

NY Pay Frequency Ruling May Expand Employer Liability

By **Leni Battaglia and Melissa Rodriguez** (October 4, 2019, 4:02 PM EDT)

The First Judicial Department of New York's Appellate Division, issued a significant wage-and-hour decision on Sept. 10 that will require employers to reevaluate their frequency-of-pay practices and policies. In *Vega v. CM & Associates Construction Management LLC*[1], the Appellate Division held that manual workers who were paid in full, but on a biweekly or later basis, had a private right of action and could recover liquidated damages because their employer failed to pay them on a weekly basis, as required under the New York Labor Law.



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Frequency of Pay and Manual Workers Under New York Law

Labor Law Section 191(1)(a) requires that manual workers be "paid weekly and not later than seven calendar days after the end of the week in which wages are earned."

The term manual worker is defined under New York Labor Law as "a mechanic, workingman or laborer." Its statutory definition and the New York Department of Labor's interpretation of the statute extends beyond what the general public might consider to be a manual worker to generally include individuals who spend more than 25% of their working time engaged in physical labor. Additionally, the department interprets physical labor to broadly include multiple physical tasks performed by employees. These tasks do not have to be strenuous or taxing.



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By way of example, the statute makes clear that construction workers and handymen are considered manual workers. Additionally, the department has taken the position that workers who engage in supplementary physical activity as part of their job duties — such as barbers, hairdressers, chauffeurs and positions that require the worker to do "light to medium lifting and carrying of objects" — are also manual workers under New York's frequency-of-pay requirements and, therefore, must be paid weekly.

The Vega Decision

The plaintiff, Irma Vega, filed a class action complaint alleging that she and all similarly situated manual workers were paid on at least a biweekly basis in violation of the New York Labor Law. Vega was a construction worker, and it was undisputed that she was a manual worker under the law and was entitled to payments on a weekly basis. It was unclear, however, whether she had a private cause of

action under the frequency-of-pay statute and if so, whether she was entitled to damages because she had already been paid in full by her employer, albeit approximately one week later than required on two cycles per month.

The employer argued that the statutory framework did not permit an employee to bring a private cause of action against it under the New York Labor Law's frequency-of-pay provisions. Rather, the employer argued, an employee could only bring a claim for underpayment or nonpayment of wages — not late payment. Further, the employer argued that even if there was a cognizable private cause of action, it could not be subject to liability because the employer had cured any violation by paying the employees in full before commencement of the action.

Private Cause of Action

Contrary to prior court decisions, the appellate court in Vega found that an employee who was paid wages in full, albeit late, can maintain a private cause of action against his/her employer. Generally, before Vega, courts had found that the New York Labor Law did not provide plaintiff-employees with a private cause of action under the frequency-of-payment provision where the employees did not allege underpayment or nonpayment of wages. Stated differently, employees who were not timely paid were not entitled to bring a private cause of action where the employer already paid the employee all compensation owed.

While the Appellate Division acknowledged that the New York Labor Law does not expressly authorize a private cause of action for frequency-of-pay violations, it stated that a remedy may be implied where "recognition of a private right of action would promote the legislative purpose of the statute and the creation of such a right would be consistent with the legislative scheme." According to the court, allowing Vega to bring a lawsuit for a clear violation of the frequency-of-pay law promotes the legislative purpose of the law and protects workers' rights — a primary goal of the New York Labor Law.

Damages

The Appellate Division also found that full payment prior to the commencement of the action did not "eviscerate the employee's statutory remedies." Instead, it applied the liquidated damages analysis utilized under the federal Fair Labor Standards Act and held that employees are entitled to liquidated damages as a remedy for untimely payment of wages, in addition to the complete nonpayment or partial payment.

Practical Implications

Whereas employers previously argued that employees who were not timely paid as provided by the New York Labor Law are not entitled to bring a private cause of action and cannot recover damages, because the employer already paid the employee all compensation owed, the Vega decision recognizes the availability of a private cause of action and recovery of liquidated damages even where employees have been paid in full, albeit late.

Given this decision, there is likely to be an uptick in New York lawsuits alleging pay frequency violations with potentially significant damages for employers found to have untimely paid their New York employees. There will also likely be considerable litigation around the definition of manual worker for purposes of Section 191.

Although the Vega decision dealt with manual workers, it also has broader implications with respect to damages for violations of the New York Labor Law's frequency-of-pay provisions for other categories of workers — potentially including commissioned salespersons paid less frequently than monthly, and clerical and other workers paid less frequently than semimonthly, and there is likely to be an increase in those claims as well.

With a six-year statute of limitations, payments made in violation of the New York Labor Law potentially open employers up to substantial liability going forward. Accordingly, it is recommended that employers review their payment practices and analyze their employees' job duties to determine whether they are manual workers under the New York Labor Law, or fall under other categories of workers for which a specific frequency of pay is required under the New York Labor Law.

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[1] Vega v. CM & Assocs. Constr. Mgmt., LLC, No. 9733, 2019 BL 338010 (App Div, 1st Dept, Sept. 10, 2019).