Advisory

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When is a Bonus a "Wage"?

In a relatively brief span of twenty months, the Supreme Court of Connecticut has issued three opinions interpreting Connecticut's wage payment statute, codified at Conn. Gen. Stat. § 31-72 ("Section 31-72"). That statute creates a cause of action in favor of an employee who is not paid his or her earned "wages"—statutorily defined as "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," Conn. Gen. Stat. § 31-71a(3)—and raises the specter of an award that includes not only the outstanding "wages" but double damages and attorneys' fees as well. The statute's seemingly straightforward definition of "wages" has spawned much litigation between employers and employees. These disputes often turn on whether the compensation contemplated by a particular bonus program constitutes a form of "wages." The recent spate of decisions issued by Connecticut's Supreme Court in Section 31-72 cases has done much to clarify this heretofore divisive area of Connecticut employment law.

The first of these decisions came in Weems v. Citigroup, Inc., 289 Conn. 769, 961 A.2d 349 (2008), and was a boon for employers. The Weems case was brought as a class action on behalf of participants in certain incentive compensation programs that paid portions of discretionary bonuses in the form of restricted stock. Similar suits were filed in other states, including California and Massachusetts, without success. The plaintiffs fared no better here as Connecticut's Supreme Court rejected their contention that the bonuses at issue constituted "wages." Relying principally on New York precedent, the Court adopted the sweeping rule that "bonuses that are awarded solely on a discretionary basis, and are not linked to the ascertainable efforts of the particular employee, are not wages under § 31-71a(3)." From there, the Court went on to hold that because "the bonus awards are tied to subjective factors such as diversity within a branch, and the profitability of the particular branches, which are factors not entirely predictable or within the control of the specific employee. . .the wage statutes are inapplicable to these particular claims."

Similar reasoning was behind the Court's rejection of a bonus claim in Ziotas v. Reardon Law Firm, P.C., 296 Conn. 579, __ A.2d __ (2010). The plaintiff in that case was an associate attorney who claimed the law firm by whom he had been employed violated Section 31-72 in failing to pay him his annual bonus after he left the firm some two months before bonuses were customarily paid. Ziotas presented an issue left open in Weems, to wit, whether a bonus that was contractually mandated but discretionary as to amount constituted "wages" within the meaning of the wage payment statutes. Resolving this issue in favor of the employer law firm, the Court explained that "the wording of the statute, in expressly linking earnings to an employee's labor or services personally rendered, contemplates a more direct relationship between an employee's own performance and the compensation to which that employee is entitled. Discretionary additional remuneration, as a share in a reward to all employees for the success of the employer's entrepreneurship, falls outside the protection of the statute.... Although an employee may have a justified expectation of additional compensation when the employer is contractually obligated to give a bonus to the employee and any contractual conditions, such as the employer's annual profitability, are met, the relationship between performance and compensation is still attenuated if the amount of the bonus is discretionary and dependent on factors other than the employee's performance."

The ink on the Ziotas decision hardly had time to dry before Connecticut's high court took up Section 31-72 again in Association Resources, Inc. v. Wall, 298 Conn. 145, __ A.2d __ (2010). There, the Court applied the teaching of Ziotas and Weems but determined that, under the particular facts involved, a bonus tied to profitability came within the statutory definition of "wages." Affirming a judgment in favor of a high-level executive in charge of a division (the Digital Group), the Court reasoned that, "Under the employment agreement, the defendant was contractually bound to pay the bonus to the plaintiff. Additionally, the amount of the bonus, which derived from the net profitability

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of the Digital Group after expenses, was nondiscretionary because it was subject to calculation by applying a contractually mandated, precise formula set forth in the ... employment agreement." The Court distinguished Weems by focusing on "the nature of the plaintiff's employment as a senior level, executive manager of one of the defendant's divisions, with the bonus tied directly to the success of that specific division, rather than the performance of the defendant as a whole." Thus, "the necessary link between the plaintiff's efforts and the mandated bonus" was established by "the plaintiff's execution of his management responsibilities vis-á-vis the employees and other resources of the Digital Group in order to accomplish the profitability goals of that particular division." Responding to the employer's suggestion that no such link can be found to exist where a bonus is based on the productivity of a business unit as a whole, the Court opined that "to conclude that the bonus is not a wage because not every dollar earned by the Digital Group was directly attributable to the plaintiff's labors would be to ignore the realities of his executive-level managerial position, which was to be directly and solely responsible for the profitability of that division."

In simplest terms, the lesson of the Connecticut Supreme Court's recent decisions in Weems, Ziotas, and Association Resources is that the greater the amount of discretion reserved by the employer and the less formulaic the means of calculation, the more likely a bonus is to fall outside the statutory definition of "wages," such that a payment dispute will not implicate Section 31-72's double damages and attorneys' fees remedies. And when those enhanced remedies are not in the picture, bonus claims become far less attractive to pursue in the first instance.

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