

THE WAGE AND HOUR ACT IS NOT JUST FOR BLUE COLLAR WORKERS: EXECUTIVES AND HIGHLY COMPENSATED EMPLOYEES ALSO HAVE THE RIGHT TO RECOVER THEIR EARNED BONUSES AND VESTED BENEFITS

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I have represented both employers and employees in many disputes involving compensation issues. In the wake of an employer's termination of a highly compensated employee, some employers view the once-valued employee's skills and market knowledge as a threat. Potentially, this is one "business" justification some employers use to support the pretextual grounds they provided to the employee for failing to pay earned compensation. Such pretextual grounds can range from perceived poor job performance, a drop in revenues, a violation of company policy, to personality conflicts. In general, the employer's rationale for the "forfeiture"² of an employee's earned bonus or other vested incentive compensation does not excuse the failure to pay an employee.³ An employer must pay the employee's earned compensation even if the employee quits.⁴

In a typical compensation dispute,⁵ the employee can wield a powerful hammer against their employer: the North Carolina Wage and Hour Act (the "ACT").⁶ Over the years, I

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² As more fully explained in this article, there are circumstances where an employee can contractually agree to waive certain types of compensation upon termination.

³ There are exceptions. For example, where an employee embezzles money from an employer and the employer reported the crime, the employer can potentially set off the amount embezzled from the employee's earned wages. By way of another example, for certain types of wages, written policies or agreements can define when a "wage" is earned. Therefore, bonuses, under certain circumstances, that employees would receive if still employed, could potentially be forfeited upon termination. However, where only the administrative act of paying the bonus remains, the employer cannot avoid the obligation to pay the bonus if the sole grounds for termination was to avoid payment.

⁴ As discussed in this article, it is possible for the employer to waive certain types of compensation (e.g. a commission) through a written agreement or policy.

⁵ Different areas of the law apply to disputes involving comprehensive employee benefit plans. This article does not address the application of such laws, including the Employee Retirement Income Security Act ("ERISA").

⁶ This article contains a high level summary of common questions or issues that may arise in a wage dispute. The particular application of the Act depends upon the specific circumstances of the dispute; therefore, the

have represented numerous highly compensated employees, ranging from former bank executives to officers of closely held businesses, in their successful recovery of compensation that their employers either deemed “forfeited” or attempted to retroactively eliminate. This article is not intended to create the impression that I believe employers across North Carolina routinely fail to pay their employees. Rather, the opposite is true. In my opinion, the vast majority of employers properly terminate employment relationships with due regard to their employees’ rights to earned compensation.

I. **What are the employee’s potential remedies where the employer fails to pay earned wages?**

- **The employee can recover their earned wages, liquidated damages in an equal amount, and attorneys’ fees. Potentially, the employee can hold certain individuals liable. Employers are required to pay the undisputed portion of the earned wages**

An employee, regardless of job type or level of employment, from street sweeper to chief executive officer, has the right to receive their earned “wages.” If an employer violates the Act by failing to pay, the employee can recover his earned wages. In addition, he may recover liquidated damages in an equal amount, interest at the legal rate on the amount awarded, and his attorneys’ fees. See N.C. Gen. Stat. § 95-25.22. In other words, the employer may be liable for double the amount of wages, plus interest and attorneys’ fees.

The Act provides the financially harmed employee with at least three other remedies. First, individuals who act “directly or indirectly in the interest of the employer” are deemed the “employer.” See N.C. Gen. Stat. § 95-25.2. Therefore, individual liability can potentially extend to an employer’s personnel who made the decision to not pay an employee.⁷ This potential for individual liability should incentivize prompt payment of earned wages.

Second, if a portion of the compensation is in dispute, the employer must immediately pay the employee the undisputed portion. See N.C. Gen. Stat. § 95-25.7A. The failure to pay the undisputed portion is in and of itself a violation of the Act that would likely bolster an employee’s right to recover liquidated damages and attorneys’ fees.

contents of this article should not be relied upon for legal advice. Rather, to the extent a reader of this article is involved in a compensation dispute, he, or she, should consult with an attorney experienced in employment law.

⁷ The corporate structure of the employer could potentially limit individual liability.

Third, if an employer requires that the employee sign a release or waiver in order to receive a partial payment of wages, the release or waiver is void and unenforceable. This rule prevents an employer from using an employee's financial duress to extort an agreement to accept a partial payment.

Given the remedies available, competent counsel for the employee can wield the Act as a stiff bat to bludgeon employers that fail to pay earned compensation.

II. Does the North Carolina Wage and Hour Act only apply to certain types of compensation?

- **The North Carolina Wage and Hour Act applies to almost every employee compensation arrangement.**

Many employees believe that their "wages" only consist of their salary or hourly compensation. However, the Act defines "wages" broadly to include salary, bonuses, commissions, severance pay, vacation pay, and any "compensation for labor or services rendered by an employee." See N.C. Gen. Stat. § 95-25.6. A "wage" includes almost any form of compensation promised "when the employer has a policy or a practice of making such payments." N.C. Gen. Stat. § 95-25.2(16). Because the Act does not expressly limit what constitutes a "wage," North Carolina Courts have held that any remuneration is a "wage" under the Act. See *Murphy v. First Union Capital Markets Corp.*, 152 N.C. App. 205,208-209,567 S.E.2d 189 (2002) (bonus paid in form of restricted stock was a "wage," despite fact that it had not vested, because state statute specifically defined "wages" to include "bonuses").

A. Compensation and wage related benefits

Compensation packages routinely contain traditional "wages" along with other "wage-related" benefits. With respect to "wage-related benefits, such as vacation pay, the employer can choose to have either no policy at all or to have any policy of his own choosing." *Narron v. Hardee's Food Sys. Inc.*, 75 N.C. App. 579, 582,331 S.E.2d 205,207 (1985) (citing N.C. Gen Stat. § 95-25.12). Employers and employees have broad discretion to agree upon the type of compensation, as well as how the compensation program is organized. Compensation can take several forms, such as bonuses, commissions, paid time off, vested stock options, unvested stock options, disability payments, sick pay and vacation pay. With the exception of statutory requirements to pay at least the current minimum wage and overtime, the employer

is free to offer the employee any wage he desires. See *Id.* The Act also allows employees and employers extensive leeway in determining the form of wages.

1. Equity incentive plans such as stock options

Under certain circumstances, an employee's rights to stock options can be considered "wages" under the Act. For example, in *Murphy*, 152 N.C. App. At 208-209, the Court found that a bank executive's bonus paid in the form of restricted stock was a "wage," even though it had not vested, because the Act specifically defined "wages" to include "bonuses." Understand that stock options and restricted stock are not necessarily "wages." They can be. Whether or not stock options, or other wage related benefits, are "wages," in large part depends upon the employee's agreement with the employer. If the employment agreement treats an award of restricted stock, or stock options as an earned bonus, then the stock options or restricted stock are likely wages.

2. Bonuses and commissions

A bonus is a promised amount that an employer has a practice of paying. N.C. Gen. Stat. § 95-25.2(16). A bonus policy need not be in writing to be enforceable. See, e.g., *McCullough v. BB&T Co.*, 136 N.C. App. 340, 349, 524 S.E.2d 569, 575 (2000); see also 13 N.C.A.C. 12.0805 (stating that the term "promised wages ...includes wages promised in accordance with an unwritten policy or practice with regard to the wages"). The North Carolina Administrative Code (NCAC) contains some general and specific rules governing the payment of bonuses and commissions. *Buckner v. UPS*, 2010 U.S. Dist. LEXIS 74102 (E.D.N.C. July 21, 2010); see also 13 N.C.A.C. 12.0307. In essence, those rules generally provide that the employer must pay all earned bonuses. While the employer can change its bonus policies to apply to an employee's efforts going forward, it cannot take away a bonus that the employee earned in the past. The application of those rules depends upon the compensation arrangement and the content of any written notices directed to the employee. However, in general, such a written notice must be clear and can only apply to an employee's future efforts.

B. Can an employer retroactively change an employee's compensation without notice?

- **No. The employer must provide notice.**

An employer should carefully consider how, and when, it either modifies an employee's compensation agreement, or introduces an altogether new compensation arrangement. Unilateral changes to compensation can affect employees who have existing rights to bonuses or other forms of wages. Once the employee earns his wages or benefits, the employer is prevented from rescinding them; however, where an employer provides written notification to the employee of the conditions for loss of certain benefits (e.g. commissions, bonuses, vacation pay, etc.) in advance of the earning of the benefit, the employee can lawfully waive his right to the benefit.

1. What if the employer's notice of a change in compensation is confusing?

- **The employer's notice of a change in compensation must be clear. If not, the employee may be entitled to compensation based on the original arrangement.**

The Act places the burden on the employer to communicate in writing any changes in compensation benefits. For example, N.C. Gen. Stat. § 95-25.13 provides that every employer shall:

- (1) Notify its employees, orally or in writing at the time of hiring, of the promised wages and the day and place for payment;
- (2) Make available to its employees, in writing or through a posted notice maintained in a place accessible to its employees, employment practices and policies with regard to promised wages;
- (3) Notify employees, in writing or through a posted notice maintained in a place accessible to its employees, at least 24 hours prior to any changes in promised wages.[...]

See N.C. Gen. Stat. § 95-25.13 (underscore added). Our courts have construed this statute to allow an employer to make changes, but the changes cannot be retroactive. *McCullough v. Branch Banking & Tr. Co.*, 136 N.C. App. 340, 349, 524 S.E.2d 569, 575 (2000).

Before an employee has earned a bonus under an existing employer's policy or practice, the employer can eliminate the employee's right to a bonus by providing a clear

written notice of the change in policy to the employee. A “notification that causes forfeiture of a bonus is not sufficient if it does not specify ‘the conditions for loss or forfeiture.’” *Mancinelli v. Momentum Research, Inc.*, 2012 NCBC 4 (N.C. Super. Ct. 2012). Furthermore, any ambiguity in a purported notice must be resolved in favor of the employee. Ambiguous policies and practices relating to bonuses and commissions shall be construed against the employer and in favor of the employees. Placing the burden of clarity in communications on the employer makes sense because the employer is traditionally more sophisticated than the employee and is in a better position to specify the terms of compensation. However, both employers and employees benefit from the written-notice requirement as it eliminates the risk of a “he said, she said” swearing contest in litigation.

2. How do unique compensation arrangements for particular employees affect the employer’s obligation to provide notice?

- **The employer’s notice of a change in the structure of a bonus plan must target the affected employees.**

An employer must tailor any notice of its modifications of its bonus plan to the employee affected by the modification. See *Arndt v. First Union Nat’l Bank*, 170 N.C. App. 518, 613 S.E.2d 274 (2005) (because the employee’s bonus and compensation structure was unique to him and different from the generic plans applicable to defendant’s other employees, the notices the employer provided in accordance with the Act did not apply to the employee). The Act not only requires that the employer provide a clear notice to the correct employee, but also that the employer take into consideration the complexity of the compensation arrangement with the employee. For example, a generic notice to all employees does not necessarily bind the executive who has a different compensation arrangement. After all, the executive whose past bonus was driven by the profits and losses of the department he managed would not expect a general notice that concerned annual bonuses for all employees in his department to apply to him.

C. When is a wage earned?

- **A wage is earned when the employee has performed the work required to trigger the employer’s payment obligation.**

I have represented several clients in disputes over when the employee’s compensation was “earned.” In my experience, issues surrounding whether the compensation was “earned”

arise more often than not in either commission based arrangements, or bonuses tied to profits. In general, a wage is not “earned” until the employee has actually performed all of the work necessary to be entitled to the claimed wage. See *Narron*, 75 N.C. App. at 583. Once the employee has **earned** the wages and benefits, the employer is prevented from rescinding them. *Kornegay v. Aspen Asset Grp., LLC*, 204 N.C. App. 213, 693 S.E.2d 723 (2010); see also N.C. Gen. Stat. § 95-25.7.

In determining what an employee’s promised wage is and what work an employee must perform to earn that wage, our courts first look to the applicable provisions of the employment agreement. If the employment agreement is not in writing, or is ambiguous, our courts will then look to the intent and actions of the parties. Ambiguous policies and practices relating to bonuses and commissions are construed against the employer and in favor of the employees. *Kornegay v. Aspen Asset Grp., LLC*, 204 N.C. App. 213, 693 S.E.2d 723, 735 (2010). Accordingly, in a compensation dispute, the cards are stacked slightly in favor of the employee. The employer bears the burden of clearly communicating its compensation arrangement to its employees. If the employer fails to do so, then an employee’s reasonable interpretation of the compensation arrangement could prevail.

D. What if the compensation arrangement is not in writing?

- **The pattern or practice of paying a bonus may establish the compensation due.**

When the compensation arrangement is not in writing, or when there is no clear evidence that defines the employer’s payment practice, the payment practices of the employer can establish what the employee is owed. The Act provides that a “wage” includes “bonuses, and other amounts promised when the employer has a **policy or a practice** of making such payments.” N.C. Gen. Stat. § 95-25.2 (16). When there is no written contract, and the employer and employee disagree on the terms of the compensation arrangements, extrinsic evidence, such as the parties’ course of dealings, may be relied upon to determine the terms of the alleged contract, the meaning of the terms, and the intention of the parties. *Fulk v. Piedmont Music Center*, 138 N.C. App. 425, 430-31, 531 S.E.2d 476, 479 (2000). This means that if there is a legitimate difference of opinion about whether an employer is obligated to pay a bonus, the manner and method used by the employer to pay bonuses in the past can be used by the employee to demonstrate he is owed wages in the present.

E. How are wage related benefits calculated?

- **If an obligation to pay compensation exists, the employee may use a reasonable method to arrive at the wages owed.**

“[W]ages based on bonuses, commissions, or other forms of compensation” are required to be “paid on the first regular payday after the amount of bonuses becomes calculable when a separation occurs.” N.C. Gen Stat. §95-25.7 (underscore added). The term “calculable” is not defined in the Act. An employee in a “wage” dispute is not required to arrive at an exact calculation of what the employer owes. The employee need only employ a reasonable method to arrive at a reasonable number. *Morris v. Scenera Research, LLC*, 747 S.E.2d 362 (N.C. App. 2013). If there is a legitimate factual dispute over the calculation of the “wage,” the jury can provide the answer.

III. CONCLUSION

Highly compensated executives that are faced with an employer that reneges on its agreement to pay compensation has the Act on his, or her, side. An employer that refuses to pay an employee’s earned wages takes a significant risk that it could end up paying the employee much more than what it originally promised. The employer stands in the best position to mitigate its risk by providing clear compensation metrics and policies to the employee. Ambiguity in compensation arrangements can potentially lead to a wage and hour claim. Under such circumstances, the Act favors the executive’s right to recover his, or her, unpaid wages because the burden of clearly memorializing and communicating compensation terms rests on the employer’s shoulders.