen. Stat. § 31-72.

Only wages, as broadly and liberally defined by the statute, are subject to double damages, costs and attorney's fees if the wages are not paid. Therefore, for example, failure to pay severance or a solely discretionary bonus that is not a wage would not be subject to double damages. The potential double damages and attorney's fees are permissive, not mandatory, upon a finding of bad faith, arbitrariness or unreasonableness. *Sansone v. Cli ord*, 219 Conn. 217 (1991). **b**