

Recent Appellate Decision May Make New York Employers Vulnerable to Liquidated Damages for Violating New York's "Frequency of Pay" Requirements

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On September 10, 2019, the Appellate Division of the New York Supreme Court for the First Department ruled in *Vega v. CM & Associates Construction Management, LLC* that "manual workers" who receive full pay but are paid "late" in violation of the frequency of payment provision of the New York State Labor Law ("NYLL") have a private cause of action and can recover liquidated damages.

Although the plaintiff in *Vega* was a manual worker, the First Department's rationale suggests that its holding applies to all employees who are able to assert a claim under the NYLL's frequency of payment provision, including all manual workers, railroad workers, commissioned salespersons, and "clerical and other workers" in New York.

State of the Law Prior to *Vega*

Section 191 of the NYLL regulates how frequently certain non-exempt employees must be paid. "Manual workers"¹ and "railroad workers" generally must be paid once a week, "clerical and other workers"² at least semi-monthly, and "commission sales persons" at least once a month. Employees in an executive, managerial, or administrative capacity are not covered by NYLL Section 191.³

¹ The term "manual workers" is broader than it appears. According to the New York State Department of Labor, "individuals who spend more than 25% of working time engaged in 'physical labor' fit within the meaning of the term 'manual worker.'" Likewise, the New York State Department of Labor has broadly interpreted the term "physical labor" to "include countless physical tasks performed by employees." New York State Department of Labor, "Frequency of Pay Frequently Asked Questions," available at <https://www.labor.ny.gov/legal/counsel/pdf/frequency-of-pay-frequently-asked-questions.pdf> (last accessed Sept. 27, 2019).

² "The catchall category of 'clerical and other worker[s]' does not apply to corporate officers because there is an explicit exemption of bona fide executives [i.e., employees serving in an executive, managerial or administrative capacity] in its definition." *Auffarth v. Herald Nat'l Bank*, No. 600800/10, 2012 N.Y. Misc. LEXIS 6307, at * 3 (N.Y. Sup. Ct. July 25, 2012).

³ *Pachter v. Bernard Hodes Group, Inc.*, 10 N.Y.3d 609, 615 (2008); *Nornberg v. Thai Magic Co., Inc.*, 10 Misc. 3d 1076(A), at *7 (N.Y. Sup. Ct. 2006).

Notably, Section 191 contains no express right of action to an employee. And NYLL Section 198, the NYLL's remedy section, expressly affords relief for unpaid wages, not for late-paid wages.⁴

Prior to *Vega*, numerous New York federal and state courts have held that there is no private right of action under NYLL Section 191 for purely untimely payments.⁵ While a few courts have entertained/sustained claims made by employees under Section 191, they did not specifically analyze the threshold issue of whether such a claim was, in fact, authorized by the statute.⁶

As for guidance from the applicable regulatory authority, opinions rendered by the New York State Department of Labor on Section 191 do not advise or otherwise suggest that a private cause of action exists for wages paid late but paid nonetheless.

Thus, the consensus was that the only consequence for violating frequency of pay requirements was the possibility of the New York State Department of Labor assessing a penalty. However, that concern was minimal as NYLL Section 218 distinguishes between penalties for the late payment of wages and those for unpaid wages, minimum wage violations, etc. For violations of article six provisions (payment of wages), article 19 (minimum wage act), and certain other specified provisions, NYLL Section 218 states that the commissioner can direct payment of unpaid wages, "liquidated damages in the amount of one hundred percent of unpaid wages," and, for repeat offenders, additional civil penalties. In contrast, for violations "other than an employer's failure to pay wages," which necessarily includes violations of the NYLL's frequency of payment provision, at most, the commissioner can assess a civil penalty (i.e., a \$1,000.00, \$2,000.00, or \$3,000.00 civil penalty for first, second, third, and subsequent violations of NYLL Section 191). Thus, pre-*Vega*, employers feared only a small fine for a frequency of payment violation.

⁴ By its plain terms, Section 198 provides remedies in only three specific scenarios: (1) an enforcement action by the commissioner "on behalf of an employee paid less than the wage to which he or she is entitled under the provisions of this article" or a civil action by an employee "to recover" an "underpayment" of wages due; (2) an action by an employee who is not provided a wage notice upon commencement of employment; and (3) an action by an employee who is not provided accurate wage statements.

⁵ See, e.g., *Holick v. Cellular Sales of N.Y., LLC*, No. 12-cv-584, 2019 U.S. Dist. LEXIS 120309, at *29 (reaffirming prior decision that no private right of action exists under NYLL Section 191); *Hussain v. Pak. Int'l Airlines Corp.*, 2012 U.S. Dist. LEXIS 152254, at *5 (E.D.N.Y. Oct. 23, 2012) ("The NYLL contains no provision for private recovery for violations of its provisions regarding frequency of payment and recordkeeping"); *Hunter v. Planned Bldg. Servs. Inc.*, No. 715053/2017, 2018 N.Y. Misc. LEXIS 2896, at *4 (N.Y. Sup. Ct. June 11, 2018) ("[P]laintiff has no private right of action under NYLL §198 (1-a) for a frequency of payment violation of NYLL §191(1)(a)(i) where there is no claim for unpaid wages.").

⁶ The sole outlier appears to be *Scott v. Whole Foods Mkt. Grp., Inc.*, which explicitly recognized an implied private right of action under Section 191 and held that delay in payment constituted damages per se in cases involving violations of Section 191. No. 18-cv-0086, 2019 U.S. Dist. LEXIS 61726, at *8-12 (E.D.N.Y. April 9, 2019).

The Vega Decision

In a marked departure from New York precedent, the First Department held that NYLL Section 198(1-a) expressly provides a right of action for a violation of NYLL Section 191 (or, alternatively, a private cause of action may be implied) and liquidated damages are available. In so holding, the court reasoned that (i) NYLL Section 198 references a “wage claim” against an employer; (ii) the remedies provided by Section 198(1-a) apply to “violations of article 6,” of which Section 191(1)(a) is a part; (iii) the term “underpayment” can encompass late payments because “underpay” is defined as “to pay less than what is normal or required” and failing to pay wages in compliance with Section 191 is less than what is required. With respect to damages, the court relied on U.S. Supreme Court authority interpreting the Fair Labor Standards Act of 1938 to provide a liquidated damages remedy for the failure to pay the statutory minimum wage on time.

Implications for Employers

From an employer perspective, *Vega* represents a deeply troubling sea change in the law. While the plaintiff in *Vega* was a “manual worker,” a defined, though not insubstantial, category of employees, the court’s rationale suggests that its holding applies to all employees able to assert a frequency of pay claim under Section 191—i.e., all manual workers, railroad workers, commissioned salespersons, and “clerical and other workers” in New York. Under *Vega*, any employee in these categories who experiences any delay in payment can bring a lawsuit, presumably whether or not they have suffered any damage resulting from the delay. Taken to its logical extreme, *Vega* suggests that a large number of New York employees can recover liquidated damages if their paycheck is just one day late. Given its broad scope and low pleading standard, *Vega* could usher in a wave of previously foreclosed litigation.

Because of *Vega*’s significance to employers and employees alike, we expect that the case will be appealed to the New York Court of Appeals, New York’s highest court.

What New York Employers Should Do Now

While *Vega*’s fate is decided, which could be a year or more from now, New York employers should mitigate their exposure (which goes back six years) by ensuring that their covered, non-exempt employees are paid in accordance with NYLL Section 191 and paid timely.

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