



## **DEPARTING EXECUTIVES and the Wage Payment Act**

A primer for employers and departing executives.

**Richard L. Miller II and John Haarlow, Jr.**

**D**eparting executives – rightly or wrongly – often feel that they have not been properly compensated at the time of their departure. Over the past few years, Illinois courts have made it clear that the Illinois Wage Payment and Collections Act<sup>2</sup> is a powerful tool for such individuals. Many employers are surprised to learn of the final wages for which they can be held liable for under the Wage Payment Act. Moreover, a related statute provides for attorneys’ fees for victorious Wage Payment Act claimants.<sup>3</sup> Remaining executives can even be held personally liable for the departing employee’s damages and attorneys’ fees.

Thus, an understanding of this remedy is essential to employers considering changes in executive personnel, departing executives seeking final compensation and attorneys for both.

## DEPARTING EXECUTIVES AND THE ELEMENTS OF A WAGE PAYMENT ACT CLAIM

To establish a typical Wage Payment Act claim, a former employee must show three elements, all of which typically can be established by departing executives. First, the claimant must demonstrate that he or she was an “employee,” *i.e.* an “individual permitted to work by an employer in an occupation.”<sup>4</sup> Courts have held that this definition includes an associate attorney at a law firm,<sup>5</sup> a regional manager,<sup>6</sup> an arbitrage fund manager,<sup>7</sup> a sales account executive,<sup>8</sup> a vice-president,<sup>9</sup> and even a president.<sup>10</sup>

**According to the courts, the Act provides broader relief than that afforded by contract law because it uses the term “employment agreement” rather than “employment contract.”**

Second, the claimant must demonstrate that his or her former employer is an “employer” in Illinois for purposes of the Act, which includes: “any individual, partnership, association, corporation, business trust, employment and labor placement agenc[y] . . . or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.”<sup>11</sup> Therefore, this element of a Wage Payment Act claim is easily met in the vast majority of cases, including those brought by executives.<sup>12</sup>

Third, the claimant must demonstrate that the employer has violated an “agreement” with the departing executive employee by denying the claimant some portion of wages or final compensation.<sup>13</sup>

Strikingly, the “agreement” need *not* be a written employment contract, but may be entirely implicit in the pattern or practice between the employee and employer. In other words, a pattern of payment for past work or payment according to “a demonstrable formula for work done”<sup>14</sup> can establish the terms of an employment agreement.

**“Final Compensation” Covers Many Forms Of Executive Remuneration**  
Pursuant to the Act, a claimant may seek “final compensation,” which is broadly defined as: “wages, salaries, earned commissions, earned bonuses and the monetary equivalent of earned vacation and earned holidays and any other compensation.”<sup>15</sup> Courts hold that “any other compensation” includes *any* compensation provided pursuant to an agreement between employee and employer which is not specifically enumerated in the statute. Consequently,

courts have held that “final compensation” under the Act includes a great many forms of executive compensation, such as bonuses,<sup>16</sup> stock options,<sup>17</sup> vacation pay,<sup>18</sup> severance pay,<sup>19</sup> commissions<sup>20</sup> and pension contributions.<sup>21</sup>

**Vacation pay must be awarded *pro rata*, even when contrary to employer policy.**  
The Act specifically requires that departing employees, including executives, must be paid the monetary equivalent of earned, but unused, paid vacation time. Further, the Act *forbids* an employment agreement or an employment policy which results in the forfeiture of earned vacation upon separation.<sup>22</sup> Courts have interpreted this provision to mean that vacation pay must be awarded *pro rata* as it accrues, even if an employer’s written policy states otherwise.<sup>23</sup> For example, an employee who departs

<sup>1</sup> Richard L. Miller II <rmiller@novackmacey.com> is a partner at Novack and Macey LLP in Chicago, where he concentrates his practice in commercial litigation. John Haarlow, Jr. <jhaarlow@novackmacey.com> is an associate at Novack and Macey LLP. This article is an excerpt from a lengthier article found in the March 2008 issue of the Illinois Bar Journal.

<sup>2</sup> 820 ILCS 115/1 et seq (West 2006) (the “Wage Payment Act” or the “Act”).

<sup>3</sup> Attorneys Fees in Wage Actions Act, 705 ILCS 225/1 (West 2006) (the “Fees Act”).

<sup>4</sup> 820 ILCS 5/1.3.

<sup>5</sup> *Shramuk v Snyder*, 278 Ill App 3d 745, 748S49, 663 NE2d 468, 471 (2d D 1996) (considering attorneys’ fees award under Fees Act).

<sup>6</sup> *Stafford v Puro*, 63 F3d 1436, 1439 (7th Cir 1995).

<sup>7</sup> *Zabinsky v Gelber Group, Inc*, 347 Ill App 3d 243, 246, 807 NE2d 666, 669 (1st D 2004).

<sup>8</sup> *Landers-Scelfo v. Corporate Office Sys, Inc*, 356 Ill App 3d 1060, 1061, 827 NE2d 1051, 1054 (2d D 2005).

<sup>9</sup> *Adams v Catrambone*, 359 F3d 858, 861 (7th Cir 2004); *In re Handy Andy Home Improvement Centers, Inc*, 1997 WL 401583, at \*1 (Bankr N D Ill 1997).

<sup>10</sup> *Sob v Target Marketing Sys, Inc*, 353 Ill App 3d 126, 128, 817 NE2d 1105, 1106 (1st D 2004).

<sup>11</sup> 820 ILCS 115/2.

<sup>12</sup> *Landers-Scelfo* at 1067, 827 NE2d at 1058.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> 820 ILCS 115/2.

<sup>16</sup> *In re Handy Andy* at \*5; *Zabinsky* at 248, 807 NE2d at 670.

<sup>17</sup> *Kim v Citigroup, Inc*, 368 Ill App 3d 298, 306, 856 NE2d 639, 646 (1st D 2006).

<sup>18</sup> *Golden Bear Family Restaurants v Murray*, 144 Ill App 3d 616, 626, 494 NE2d 581, 589 (1st D 1986).

<sup>19</sup> *In re Handy Andy* at \*5; *Kulins v Malco, a Microdot Co*, 121 Ill App 3d 520, 526, 459 NE2d 1038, 1038 (5th D 1991).

<sup>20</sup> *Landers-Scelfo* at 1068, 827 NE2d at 1059S60.

<sup>21</sup> *Shramuk*, at 750S51, 663 NE2d at 472.

<sup>22</sup> 820 ILCS 115/5.

<sup>23</sup> *Arrez v Kelly Servs, Inc*, — F Supp 2d —, 2007 WL 3170118, \*3-\*4 (N D Ill 2007); *Prettyman v Commonwealth Edison Co.*, 273 Ill App 3d 1090, 1093, 653 NE2d 65, 68 (1st D 1995).

ten months into the year and uses none of his or her vacation time must be paid for his or her *pro rata* share – ten months worth – of his or her total vacation time.<sup>24</sup>

### **Earned bonus is sometimes awarded *pro rata* despite an agreement otherwise.**

In contrast to earned vacation, the Act does not expressly forbid an employment contract or policy which results in the forfeiture of *earned bonus*. But at least one court has treated earned bonus like earned vacation. Specifically, *Camillo v. Wal-Mart Stores, Inc.* held that if a bonus is provided for by agreement, it must be awarded *pro rata*, and an employer's policy may not require its forfeit.<sup>25</sup> This holding has a significant impact on executives, especially those who are primarily compensated by bonus payments. However, courts have been reluctant to extend *Camillo v. Wal-Mart*, distinguishing it most frequently

## **A corporate officer or agent can sometimes be held jointly and severally liable with the employer for the compensation and attorneys' fees awarded to a departing employee.**

because the plaintiff was not terminated or there was no agreement providing for a bonus.<sup>26</sup>

Illinois courts have not fully explored the extent to which an agreement exists regarding a bonus, but it should be recalled that, in the context of the Act, an "agreement" requires only a "mutual assent" of the parties.<sup>27</sup> In all events, departing executives may be entitled to various types of damages under the Act. In addition to stock options, vacation pay, bonus, severance and commissions which have been held recoverable, the courts' adoption of a broad definition for compensation suggests that various kinds of other executive compensation, such as shared profits, *may* be recoverable. Still, it has been held that where an executive employee elects to purchase stock options

with a two year vesting period with part of his or her paycheck, it is not improper for the employer to withhold the unvested stock options when the employee departs.<sup>28</sup>

### **Corporate Officers May Be Held Personally Liable For Damages Under The Act**

A corporate officer or agent can be held jointly and severally liable, with the employer,<sup>29</sup> for the compensation and attorneys' fees awarded to a departing executive or other employee under certain circumstances.<sup>30</sup> The Act states that "[a]ny officers of a corporation or agents of an employer who *knowingly permit* such employer to violate the provisions of this Act shall be deemed to be employers of the employees of the corporation."<sup>31</sup>

This requirement can be astonishingly easy to meet.<sup>32</sup> Indeed, case law indicates that, in order to incur *personal* liability, a corpo-

rate officer located in Illinois need only: (i) have knowledge of the compensation arrangement between the departing executive and the employer; and (ii) knowingly permit the corporation to wrongfully deny some amount of compensation by participating in the decision to do so.<sup>33</sup>

The Illinois Supreme Court has stated, however, that personal liability is limited to "individual decision makers" who knowingly permit violations of the Act.<sup>34</sup> In other words, according to one federal court, officers must be in a position to affect the decision to withhold the bonus to be held personally liable.<sup>35</sup>

### **Waivers May Not Protect Employers**

Signed waivers obtained at the time of termination may *not* protect an employer from a Wage Payment Act claim. Section

<sup>24</sup> *Golden Bear* at 625, 494 NE2d at 587.

<sup>25</sup> *Camillo v Wal-Mart Stores, Inc.*, 221 Ill App 3d 614, 621S22, 582 NE2d 729, 734 (5th D 1991) (employee entitled to promised bonus for eleven months of work where separation occurred one month before bonus vested according to employer policy).

<sup>26</sup> For example, *In re Comdisco, Inc.*, 2003 WL 685645, \*6 (ND Ill 2003).

<sup>27</sup> *But see Stark v PPM Am, Inc.*, 2002 WL 31155083, \*9 (ND Ill 2002) (emphasizing the need to establish a "contractual" right to the bonus, despite broader language of the Act). To date, it appears that the *Stark* court's more formal approach has not been followed.

<sup>28</sup> See generally *Kim*; see also 820 ILCS 115/9.

<sup>29</sup> *Catania v Local 4250/5050 of the Communications Workers of Am.*, 359 Ill App 3d 718, 728S29, 834 NE2d 966, 975S76 (1st D 2005).

<sup>30</sup> *Andrews v Kowa Printing Corp.*, 217 Ill 2d 101, 109, 838 NE 2d 894, 899S900 (2005); *Stafford* at 1441; *Zabinsky* at 250, 807 NE2d at 672.

<sup>31</sup> 820 ILCS 115/13 (emphasis added).

<sup>32</sup> *Stafford* at 1440S41.

<sup>33</sup> *Andrews* at 109, 838 NE 2d at 899S900; *Stafford* at 1440S41; *Zabinsky* at 249S50, 807 NE2d at 671S72.

<sup>34</sup> *Andrews* at 109, 838 NE 2d at 899S900.

<sup>35</sup> *Corso v Suburban Bank & Trust Co.*, 2006 WL 418655, \*8 (ND Ill 2006).

9 of the Act states: “The acceptance by an employee of a disputed paycheck shall not constitute a release as to the balance of his claim and any release or restrictive endorsement required by an employer as a condition to payment shall be a violation of this Act and shall be void.”<sup>26</sup>

Further, two federal courts have held that releases under the Act are void as a matter of public policy, without even considering Section 9.<sup>37</sup> Consistent therewith, a departing executive may be able to pursue claims under the Act even if he or she signed a release.

### Attorneys’ Fees For Wage Payment Act Claims

The Fees Act, which is separate from the Wage Payment Act, provides successful Wage Payment Act claimants with a means to recover their attorneys’ fees if certain conditions are met. The Fees Act states that if a “mechanic, artisan, miner, laborer, servant or employee” brings a successful Wage Payment Act claim after having demanded, in writing: (a) a “sum” not exceeding the amount awarded by the judge or jury; (b) at least *three days* before the action was filed; (c) attorneys’ fees shall be awarded.<sup>38</sup>

Courts interpret the Fees Act strictly because it is in derogation of the common law.<sup>39</sup> Hence, the Fees Act must be “complied with in every particular to entitle the plaintiff to recover attorney fees.”<sup>40</sup> Failing to write a letter or otherwise notify the employer in writing of the specific amount of the claim prior to filing the action is fatal.<sup>41</sup>

Likewise, demanding more than the amount ultimately awarded dooms a claim for attorneys’ fees.<sup>42</sup>

While there are differences in the way courts apply the Fees Act, nearly all executives are likely to be covered regardless of where in Illinois their case is filed.<sup>43</sup> This fact, combined with the Fees Act’s *mandatory* requirement that fees be awarded when a plaintiff has complied with it, means that executives have a significant weapon at their disposal if they are not properly compensated when terminated.

---

*This portion of the authors’ article is reprinted with the permission of the Illinois Bar Journal where it can be found at Vol. 96 #3, March 2008. Copyright by the Illinois State Bar Association, on the Web at [www.isba.org](http://www.isba.org).*

---

## Appellate Court Affirms Summary Judgment in Declaratory Judgment Action

Following a summary judgment victory in the Circuit Court of Cook County on their client’s declaratory judgment action, Novack and Macey attorneys Stephen Novack, P. Andrew Fleming, and Joseph S. Nacca recently obtained an opinion affirming that judgment from the Illinois Appellate Court, First District.

Representing the plaintiff – an upscale condominium developer – Novack and Macey sought a declaratory judgment stating that its client had not entered into a contract with a prospective purchaser for the sale of a condominium. The prospective purchaser

then counterclaimed seeking to enforce its alleged contract to purchase the condominium. Following substantial briefing and oral argument, the Circuit Court awarded plaintiff summary judgment on all claims, finding that no contract existed for the sale and purchase of the condominium at issue.

The prospective purchaser appealed the Circuit Court’s decision. On December 27, 2007, the Appellate Court affirmed the Circuit Court’s ruling. The victory cleared title to the condominium at issue and allowed Novack and Macey’s client to close on its sale of the condominium to another purchaser.

<sup>36</sup> 820 ILCS 115/9.

<sup>37</sup> *O’Brien v Encotech Constr Serv*, 183 F Supp 2d 1047, 1049 (ND Ill 2002); *Ladegaard v Hard Rock Concrete Cutters, Inc*, 2001 WL 1403007, \*6 (ND Ill 2001).

<sup>38</sup> 705 ILCS 225/1.

<sup>39</sup> *Anderson at 412*, 818 NE2d at 750S51.

<sup>40</sup> *Catania at 725*, 834 NE2d at 974.

<sup>41</sup> *Zabinsky at 251*, 807 NE2d at 673 (filing a written wage claim with the Department of Labor is sufficient to satisfy the three day notice requirement under the Fees Act); *Schackleton v Federal Signal Corp*, 196 Ill App 3d 437, 446, 554 NE2d 244, 251 (1st D 1989) (same).

<sup>42</sup> *Anderson at 414S15*, 818 NE2d at 752.

<sup>43</sup> Compare *Anderson at 413*, 818 NE2d at 743 with *Landers-Scelfo at 1071*, 827 NE2d at 1062.

**Novack and Macey Attorneys  
Are Teachers Too:**

Name partner Eric N. Macey and partners Karen L. Levine and Richard L. Miller II are going back to school! All three of them teach law school at Northwestern University as adjunct professors, assisting Professor Steve Lubet in his Trial Advocacy course in the Fall semester of each year. It is the most popular class at Northwestern, and Professor Lubet picks top trial attorneys in Chicago to assist him in the course. Karen Levine adds, "It's great to give back, especially to your law school alma mater, and I actually learn as much from the students as they get from me."

**Founding Partner Eric Macey Heads  
A National Initiative On College Access:**

Partner Eric N. Macey is the Chairman of The Posse Foundation in Chicago and a member of its National Board. The Posse Foundation identifies public high school students with extraordinary academic and leadership potential who may be overlooked by traditional college selection processes. The Foundation extends to these students the opportunity to pursue personal and academic excellence by placing them in supportive, multicultural teams ("Posses") of 10 students. The Foundation's partner universities award Posse Scholars four-year, full tuition leadership scholarships. Incredibly, over 92% of Posse's scholars graduate.

**Copyright Trial Leads To Favorable Settlement**

In March 2008, Novack and Macey partners Mitchell L. Marinello and Richard L. Miller II tried a copyright infringement case involving hundreds of fabric designs in the Northern District of Illinois before the Honorable David H. Coar.

The case was favorably settled during the first day of the trial after Marinello had delivered his opening argument and while Miller was examining the firm's key witness. The case also served as a catalyst for resolving two other copyright infringement cases that were pending between related parties in federal court in New York.

**Novack and Macey  
Swiftly Defeats  
Subrogation Lawsuit  
Against The State Of Illinois**

Mitchell L. Marinello and Alison T. Schwartz, acting as special counsel to the Capital Development Board of the State of Illinois, obtained a complete victory in a lawsuit asserted against the State by Westchester Fire Insurance Company.

The lawsuit centered on the construction of a library building at Chicago State University. The general contractor for the project obtained a builder's risk policy from Westchester. In May 2004, a severe rainstorm damaged the Library while it was under construction. Westchester paid \$600,000 to the general contractor under its builder's risk policy and then filed suit to recover the \$600,000 from the State whom it blamed for permitting the water damage to occur.

The State moved for summary judgment on the grounds that Westchester's claim was barred by the anti-subrogation rule and also by a waiver that was contained in the general contractor's agreement with the State. Mr. Marinello and Ms. Schwartz drafted the State's summary judgment motion.

On January 31, 2008, in response to the State's summary judgment motion, Westchester voluntarily dismissed its lawsuit.

**Partner John Shonkwiler and Associate Molly DiRago published "Trademark Infringement/Dilution" for the 2008 Illinois Institute for Continuing Legal Education Illinois Causes of Action-Elements, Forms & Winning Tips publication.**

## ABOUT THE FIRM

Novack and Macey LLP is a litigation firm that concentrates in complex commercial matters, including matters involving banking, contracts, class actions, creditors' rights, energy, RICO, securities, business torts, real estate, partnerships and close corporations, employment, unfair competition and antitrust, insurance coverage and environmental issues.

Novack and Macey LLP prides itself on being creative while providing sound, practical and cost effective advice and representation. Please contact us if you have a legal problem that you wish to discuss. *The Litigation Review* is a periodic publication of Novack and Macey LLP, and addresses legal issues that impact commercial litigation. The publication is edited by Mitchell L. Marinello, Monte L. Mann and Richard L. Miller II.

We are interested in providing our newsletter to as many readers as would find the information useful. Please let us know of any of your colleagues who would like to receive *The Litigation Review*. Such requests and any comments may be sent to the editor at: [mmarinello@novackmacey.com](mailto:mmarinello@novackmacey.com) or [mmann@novackmacey.com](mailto:mmann@novackmacey.com).

Issues of *The Litigation Review* may be downloaded from our web site, [www.novackmacey.com](http://www.novackmacey.com), using Adobe Acrobat.

Novack and Macey LLP provides this newsletter for informational purposes only. The information contained in this newsletter is not legal advice, and it is not intended to and does not create any attorney-client relationship with the recipient. Readers should consult with a lawyer before acting in reliance on any such information. Although Novack and Macey LLP has attempted to make the information in this newsletter as timely and as accurate as possible, there may be inaccuracies due to, among other things, the fact that laws, and their interpretations, constantly change and vary from jurisdiction to jurisdiction. Novack and Macey LLP assumes no responsibility, and expressly disclaims all liability, for errors or omissions in, and use or interpretation by others of, any information contained in this newsletter.

## novack ▶ macey

100 North Riverside Plaza | Chicago, IL 60606-1501

T 312 419 6900

F 312 419 6928

[www.novackmacey.com](http://www.novackmacey.com)

**If you would prefer to receive copies of our newsletter electronically,  
please send your contact information  
to Caroline Berger, Marketing Coordinator, at [cberger@novackmacey.com](mailto:cberger@novackmacey.com).**