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## Punishing and Deterring the Unknowing: Mandatory Treble Damages under the Massachusetts Wage Act

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## **PUNISHING AND DETERRING THE UNKNOWNING: MANDATORY TREBLE DAMAGES UNDER THE MASSACHUSETTS WAGE ACT**

*Imagine you own a small landscaping company in rural Massachusetts. All of your ten employees have been with the company for three years or more. The recent economic downturn has threatened your family business, and to stay afloat and keep your employees working, you need to cut costs. You have an idea—you will charge the employees a daily fee to use the trucks you have provided to them for use on the job—\$10.00 a day seems fair, especially because these are your vehicles and you allow your employees to take the vehicles home at night and on the weekends. Unfortunately, you are unaware that this deduction is likely unlawful pursuant to the Massachusetts Wage Act, a state law that regulates the payment of wages to employees who perform work in Massachusetts. Three years later, one of your employees discovers that this practice is illegal and files a lawsuit against your company, claiming that the deduction was an “invalid setoff” against wages due to the employee. The employee convinces all of the other nine employees affected to join the lawsuit.*

*Before the 2008 legislative amendment, a Massachusetts judge—within judicial discretion—would have likely awarded the employees single damages to compensate for the improper vehicle deductions that the law deems non-paid wages. After all, you did not know that you were violating the law. These people have worked for your company for a long time, and you genuinely did not intend to shortchange them. You would gladly restore to the employees what they were originally entitled. However, in light of the new 2008 statutory amendment, you now face mandatory treble damages (plus attorneys’ fees and court costs), and could owe more than a quarter of a million dollars (10 employees x \$50 per week x 52 weeks x 3 year statute of limitations x 3 for treble damages = \$234,000). This will surely devastate your small business. Today, this is the reality that unsuspecting Massachusetts employers face in a weak economy.*

### **I. MASSACHUSETTS - THE ONLY STATE WITH MANDATORY TREBLE DAMAGES**

The Massachusetts Wage Act is a state statute with teeth—employers who violate the various provisions of the state’s wage and hour laws will be ordered to pay mandatory treble damages, court costs, interest,

and attorneys' fees upon the judicial finding of a violation in a civil proceeding.<sup>1</sup> Moreover, senior corporate officers responsible for payroll can also be held personally liable under the Act.<sup>2</sup> Given the harsh penalties associated with the non-payment of wages in Massachusetts, employers who employ workers in the state should have a crystal clear understanding of the law.<sup>3</sup> Unfortunately, due to the complex nature of the statutory scheme, even employers with the brightest attorneys and the best intentions may inadvertently violate the Act.<sup>4</sup> The Wage Act is incredibly broad and complex, and the effect of several of its provisions are still evolving through common law.<sup>5</sup>

The mandatory treble damages provision in Massachusetts is needlessly harsh on an employer acting in good faith, especially considering that no other state has such a sweeping damages provision.<sup>6</sup> Treble damage awards in the wage and hour context require employers to pay workers up to three times the amount of wages owed, but not paid, within the period covered under the statute of limitations.<sup>7</sup> Essentially

<sup>1</sup> See MASS. GEN. LAWS ch. 149, § 150 (2010); see also ch. 149, § 148 (describing wage payment timing).

<sup>2</sup> See ch. 149, § 148 ("The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section.").

<sup>3</sup> See ch. 149, § 150 (discussing penalties associated with wage nonpayment); ch. 149, § 148 (same).

<sup>4</sup> See *infra* Part III (highlighting unsettled areas of law and demonstrating statute's complexity).

<sup>5</sup> See *infra* Part III (highlighting unsettled areas of law and demonstrating statute's complexity).

<sup>6</sup> See *Winning Wage Justice*, NAT'L EMP. L. PROJECT 20 (Jan. 2011), <http://www.nelp.org/page/-/Justice/2011/WinningWageJustice2011.pdf?nocdn=1> (listing states that impose treble damages); see also OHIO CONST. art. II, § 34a ("Where an employer is found . . . to have violated any provision of this section, the employer shall . . . pay the employee back wages, damages, and the employee's costs and reasonable attorney's fees. Damages shall be calculated as an additional two times the amount of the back wages . . ."); ARIZ. REV. STAT. ANN. § 23-355 (2012) ("[I]f an employer . . . fails to pay wages due any employee, the employee may recover . . . an amount that is treble the amount of the unpaid wages."); N.M. STAT. ANN. § 50-4-26(C) (West 2012) ("[A]n employer who violates any provision of [this statute] shall be liable to the employees affected in the amount of their unpaid or underpaid minimum wages plus interest, and in an additional amount equal to twice the unpaid or underpaid wages."); *Cummings v. Aviation Specialties Trade Corp.*, 587 P.2d 255, 256 (Ariz. Ct. App. 1978) (holding employer not liable for treble damages when acting "reasonably" and in "good faith").

<sup>7</sup> See BLACK'S LAW DICTIONARY 449 (9th ed. 2009) ("[Treble damages are] [d]amages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed."); see also PHILIP J. GORDON ET AL., MASSACHUSETTS CONTINUING LEGAL EDUCATION: MASSACHUSETTS EMPLOYMENT LAW—WAGES § 13:1 (Mass. Continuing Legal Educ. ed., 2011) (explaining how federal and state statutes regulate wage and hour laws in Massachusetts). The Fair Labor Standards Act (FLSA) is the federal law governing wages, including the federal minimum wage, overtime pay, recordkeeping requirements, and child labor standards. See 29

punitive in nature, this type of provision punishes the employer violator and sets an example to deter other employers from committing wage and hour violations.<sup>8</sup> The business community regards Massachusetts as a rigid state with employment regulations that are restrictive and unfriendly to business growth and job creation.<sup>9</sup> One of the “symbols” of the state’s hostility towards business is the Wage Act’s mandatory treble damages provision.<sup>10</sup> Only nine other states allow for treble damages in wage claims

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U.S.C. §§ 201-219 (2006). The FLSA was enacted in 1938 as a means to protect working people from low wages, long-working hours, and to help bring economic recovery from the depression. See Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T LABOR, <http://www.dol.gov/oasam/programs/history/flsa1938.htm> (last visited Apr. 17, 2013) (describing political struggle to establish federal minimum wage). The FLSA provides minimum standards that may be exceeded by state law, but cannot be waived or reduced. *Id.* Massachusetts has enacted statutes that provide greater protection to workers. See, e.g., MASS. GEN. LAWS ch. 149, § 148 (2010) (addressing payment of wages and commissions); ch. 151, § 1A (codifying overtime law for private employers); ch. 149, § 30C (codifying overtime law for state police); ch. 151, § 1 (setting forth Massachusetts minimum wage); 455 C.M.R. § 2.02(3) (2003) (requiring overtime pay be calculated at one and one-half times employee’s regular rate).

<sup>8</sup> See *Valcourt v. Hyland*, 503 F. Supp. 630, 639 (D. Mass. 1980) (stating punitive damages serve two main purposes (citing RESTATEMENT (SECOND) OF TORTS § 908 (1979))); *Winning Wage Justice*, *supra* note 6, at 19 (“Compensation to workers who have experienced wage theft should be high enough to make it worth the trouble to make a complaint and to deter violations in the future.”). The purpose of awarding punitive damages is to punish the wrongdoer for outrageous conduct and to deter others and the wrongdoer from similar future conduct. *Valcourt*, 503 F. Supp. at 639. Multiple damages provisions are intended to provide additional compensation for plaintiffs, which incentivizes the plaintiffs to file suit, and helps to fully compensate those who do so and prevail. See Stephen J. Shapiro, *Overcoming Under-Compensation and Under-Deterrence in Intentional Tort Cases: Are Statutory Multiple Damages the Best Remedy?*, 62 MERCER L. REV. 449, 452-53 (2011) (discussing under-compensation and under-deterrence in intentional tort cases).

<sup>9</sup> See generally *The Impact of State Employment Policies on Job Growth: A 50 State Review*, U.S. CHAMBER COM. 60-61 (2011), [http://www.uschamber.com/sites/default/files/reports/201103WFI\\_StateBook.pdf](http://www.uschamber.com/sites/default/files/reports/201103WFI_StateBook.pdf) [hereinafter *Impact of State Employment Policies*] (ranking Massachusetts among most heavily regulated states in nation). Economists developed an employment regulation index (“ERI”) to measure the impact of state labor and employment regulations in every state. *Id.* at 5-11. States were then sorted into the three tiers to reflect their level of regulation: fifteen states were classified as “good,” twenty as “fair,” and fifteen as “poor.” *Id.* at 11. “Poor” ratings indicate that the state has policies that inhibit job creation in most categories. *Id.* Factors that contributed to Massachusetts’s “poor” ranking include extensive restrictions on pre-hire background checks, wide-ranging state employment discrimination laws beyond federal requirements, extensive wage-hour regulation beyond federal requirements, presumption against independent-contractor status and aggressive enforcement, a three-hour reporting pay requirement, prevailing and living wage laws, and notice payment laws that can require severance for change in control. *Id.* at 60. The study concludes that higher levels of regulation, as demonstrated by higher ERI scores, result in higher unemployment and lower rates of new business formation. *Id.* at 103.

<sup>10</sup> See *In support of House Bill No. 1411, an Act Regarding Treble Damages, and Senate Bill No. 965, an Act Relative to Willful Violations of the Wage Law*, Before Joint Committee on Labor and Workforce Development, 2011 Leg., 187th Sess. (Mass. 2011) (testimony of Bill Vernon,

and, unlike Massachusetts, no other state strictly mandates its imposition upon finding of a violation, regardless of the employer's intent.<sup>11</sup>

On April 14, 2008, the legislature amended chapter 149, section 150 of the Massachusetts General Laws, entitled "An Act Further Regulating Employee Compensation," which made treble damages mandatory for violations of state wage and hour laws.<sup>12</sup> This "strict liability" imposition of treble damages has increased wage and hour lawsuits in the Commonwealth and creates noteworthy economic risk for employers.<sup>13</sup> The amendment was a legislative response to invalidate *Wiedmann v. The Bradford Group, Inc.*,<sup>14</sup> in which the Massachusetts Supreme Judicial Court held that treble damage awards in the non-payment of wages context were discretionary for the trial court to decide.<sup>15</sup> In

State Director, National Federation of Independent Business).

<sup>11</sup> See *Winning Wage Justice*, *supra* note 6, at 20 ("Ten states allow for treble damages in . . . wage claims: Arizona, Idaho, Maine, Maryland, Massachusetts, Michigan, Nebraska, North Dakota, Vermont and West Virginia").

<sup>12</sup> An Act Further Regulating Employee Compensation, S.B. 1059, 186th Sen. Ch. 80 (2007-2008) ("[a]n employee so aggrieved who prevails in such an action shall be awarded treble damages"). Employees who prevail in their Wage and Hour lawsuits shall receive treble damages, attorneys' fees, and litigation costs for violations of chapter 149, sections 27, 27F, 27G, 27H, 33E, 52D, 148, 148A, 148B, 150, 150C, 152, 152A, 159C, and chapter 151, sections 1B, 19 and 20 of the Massachusetts General Laws. See *Employee's Private Right to Sue*, ATT'Y GEN. MARTHA COAKLEY, <http://www.mass.gov/ago/doing-business-in-massachusetts/labor-laws-and-public-construction/wage-and-hour/private-right-to-sue.html> (last visited Apr. 17, 2013).

<sup>13</sup> See PHILIP J. GORDON & ELIZABETH A. RODGERS, MASSACHUSETTS CONTINUING LEGAL EDUCATION: MASSACHUSETTS PAYMENT OF WAGES LAW—A PLAINTIFF'S PERSPECTIVE § 1.1 (Mass. Continuing Legal Educ. ed., 2010) ("Litigation for failure to pay regular wages has become increasingly common as Massachusetts lawyers work to enforce the Act's protections."); Christopher Kaczmarek & Jeanne Barber, *Massachusetts High Court Rules Wage Act's Mandatory Treble Damages Provision Does Not Apply Retroactively*, WAGE & HOUR COUNS. (Sept. 2, 2011), <http://www.wageandhourcounsel.com/2011/09/articles/state/massachusetts-1/massachusetts-high-court-rules-wage-acts-mandatory-treble-damages-provision-does-not-apply-retroactively/> ("The 2008 amendment led to a significant increase in wage and hour litigation in Massachusetts."); *Impact of State Employment Policies*, *supra* note 9, at 61 (condemning "An Act Further Regulating Employee Compensation"). "Strict liability" is defined as "liability that does not depend on actual negligence or intent to harm, but that is based on the breach of an absolute duty . . . ." BLACK'S LAW DICTIONARY 998 (9th ed. 2009). Defenses for employers are limited and do not include any version of a "good faith" defense, thus the Wage Act is considered a strict liability statute. See JOEL LEWIN & CHARLES E. SCHAUB, JR., MASSACHUSETTS PRACTICE SERIES: CONSTRUCTION LAW § 10:52 (Mass. Prac. Series ed., 2012) ("Defenses are limited to nonpayment due to trustee process, valid assignment, valid set off, or absence of the employee on payday. Post demand payments or assignment are not a valid defense.").

<sup>14</sup> 831 N.E.2d 304 (Mass. 2005), *superseded by statute*, MASS. GEN. LAWS ch. 149, § 150 (2010) *as recognized in* *Melia v. Zenhire, Inc.*, 967 N.E.2d 580, 588 n.8 (Mass. 2012).

<sup>15</sup> See *Wiedmann*, 831 N.E.2d at 313 (concluding plain language of statute does not require judge to award treble damages). The *Wiedmann* case involved a dispute about the formula that was used to calculate the plaintiff's commissioned wages pursuant to the terms of an oral

*Wiedmann*, the court stated that because treble damages are a punitive measure, they would only be appropriate when specifically authorized by statute and where conduct is “outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.”<sup>16</sup> Shortly after the *Wiedmann* decision, the legislature amended the statute to include the word “shall,” which effectively removed judicial discretion and made treble damages mandatory in an effort to punish Massachusetts employers who violated the Wage Act, while deterring other employers from committing similar acts.<sup>17</sup> Although the objectives of statutory treble damages are laudable, the automatic imposition unfairly penalizes Massachusetts’s employers who make a good faith wage violation.<sup>18</sup> Employees are entitled to be made whole, but not through a windfall at the employers’ expense.<sup>19</sup> Wage disputes can involve legitimate differences of

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contract. *Id.* at 306.

<sup>16</sup> *Id.* at 313 (quoting *Goodrow v. Lane Bryant, Inc.*, 732 N.E.2d 289, 299 (Mass. 2000)) (stating absence of these factors would make treble damages inappropriate).

<sup>17</sup> See MASS. GEN. LAWS ch. 149, § 150 (2010) (“An employee so aggrieved who prevails in such an action shall be awarded treble damages . . . .”); *Melia v. Zenhire, Inc.*, 967 N.E.2d 580, 588 n.8 (Mass. 2012) (“St.2008 [sic], c. 80, § 5, which made the treble damages mandatory, overruling our decision in *Wiedmann v. Bradford Group, Inc.* . . . .”). Chapter 149, section 150 was amended in 2008 to incentivize employers to scrutinize their wage payment practices and policies to ensure employers’ compliance with the Massachusetts wage and hour laws. See GORDON & RODGERS, *supra* note 13, at § 1:1. For example, some of the included provisions pertain to prompt payment of wages due to active and terminated employees, properly classifying employees misclassified as independent contractors, avoiding retaliation against those who seek payment of wages, and complying with all overtime pay, minimum wage, pooling and distribution of gratuities, vacation pay, and Sunday and holiday premium pay under the Massachusetts Blue Laws. *Id.*

<sup>18</sup> See *Temple v. Tec-fab, Inc.*, 675 S.E.2d 414, 415 (S.C. 2009) (stating mandatory treble damages unjust and harsh where bona fide dispute exists); *State of Associated Industries of Massachusetts Before Senate Chair Thomas M. McGee, House Chair Cheryll A. Coakley Rivera & Members of the Joint Committee on Labor & Workforce Development in Support of H.3583, An Act Regarding Treble Damages and S.719, An Act Relative to Willful Violations of the Wage Law*, 2009 Leg., 186th Sess. 18, 27 (Mass. 2009) [hereinafter *State of Associated Industries of Massachusetts*] (summarizing AIM’s strong opposition to Treble Damages Act); Shapiro, *supra* note 8, at 455 (“Although it seems fair to require a negligent defendant to pay for the plaintiff’s injuries and losses, it does not seem fair to have them pay an amount higher than that.”).

<sup>19</sup> See *Lupien v. City of Marlborough*, 387 F.3d 83, 88-90 (1st Cir. 2004) (declaring plaintiffs are not entitled to windfall at defendant’s expense) (citing *Roman v. Maietta Constr., Inc.*, 147 F.3d 71, 77 (1st Cir. 1998)); *Kattar v. Demoulas*, 739 N.E.2d 246, 258 (Mass. 2000) (“Compensation is that amount of money that reasonably will make the injured party whole. Compensatory damages may not exceed this amount. Anything beyond that amount is a windfall.”); Shapiro, *supra* note 8, at 490 (“Trebling the damages might unintentionally over-compensate the plaintiff in some cases.”). But see *Somers v. Converged Access, Inc.*, 911 N.E.2d 739, 749 (Mass. 2009) (rejecting employer’s “windfall” argument). The legislature would not have written the Wage Act to impose strict liability on employers if it was concerned with the risk of an employee windfall. *Id.* “The ‘windfall’ the Legislature appeared most concerned with is the ‘windfall’ that employers enjoy from the misclassification of employees as independent

opinion between employers and employees regarding the payment of wages because wage and hour laws are complex, can hinge on factual circumstances, and are rarely the subject of judicial interpretation.<sup>20</sup>

This Note advocates for the Massachusetts Legislature to amend chapter 149, section 150 of the Massachusetts General Laws.<sup>21</sup> The statute should be amended to allow employers to raise a good faith defense to an alleged Wage Act violation.<sup>22</sup> Part II of this Note recounts the history of chapter 149, section 150, specifically focusing on the treble damages provision.<sup>23</sup> Part III describes the legal landscape today and illustrates how the 2008 amendment has impacted litigation, employment, and the business climate in the Commonwealth.<sup>24</sup> Part IV analyzes how an employer's attorney could legally challenge the treble damages provision as unconstitutional, and barring any successful constitutional challenge, suggests alternative policy recommendations for future legislative amendments to chapter 149, section 150.<sup>25</sup> This Note concludes that the Massachusetts Legislature should amend chapter 149, section 150 to include an affirmative good faith defense to violations of the Wage Act.<sup>26</sup> The current damages provision is exceptionally unfair to those employers who make a good faith violation, thus creating a windfall for employees

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contractors: the avoidance of holiday, vacation, and overtime pay; Social Security and Medicare contributions; unemployment insurance contributions; workers' compensation premiums; and income tax withholding obligations." *Id.* at 750.

<sup>20</sup> See, e.g., Richard L. Alfred, *Mandatory Treble Damages for Wage and Hour Violations Cannot be Applied Retroactively*, MASS. L. WEEKLY 5 (June 1, 2009), available at [http://www.seyfarth.com/dir\\_docs/news\\_item/4307f911-e6b2-4c34-b032-608beaad360\\_documentupload.pdf](http://www.seyfarth.com/dir_docs/news_item/4307f911-e6b2-4c34-b032-608beaad360_documentupload.pdf) ("Many of these and other wage and hour laws are old, have rarely been the subject of judicial interpretation and guidance, and are open to differing good-faith interpretations by courts and the state agencies charged with the enforcement of the wage and hour laws."); C.J. Eaton, *The A to Z of the Massachusetts Wage Payment Law*, EMP. L. UPDATE 8 (2012), <http://www.wagehourlitigation.com/C.J.%20Wage%20Payment%20Article.pdf> ("The primary statute that governs this topic is complex and difficult to interpret, not to mention long"); *State of Associated Industries of Massachusetts*, *supra* note 18, at 4 ("In the arena of employment laws and regulations it is confusing to sort out the sometimes mixed messages that come from Boston and Washington and the state Treble Damages Law means that employers have no room for error.").

<sup>21</sup> See *infra* Part IV(D) (justifying why good faith defense is necessary).

<sup>22</sup> See *infra* Parts IV-V (scrutinizing Wage Act and finding treble damages for violation unduly punitive).

<sup>23</sup> See *infra* Part II (outlining history of statute's provision for mandatory treble damages).

<sup>24</sup> See *infra* Part III (describing wage theft, unsettled areas of law, and statute's complexity).

<sup>25</sup> See *infra* Part IV (analyzing possible constitutional challenges and suggesting meaningful policy alternatives).

<sup>26</sup> See *infra* Part V (mandating treble damages unfairly punitive against defendant who committed violation in good faith).

and plaintiffs' attorneys at the employers' and society's expense.<sup>27</sup>

## II. EVENTS LEADING TO THE 2008 LEGISLATIVE AMENDMENT

The Massachusetts Wage Act encompasses both chapter 149, section 148, covering the payment of wages to Massachusetts employees, and its companion enforcement statute, chapter 149, section 150, which requires employers to pay wages promptly, fully, and regularly.<sup>28</sup> The original purpose of the Wage Act was to limit the temporal interval between the completion of an employee's work and the payment of wages.<sup>29</sup> It was designed to cure the unreasonable detention of wages by unscrupulous employers and to prevent unwise employees from squandering their pay.<sup>30</sup> Initially, only the Attorney General and the Massachusetts Department of Labor and Industries had standing to bring enforcement actions under the Wage Act.<sup>31</sup> In 1993, the legislature amended the Wage Act to allow individual employees to bring civil actions directly against their employer.<sup>32</sup> The amendment also allowed for the recovery of interest, attorneys' fees, and treble damages.<sup>33</sup> Notably, the

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<sup>27</sup> See *infra* Part V (concluding mandatory treble damages are inappropriate as one-size-fits-all remedy).

<sup>28</sup> See MASS. GEN. LAWS ch. 149, §§ 148, 150 (2010); see also ROBERT M. SCHWARTZ, YOUR RIGHTS ON THE JOB: A PRACTICAL GUIDE TO EMPLOYMENT LAWS IN MASSACHUSETTS 15-17 (5th ed. 2008) (explaining employee's rights to prompt payment of wages).

<sup>29</sup> See *Am. Mut. Liab. Ins. Co. v. Comm'r of Labor and Indus.*, 163 N.E.2d 19, 20-21 (Mass. 1959) (discussing legislative history of chapter 149, section 150).

<sup>30</sup> See *id.* at 21.

<sup>31</sup> See Mark F. Murphy & Michael P. Murphy, *Wage Act Claims*, 48 BOS. B.J. 19, 19 (2004) (describing history of Massachusetts Wage Act).

<sup>32</sup> See ch. 149, § 150. As a prerequisite to filing a civil complaint, an employee must first file a complaint with the Fair Labor Division of the Office of the Attorney General. See *Non-Payment of Wage & Workplace Complaint Form*, ATT'Y GEN. MARTHA COAKLEY 1 (Dec. 2008), <http://www.mass.gov/ago/docs/workplace/wage/wageandhour-complaintform.pdf> (stating instructions for filing complaint). The form states:

If you wish to file your own lawsuit, ninety days after filing a complaint with this office, you may sue your employer in civil court for your wages, plus triple damages and legal fees. You may also request written permission from the Attorney General's Office to proceed before the end of the ninety day waiting period.

*Id.*

After filing such a complaint, the employee must wait ninety days to file a court action, or may do so sooner if the Attorney General issues a private right of action. See *id.*

<sup>33</sup> See ch. 149, § 150 ("An employee claiming to be aggrieved by a violation of section[] . . . 148 . . . may . . . institute and prosecute in his own name . . . a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved



1993 amendments were tacit as to what was required to trigger a treble damages award, such as the requisite state of mind.<sup>34</sup> Accordingly, common law and constitutional concepts guided the judiciary from 1993 until the 2008 legislative amendment.<sup>35</sup>

In *Goodrow v. Lane Bryant, Inc.*,<sup>36</sup> the Supreme Judicial Court discussed in dicta the language added by the 1993 amendments, which provided that a person “may recover in a civil action three times the full amount of such overtime rate of compensation . . . .”<sup>37</sup> According to Justice Spina, two requirements must be met to award multiple damages under the overtime law.<sup>38</sup> First, the statute must expressly authorize such an award.<sup>39</sup> Second, the court must find the defendant willfully violated the law, or the defendant’s conduct was “evil in motive” or showed a “reckless indifference” to others.<sup>40</sup> The court noted that “[m]ultiple damages such as the treble damages at issue here ‘are essentially punitive in nature.’”<sup>41</sup> After *Goodrow*, it was generally believed that treble damages were to be imposed at the judge’s discretion after a judgment entered against an employer for failure to pay wages.<sup>42</sup> However, because there was no violation of the Wage Act in *Goodrow*, the issue of damages was moot and

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. . . shall be awarded treble damages . . . for any lost wages and other benefits . . . .”); see also Alfred, *supra* note 20, at 2 (explaining why treble damages mandatory when employer violates Massachusetts wage and hour laws).

<sup>34</sup> See *infra* note 37-42 and accompanying text (discussing legal community’s understanding of 1993 amendments).

<sup>35</sup> See *infra* notes 36-54 and accompanying text (discussing judicial interpretation of 1993 amendments).

<sup>36</sup> 732 N.E.2d 289 (Mass. 2000).

<sup>37</sup> *Id.* at 299 (quoting MASS. GEN. LAWS ch. 151, § 1B (2010) (holding employer did not violate Wage Act); see also ch. 151, § 1B (“If any person is paid by an employer less than such overtime rate of compensation [required by § 1A], such person may recover in a civil action three times the full amount of such overtime rate of compensation less any amount actually paid to him or her by the employer.”)).

<sup>38</sup> See *Goodrow*, 732 N.E.2d at 299 (addressing whether treble damages appropriate).

<sup>39</sup> *Id.* (noting punitive damages allowed only when expressly authorized).

<sup>40</sup> *Id.* (“[Defendant] relied on the advice of counsel and followed law and procedures apparently sanctioned elsewhere, there was ‘no legal or equitable basis’ on which to impose multiple damages.”).

<sup>41</sup> *Id.* (quoting *Fontaine v. Ebtac Corp.*, 613 N.E.2d 881, 889 (Mass. 1993)). Multiple damages are an old concept that dates back to the laws of ancient Greece and Rome, with “[t]he earliest multiple damages provision in Anglo-American law was the statute of Clouscester in 1278.” G. Robert Blakey, *Of Characterization and Other Matters: Thoughts About Multiple Damages*, 60 LAW & CONTEMP. PROBS. 97, 101 (1997) (tracing punitive damages to Roman law).

<sup>42</sup> Claudia Centomini, *Massachusetts Supreme Judicial Court Clarifies a Number of Issues Under the Payment of Wages Statute*, EMP. BULL. (Foley Hoag, LLP, Boston, Mass.), Aug. 18, 2005, at 2 (stating treble damages are now discretionary).

the standard articulated by Justice Spina was mere dicta.<sup>43</sup>

The Supreme Judicial Court clarified the *Goodrow* decision in *Wiedmann*, when it held that the Wage Act allows, but does not require, treble damage awards for violations of the Wage Act.<sup>44</sup> The court emphasized the permissive use of the word “may” in its holding.<sup>45</sup> Before *Wiedmann*, no reported decision in Massachusetts had affirmatively ruled that treble damages were discretionary under section 150.<sup>46</sup>

In response to the court’s seminal holding in *Wiedmann*, the plaintiffs’ bar, unions, and worker’s rights advocates lobbied for an amendment to the law that would mandate treble damage for successful plaintiffs in civil actions for unpaid wages.<sup>47</sup> House Bill 4663 was proposed the following year, only to be pocket vetoed by Governor Mitt Romney.<sup>48</sup> Nevertheless, proponents of mandatory treble damages were

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<sup>43</sup> *Goodrow*, 732 N.E.2d at 299 (“Because we hold that Lane Bryant did not violate G.L. c. 151, § 1A, *Goodrow*’s cross appeal from the denial of her claim of treble damages is moot.”).

<sup>44</sup> See *Wiedmann v. Bradford Group, Inc.*, 831 N.E.2d 304, 313-14 (Mass. 2005); see also MASS. GEN. LAWS ch. 149, §§ 148, 150 (2010).

<sup>45</sup> See *Wiedmann*, 831 N.E.2d at 313. (“Any employee claiming to be aggrieved by a violation of section 148 . . . may . . . institute . . . a civil action for injunctive relief and any damages incurred, including treble damages . . . .” (quoting MASS. GEN. LAWS ch. 149, § 150 (2010))).

<sup>46</sup> See Nina Joan Kimball, *The Wage Act Amendments: Bringing Clarity to Treble Damages*, 52 BOS. B.J. 12, 12 (2008) (“Prior to 2005, the few reported decisions either held that treble damages were mandatory, or avoided deciding the issue by finding the conduct to be sufficiently willful to support treble damages.”); see also *Gibbs v. Archie*, 2002 Mass. App. Div. 205, at 206 (Mass. Dist. Ct. 2002) (holding employee statutorily entitled to treble damages). The *Gibbs* court held that “[a] mandatory award of treble damages under [chapter 149, section 150] obviously serves the salutary purposes of deterring employers from taking advantage of their employees and of compensating employees for the time during which they have been deprived of their earned wages.” *Gibbs*, 2002 Mass. App. Div. at 206 (citing *Chiappetta v. Lyons*, 1999 Mass. App. Div. 276, 279 (Mass. Dist. Ct. 1999)); see also *Bollen v. Kingsmont*, 2000 Mass. App. Div. 56, 56 (Mass. Dist. Ct. 2000) (stating victorious plaintiff entitled as matter of law to treble damages); *Chiappetta v. Lyons*, 1999 Mass. App. Div. 276, 278 (Mass. Dist. Ct. 1999) (same); *Parow v. Howard*, No. 021403A, 2003 WL 23163114, at \*4 (Mass. Sup. Ct., Nov. 12, 2003) (holding reduced showing of willful indifference sufficient to trigger multiple damages). In *Parow*, instead of deciding whether the statute was discretionary or mandatory, the court held the issue was irrelevant because “even if discretionary, treble damages were warranted. Although the actions of the Defendants cannot be described as outrageous and stemming from an evil motive, their actions were willfully indifferent to the Plaintiffs’ rights.” *Parow*, 2003 WL 23163114, at \*4. Had the Legislature intended for discretionary damages, it could have overtly provided for them, as it did in chapter 93A of the Massachusetts General Laws. See MASS. GEN. LAWS ch. 93A, § 9 (2010) (providing that “damages may include double or treble damages”).

<sup>47</sup> See *Alfred*, *supra* note 20, at 2 (discussing Massachusetts plaintiffs’ bar reaction to *Wiedmann*).

<sup>48</sup> See H.B. 4663, 184th Sess. (Mass. 2005-2006). The legislature expressly stated that the “purpose” of that bill was “to clarify the language of the statute to reiterate the intent of the Legislature that such treble damages be mandatory.” *Id.*; see also *Alfred*, *supra* note 20, at 2 (describing legislative intent and history).

able to obtain the legislative amendment they desired through the enactment of Senate Bill 1059 in 2008.<sup>49</sup> Notably, Governor Patrick did not sign the bill.<sup>50</sup> He returned the bill without his signature, and with a letter recommending that the legislature add a good faith defense for employers.<sup>51</sup> Governor Patrick stated that in some situations where companies act in good faith, “it is neither warranted nor fair to impose mandatory treble damages.”<sup>52</sup> The Governor was concerned that mandating treble damages was “unfairly punitive.”<sup>53</sup> Similar to Governor Patrick’s recommendation at the state level, the Federal Fair Labor Standards Act (“FLSA”) has an affirmative “good faith” defense available to employers who violate the FLSA’s mandates.<sup>54</sup> Nonetheless, both chambers of the Massachusetts Legislature rejected the governor’s

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<sup>49</sup> See S.B. 1059, 186th Sess. (Mass. 2007-2008). Entitled “An Act To Clarify The Law Protecting Employee Compensation,” sponsored by Senator Cynthia S. Creem, Senate Bill 1059 expressly stated that it was an act “intended to clarify the existing law and to reiterate the original intention of the general court that triple damages are mandatory.” *Id.*; see also Alfred, *supra* note 20, at 2 (explaining that S.B. 1059 became chapter 80 upon enactment).

<sup>50</sup> See Alfred, *supra* note 20, at 3 (highlighting return to legislature with proposal recommending good faith defense).

<sup>51</sup> See Kyle Cheney, *Gov Allows Triple Damages to Become Law, Despite His Own Objections*, STATE HOUSE NEWS SERVICE, Apr. 14, 2008. The Governor stated:

[I am] concerned that mandating treble damages in all cases, without any exception for employers who act in good faith, is unfairly punitive. . . . Treble damages can be a significant penalty, especially in cases involving multiple plaintiffs, and such damages are neither warranted nor fair in every case, particularly in situations where the wage and hour issues may be complex and uncertain and where an employer relies, in good faith, on the advice of counsel and guidance received from governmental authorities.

*Id.*

<sup>52</sup> See *id.* Interestingly, not a single Senate Democrat sided with the governor; his amendment was rejected by a veto-proof margin. *Id.*

<sup>53</sup> See *id.*

<sup>54</sup> See 29 U.S.C. §§ 201-219 (2006). Two good faith statutory defenses are available to an employer defending an FLSA claim. *Id.* First, an employer is protected from all liability for back pay if the employer relied, in good faith, on any written administrative regulation, order, ruling, approval, or interpretation issued by the Administrator of the Wage and Hour Division of the Department of Labor. 29 U.S.C. § 259. Second, an employer may be protected from liability for liquidated damages if the employer had a reasonable, good faith belief that they were not in violation of the FLSA. See 29 U.S.C. § 260. Additional common law defenses, such as estoppel and exhaustion of remedies, may also be available. See *What Employers Need to Know About Wage and Hour Collective and Class Actions*, SUTHERLAND LEGAL ALERT, Apr. 2, 2007, at 5 (explaining which affirmative defenses are available to employers under FLSA). Governor Patrick stated in his message to the House and Senate that his proposed amendment to Senate Bill 1059 “is patterned after language contained in the federal Fair Labor Standards Act (FLSA), although, by requiring clear and convincing evidence . . . [the governor’s proposal] would impose a higher burden of proof on employers.” Cheney, *supra* note 51.

recommendation, and the Bill went back to Governor Patrick's desk on April 3, 2008.<sup>55</sup> The governor refused to act on the Bill and it eventually became law without the governor's signature.<sup>56</sup> On April 14, 2008, "An Act to Clarify the Law Protecting Employee Compensation" was enacted by the Massachusetts Legislature, mandating treble damages for violations of sixteen Massachusetts wage and hour laws.<sup>57</sup> Subsequently, in *Rosnov v. Molloy*,<sup>58</sup> the Supreme Judicial Court validated the language in the amendment, but ruled that the mandatory treble damages provision could not be applied against defendants retroactively.<sup>59</sup> Thus, per the Supreme Judicial Court's decision, automatic treble damages can only be imposed to

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<sup>55</sup> See *Massachusetts Triple Damages Bill Becomes Law*, HR.BLR.COM (Apr. 25, 2008), <http://hr.blr.com/HR-news/Compensation/Wage-and-Hour-Investigations/Massachusetts-Triple-Damages-Bill-Becomes-Law/>.

<sup>56</sup> *Id.*

I am allowing the bill to become law because I support efforts to ensure that all workers are paid the wages and compensation legally owed to them. I am declining to sign the bill because I remain concerned that mandatory treble damages in all cases, without exception for employer's who act in good faith, is unfairly punitive.

*Id.* (noting Governor's address to Senate and House of Representatives asking for amendment of statute).

<sup>57</sup> See MASS. GEN. LAWS ch. 149, § 150 (2010). The new law became effective July 12, 2008 and reads in pertinent part:

An employee claiming to be aggrieved by a violation of [this section] may . . . institute . . . a civil action for injunctive relief, for any damages incurred, and for any lost wages and other benefits. An employee so aggrieved who prevails in such an action *shall be awarded treble damages*, as liquidated damages, for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees.

*Id.* (emphasis added).

<sup>58</sup> 952 N.E.2d 901 (Mass. 2011).

<sup>59</sup> *Id.* at 908 (concluding 2008 amendment does not apply retroactively). In *Rosnov*, where the plaintiff sued her employer for nonpayment of wages, the superior court held that the defendant was automatically liable for treble damages pursuant to the July 12, 2008 legislative amendment despite the employer's alleged misconduct predating the amendment. *Rosnov v. Molloy*, No. 07-074, 2009 WL 8044273 (Mass. Super. Ct. 2009). The defendant appealed to the Supreme Judicial Court, and successfully argued that the statute could not apply retroactively because it affected substantive rights and was not merely procedural or remedial legislation. *Rosnov*, 952 N.E.2d at 907-08. The Supreme Judicial Court, agreeing with the employer, held that treble damages do affect substantive rights because they increase a defendant's liability. *Id.* The court stated that the legislature's history is "murky" at best and cannot support a finding of retroactivity. *Id.* at 907. Importantly, the court's decision does not insulate employers from all liability for treble damages based on conduct occurring before July 12, 2008, just not *automatic* liability. See *id.*

“claims arising on or after the amendments effective date of July 12, 2008.”<sup>60</sup>

Notwithstanding the Supreme Judicial Court’s implicit affirmation of the mandatory nature of the treble damages provision, opposition to the amendment’s effect still persists in the legislature, as State Representative Martha Walz, a labor attorney and Assistant Vice Chair of the House Ways and Means Committee, files a bill on an annual basis that would make “only willful violations” of wage and hour requirements subject to treble damages.<sup>61</sup> “An Act regarding Treble Damages,” was filed in the House in January 2011 and the state lawmakers considered the legislation during the Fiscal Year 2012 budget process, but did not include it in the final compromise bill.<sup>62</sup>

### III. POLICY CONCERNS

It is undeniable that “wage theft”—illegal nonpayment or underpayment of wages—is a serious socio-economic problem.<sup>63</sup> Although wage theft disproportionately affects low-wage earners, everyone is impacted.<sup>64</sup> When employers get away with wage theft, they attain an unfair advantage over honest competitors and simultaneously lower the wage standards for the entire industry.<sup>65</sup> Furthermore, wage theft affects the entire community because it denies employees their livelihood and support for their families; negatively impacting local economies.<sup>66</sup>

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<sup>60</sup> See *Rosnov*, 952 N.E.2d at 902, 908 (holding 2008 amendment does not apply retroactively).

<sup>61</sup> See H.B. No. 1411, 187th Gen. Court (Mass. 2011-2012) (attempting to amend Wage Act by making treble damages mandatory only for willful violation).

<sup>62</sup> See *State of Associated Industries of Massachusetts*, *supra* note 18.

<sup>63</sup> See Amicus Curiae Brief of the Commonwealth of Massachusetts at 2-3, *Wiedmann v. Bradford Group, Inc.*, 831 N.E.2d 304 (Mass. 2005) (No. SJC-09331), 2005 WL 2341669, at \*3 (“Nonpayment of wages continues to be a serious economic problem.”).

<sup>64</sup> See *Winning Wage Justice: Talking Points on the Need for Stronger Anti-Wage Theft Laws*, NAT’L EMP. L. PROJECT 1-3 (Jan. 2012), <http://www.nelp.org/page/-/Justice/2012/WinningWageJusticeTalkingPoints.pdf?nocdn=1?nocdn=1> (explaining how wage theft affects communities and tax-payers).

<sup>65</sup> *Id.* at 2 (“Well-meaning businesses often can’t compete with wage cheats that shave their operating costs by breaking the law.”).

<sup>66</sup> *Id.* When earned wages are not paid when due, it can create a serious snowball effect of problems for the employee and their family. See Letter from Kenneth J. Donnelly, Fourth Middlesex District Senator, to Joint Committee on Labor & Workforce Development Senate Chairman Daniel Wolf & House Chairwoman Cheryl Coakley-Rivera, RE: Opposition to House Bill 1411, An Act Regarding Treble Damages (Nov. 3, 2011) (on file with author). For example, if wages are not paid out in full and on time, the employee may have difficulty paying for life essentials, which could affect their credit score or their ability to pay rent, subject them to eviction or to a shut-off of their utilities. See *id.* (illustrating what can go wrong for employees

Similarly, wages that remain unpaid result in lost contributions to unemployment insurance, workers compensation insurance, and payroll taxes.<sup>67</sup> Wage theft in the Commonwealth is not only detrimental to society, it is also frequent and widespread.<sup>68</sup> The Attorney General's Fair Labor Division annually receives over 75,000 telephone and website inquiries, and roughly 5,000 formal written complaints reporting violations of the Wage and Hour Laws.<sup>69</sup> In 2010, the Fair Labor Division recovered more than \$9 million in restitution and penalties on behalf of the Commonwealth's workers.<sup>70</sup> On a national level, the United States Department of Labor estimates that more than eighty percent of employers are not in compliance with state and federal wage and hour laws.<sup>71</sup>

Most policymakers and lobbyists are in accord that there is a pervasive problem: with wage theft; however, they have conflicting beliefs about what mechanisms are most effective to protect employees.<sup>72</sup> Business advocates argue that labor regulations are a regressive force that strangles economic growth, making it too costly for employers to invest in job creation.<sup>73</sup> These advocates argue that severe penalties, such as mandatory treble damages, are deterring entrepreneurs from starting and

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who live "pay check to pay check").

<sup>67</sup> See *id.* (opposing An Act Regarding Treble Damages).

<sup>68</sup> See Amicus Curiae Brief of the Commonwealth of Massachusetts at 3-4, *Wiedmann v. Bradford Group, Inc.*, 831 N.E.2d 304 (Mass. 2005) (No. SJC-09331), 2005 WL 2341669, at \*3 (pointing to large number of complaints filed each year with Attorney General).

<sup>69</sup> See *id.*

<sup>70</sup> See Att'y Gen. Martha Coakley, *Fiscal Year 2010 Annual Report* 18 (2010), <http://www.mass.gov/ago/docs/ourorganization/fy10-annual-report.pdf>. The Fair Labor Division enforces the prevailing wage, minimum wage, payment of wages, overtime, tip pooling, child labor, Sunday and holiday premium pay laws, and the arbitration of related public construction bid disputes. *Id.* at 34. The Division has the power to investigate and enforce violations of these laws through civil and criminal enforcement actions. *Id.*

<sup>71</sup> See Han Ma, *Top Employment Law Trends That Should Be At The Forefront of Employer's Minds*, BUS. 2 CMTY. (Apr. 16, 2011), <http://www.business2community.com/strategy/top-employment-law-trends-that-should-be-at-the-forefront-of-employers-minds-024480> ("The Department of Labor . . . estimates that more than 80 percent of employers are out of compliance with federal and state wage and hour laws.").

<sup>72</sup> See generally *Winning Wage Justice*, *supra* note 6, at 17-34 (advocating raising costs for employers who violate law). Compare *In support of House Bill No. 1411, an Act Regarding Treble Damages*, & *Senate Bill No. 965, an Act Relative to Willful Violations of the Wage Law*, Before Joint Committee on Labor & Workforce Development, 2011 Leg., 187th Sess. (Mass. 2011) (testimony of Bill Vernon, State Director, National Federation of Independent Business), with Letter from Kenneth J. Donnelly, Fourth Middlesex District Senator, to Joint Committee on Labor & Workforce Development Senate Chairman Daniel Wolf & House Chairwoman Cheryl Coakley-Rivera, RE: Opposition to House Bill 1411, An Act Regarding Treble Damages (Nov. 3, 2011) (on file with author).

<sup>73</sup> See *Impact of State Employment Policies*, *supra* note 9, at 60, 103 (discussing regulation as hindrance to Massachusetts business).

growing small businesses in Massachusetts.<sup>74</sup> Undoubtedly, because the small business community creates approximately two-thirds of the state's new jobs, it is imperative that they are not unduly burdened by overregulation.<sup>75</sup> Unfortunately, the automatic treble damages provision places an added burden on even the most unsuspecting and righteous employers, and further harms the Commonwealth's business climate and its ability to grow and retain jobs.<sup>76</sup> In response, labor advocates and progressives argue that hard economic times are the worst time to roll back employee protections, and that such laws are crucial to economic growth and stability.<sup>77</sup>

The Wage Act is applicable to a variety of compensation arrangements between employees and employers, and the esoteric language of the statute can cause problems for even the most well-intentioned employer.<sup>78</sup> For example, the state statute that governs the payment of wages is exceptionally long—the first sentence alone contains 593 words, forty-one commas, nine semicolons, and the word “and” twenty times.<sup>79</sup> This makes the law vulnerable to different interpretations by courts and state agencies charged with enforcement.<sup>80</sup> Even judges have commented

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<sup>74</sup> See *In support of House Bill No. 1411, an Act Regarding Treble Damages, & Senate Bill No. 965, an Act Relative to Willful Violations of the Wage Law, Before Joint Committee on Labor & Workforce Development*, 2011 Leg., 187th Sess. (Mass. 2011) (testimony of Bill Vernon, State Director, National Federation of Independent Business) (advocating for elimination of automatic imposition of treble damages for inadvertent violations).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> See *Winning Wage Justice*, *supra* note 6, at 6 (arguing wage theft negatively impacts local economies and stunts economic recovery).

<sup>78</sup> See *supra* note 20 and accompanying text (expounding upon complexity of Wage Act); Karen Whitley, *First, Pay All Wages*, COUNSELORS AT LAW (Hanify & King, Boston, Mass.), Summer 2009, at 8-13 (summarizing applicability of Wage Act to various types of compensatory arrangements). Examples of compensation include: regular pay, bonuses, commissions, incentives, vacation pay, stock options, and severance pay. See *id.*

<sup>79</sup> MASS. GEN. LAWS ch. 149, § 148 (2010); see also Eaton, *supra* note 20, at 8 (highlighting common questions employers have due to “confusion” from statutory language).

<sup>80</sup> See *Oliveira v. ICLB Inc.*, No. 09-ADMS-10038, 2010 WL 2102992, at \*4 n.2 (Mass. App. Div. Mar. 30, 2010) (illustrating that even judges can have trouble interpreting Wage Act); Alfred, *supra* note 20, at 5 (“Wage and hour laws are . . . open to differing good-faith interpretations by courts and the state agencies charged with the enforcement . . .”). Judge Greco improperly relied on two cases that predated the 2008 amendment, and stated in dicta that “[n]otwithstanding the use of the word ‘shall,’ the award of treble damages appears to be ‘in a judge’s discretion.’” *Oliveira*, 2010 WL 2102992 at \*4 n.2 (quoting *Wiedmann v. Bradford Group, Inc.*, 831 N.E.2d 304, 313 (Mass. 2005)); see also *Grady v. Cloherty*, 2012 Mass. App. Div. 65, \*1 (March 29, 2012) (reversing judge’s award of single damages). In awarding single damages in *Grady*, the trial court judge improperly relied on dicta from *Oliveira*. *Grady*, 2012 Mass. App. Div. at \*1.

that the Wage Act is not “a model of legislative draftsmanship.”<sup>81</sup> Before 1993, the Wage Act only had a handful of opinions interpreting its provisions, resulting in present day litigation where attorneys are forced to make arguments without clearly developed common-law guidance.<sup>82</sup> There is still need for judicial guidance on some of the unresolved issues inherent in the language of the Act.<sup>83</sup>

#### A. Unsettled Law

Severance pay and wage deductions, also known as set-offs, demonstrate how an employer could theoretically commit a violation of the Wage Act in good faith as a result of inconsistent court rulings within the Massachusetts state court system.<sup>84</sup> With respect to severance pay, there is currently a split within the superior court regarding whether these payments are “wages” under the Wage Act.<sup>85</sup> In *Prozinski v. Northeast Real Estate*

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<sup>81</sup> *Dobin v. CIOview Corp.*, No. 2001-00108, 2003 WL 22454602, at \*3 (Mass. Super. Ct. Oct. 29, 2003). In *Dobin*, a superior court judge ruled that a company’s late wage payments were impermissible under the Wage Act, despite the employee volunteering to defer her salary until the company’s financial condition improved. *Id.* at \*5-8.

<sup>82</sup> See *Murphy & Murphy*, *supra* note 31, at 19 (“There is still very little guidance from the Appeals Court or the Supreme Judicial Court on the issues raised by the Wage Act.”).

<sup>83</sup> See *id.* at 23 (predicting additional appellate court decisions will bring clarity to unresolved issues); *Alfred*, *supra* note 20, at 1 (stating most class actions involve subtle violations that are rarely subject of judicial analysis). For example, the Act is silent as to what constitutes a “wage” and when a deduction constitutes a “valid setoff” against employee wages. See Labor and Employment Alert, *Recent Developments Under the Massachusetts Wage Act*, GOODWIN PROCTOR (Mar. 9, 2011), [http://www.goodwinprocter.com/Publications/Newsletters/Labor-and-Employment-Alert/2011/0309\\_Recent-Developments-Under-the-Massachusetts-Wage-Act.aspx](http://www.goodwinprocter.com/Publications/Newsletters/Labor-and-Employment-Alert/2011/0309_Recent-Developments-Under-the-Massachusetts-Wage-Act.aspx). Furthermore, the Supreme Judicial Court has not defined the term “damages incurred,” although it has explained that it includes “wages and benefits the plaintiff proves he was denied because of his misclassification as an independent contractor.” *Somers v. Converged Access Inc.*, 911 N.E.2d 739, 751 (Mass. 2009). In *Somers*, the court rejected the employer’s argument that they would have hired the plaintiff as an employee and paid a lower weekly wage had they realized they were in violation of the independent contractor statute. *Id.*

<sup>84</sup> See *Recent Developments Under the Massachusetts Wage Act*, *supra* note 83 (highlighting that Wage Act does not define “valid setoff”); *infra* note 95 and accompanying text (same).

<sup>85</sup> Compare *Juergens v. Microgroup, Inc.*, No. WOCV201002379D, 2011 WL 1020856, at \*2 (Mass. Super. Ct. Jan. 28, 2011) (holding severance pay could be considered “wages” under Wage Act), with *Farrell v. Farrell Sports Concepts, Inc.*, No. MICV20113433, 2012 WL 1994659, at \*1 (Mass. Super. Ct. Apr. 6, 2012) (holding severance pay not considered “wages” under Wage Act). In 2011, the superior court ruled that severance pay could be included under the Act’s protections, effectively discrediting *Prozinski*. *Juergens*, 2011 WL 1020856, at \*2. Most recently, a superior court judge ruled that a former employee did not have a valid Wage Act claim if his former employer reneges on a severance agreement. See *Farrell*, 2012 WL 1994659, at \*1. In May 2006, Farrell entered into an agreement with “Farrell Sports Concepts” to be its CEO. *Id.* Under the terms of the contract, the company agreed to pay Farrell a \$60,000 annual salary. *Id.* If he were terminated without cause, Farrell would receive his salary bi-weekly for



*Services, LLC*,<sup>86</sup> the appeals court ruled that the Wage Act includes items such as holiday and vacation pay, but that it does not include severance pay because it is not expressly mentioned in the Act.<sup>87</sup> Conversely, in 2005, the Supreme Judicial Court declared that commissions could be included within the law's protections, broadening what constitutes "wages" under the Act, leading most people to believe that severance pay is likely also considered "wages."<sup>88</sup>

Similarly, with respect to wage deductions, the Wage Act requires the timely payment of wages but states that a "valid set-off" is a defense to a claim of failure to pay wages.<sup>89</sup> Until *Camara v. Attorney General*<sup>90</sup> was decided in 2011, there was very little guidance on the issue of what constitutes a valid set-off under the Wage Act.<sup>91</sup> In *Camara*, the Supreme Judicial Court held that an employer could not deduct from an employee's pay based on its unilateral determination that the employee had caused a loss and was liable to the employer for damages.<sup>92</sup> The court ruled that the

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nine months. *Id.* In September of 2009, Farrell was removed from his position without cause, and the company refused to pay the nine-month severance pay. *Id.* Relying on *Prozinski*, Judge Inge granted the defendant's partial motion to dismiss on the grounds that Farrell failed to state a claim for which relief could be granted, i.e., a violation of the Wage Act. *Id.* at \*2. The *Farrell* ruling directly conflicts with *Juergens*, which was issued by a different judge in the same court, and creates a split within the Superior Court. See *Farrell*, 2012 WL 1994659, at \*1-2; *Juergens*, 2011 WL 1020856, at \*2.

<sup>86</sup> 797 N.E.2d 415 (Mass. App. Ct. 2003).

<sup>87</sup> See *id.* at 419.

<sup>88</sup> See *Wiedmann*, 831 N.E.2d at 311-12.

<sup>89</sup> MASS. GEN. LAWS ch. 149, § 150 (2010):

On the trial no defence [sic] for failure to pay as required, other than the attachment of such wages by trustee process or a valid assignment thereof or a valid set-off against the same, or the absence of the employee from his regular place of labor at the time of payment, or an actual tender to such employee at the time of payment of the wages so earned by him, shall be valid.

*Id.*

<sup>90</sup> 941 N.E.2d 1118 (Mass. 2011).

<sup>91</sup> See David Casey & Vanessa Hackett, *Massachusetts High Court: Employers Can't Dock Pay!*, LITTLER 2 (Feb. 2011), [http://www.littler.com/files/press/pdf/2011\\_02\\_ASAP\\_MA\\_HighCourt\\_EmployersCantDockPay.pdf](http://www.littler.com/files/press/pdf/2011_02_ASAP_MA_HighCourt_EmployersCantDockPay.pdf) (maintaining *Camara* decision significantly restricts employer's ability to deduct from employee's wages); *Massachusetts SJC Strikes Down Employer's Wage Deduction Policy*, MANAGEMENT-SIDE LAW. (Jan. 27, 2011), <http://managementsidelawyer.com/2011/01/27/massachusetts-sjc-strikes-down-employers-wage-deduction-policy/> ("The *Camara* decision is another example of the wage and hour minefield that employers must navigate on a daily basis.").

<sup>92</sup> See *Camara*, 941 N.E.2d at 1124. In the facts leading to the litigation in *Camara*, if a manager of ABC Disposal Service, Inc. had determined that an employee was at fault for an

company's wage policy and the deduction from the employee's paycheck was an invalid set-off against the employee's wages because the company made itself the sole arbiter of the damage assessments, there was no appeal process for the employee, and the damage assessment was not a "clear and established debt."<sup>93</sup> In a footnote, the court restated what the Attorney General considered to be valid set-offs: (1) an undisputed loan or wage advance; (2) theft of the employer's property, as established in an "independent and unbiased proceeding" with due process protections; and (3) a legal judgment obtained by an employer against an employee.<sup>94</sup> Undoubtedly, *Camara* restricts an employer's ability to make deductions from an employee's wages; however, it does not set forth a clear-cut rule for determining what is a valid set-off.<sup>95</sup> Presumably, the Attorney General and plaintiff's attorneys will raise a claim on a case-by-case basis and pursue legal action accordingly.<sup>96</sup>

### *B. Increase in Wage Act Litigation*

Wage and hour litigation has increased—especially class action lawsuits—because the 2008 amendment has made Massachusetts a more desirable jurisdiction for employee plaintiffs and plaintiffs' attorneys.<sup>97</sup> Massachusetts is a preferred jurisdiction because federal law and all other states' laws allow employers to assert a good-faith defense to a wage and hour claim, whereas Massachusetts does not.<sup>98</sup> Moreover, Massachusetts is

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accident, which caused property damage to either a company truck or to a third-party, the driver could either accept discipline for the accident or agree to pay for the damage over time through a deduction from wages. *Id.* at 1119. The Office of the Attorney General audited ABC Disposal Service, and determined that the company had deducted more than \$21,000 from employees' wages pursuant to this policy. *Id.* at 1120. ABC Disposal Service was ordered to repay those amounts and to pay a civil penalty of over \$9,000. *Id.* On appeal, the Supreme Judicial Court adopted the Attorney General's interpretation of the statute, reasoning that valid set-offs are limited to clear and established debts that are determined through some form of due process. *Id.*

<sup>93</sup> *Id.* at 1124.

<sup>94</sup> *Id.* at 1124 n.13.

<sup>95</sup> See *Massachusetts SJC Strikes Down Employer's Wage Deduction Policy*, *supra* note 91 (noting court's failure to establish set-offs).

<sup>96</sup> See Casey & Hackett, *supra* note 91, at 2 (stating attorney general will scrutinize an employer's internal process of liability determination).

<sup>97</sup> Laurent Badoux, *Trends in Wage and Hour Litigation Over Unpaid Work Time and the Precautions Employers Should Take*, ADP 1 (2011), [http://www.adp.com/workforce-management/docs/whitepaper/trendsinwageandhourlitigation\\_05292012.pdf](http://www.adp.com/workforce-management/docs/whitepaper/trendsinwageandhourlitigation_05292012.pdf) (approximating ninety percent of collective actions filed are wage and hour claims). At a national level, wage and hour class action lawsuits now exceed actions for race, sex, and religious discrimination. See *Massachusetts Triple Damages Bill Becomes Law*, *supra* note 55 (noting "tidal wave of wage and hour litigation . . . sweeping through" judicial system).

<sup>98</sup> See, e.g., Kaczmarek & Barber, *supra* note 13; Jeffrey F. Webb & Vanessa D'Anna

the only jurisdiction that will automatically award treble damages, which has created a noteworthy “uptick” in litigation.<sup>99</sup> The mere threat of subjection to treble damages is forcing employers to reach settlements quickly and often.<sup>100</sup> Once an action is filed, employers recognize that it is expensive to receive an adverse judgment at trial and most of the time it is more cost efficient to settle a case—even if they believe they did nothing wrong.<sup>101</sup>

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Gilbreth, *New Law Triples Exposure for Mass. Employers*, EMP. L. 360, Apr. 29, 2008, at 1; GORDON, *supra* note 7 (“There has been a burst of litigation seeking to enforce payment of wages.”); Whitley, *supra* note 78, at 8 (asserting lawsuits arising under Wage Act “spiked” in last eighteen months).

<sup>99</sup> See Alfred, *supra* note 20, at 1 (noting Massachusetts only state with such severe mandatory treble damages statute); *State of Associated Industries of Massachusetts*, *supra* note 18, at 18. The law firm Seyfarth Shaw predicted that, “because of the passage of this bill, plaintiffs’ lawyers from Massachusetts and around the country may bring wage and hour claims against Bay State employers to take advantage of the new damages provisions.” *Massachusetts Triple Damages Bill Becomes Law*, *supra* note 55; see also Bingham-McCutchen, *Massachusetts Wage Act Amendments Mandate Treble Damages*, MARTINDALE-HUBBELL (Apr. 24, 2008), [http://www.martindale.com/employee-benefits-law/article\\_Bingham-McCutchen-LLP\\_413038.htm](http://www.martindale.com/employee-benefits-law/article_Bingham-McCutchen-LLP_413038.htm).

<sup>100</sup> See *Salvas v. Wal-Mart Stores, Inc., Settlement Agreement*, 2009 WL 4488278 (Mass. Sup. Ct. Dec. 2, 2009) (listing “uncertainty of treble damages” in settlement agreement as reason for settling); see also *State of Associated Industries of Massachusetts*, *supra* note 18, at 19 (“[T]he result [of the amendment] is these claims are settling very quickly.”); *New Massachusetts Law Mandates Triple Damages for Employer Wage and Hour Violations*, CAIN HIBBARD & MYERS PC (July 1, 2008), [http://www.cainhibbard.com/news/client\\_alerts/new\\_machusetts\\_law\\_mandates\\_triple\\_damages\\_for\\_employer\\_wage\\_and\\_hour\\_violations.html](http://www.cainhibbard.com/news/client_alerts/new_machusetts_law_mandates_triple_damages_for_employer_wage_and_hour_violations.html) (“The automatic penalty imposed by the new law may encourage . . . large-scale class action lawsuits against employers in Massachusetts.”). See generally Shapiro, *supra* note 8, at 490 (“[T]he possibility of higher damages might . . . decrease litigation by encouraging defendants who are in the wrong to settle for an amount closer to the actual damages to avoid the possible imposition of multiple damages.”).

<sup>101</sup> See *Daddy’s Music to Liquidate*, MUSIC TRADES, Dec. 1, 2011, at 42-44. A small twelve-store New England music company, Daddy’s Junky Music, was forced into bankruptcy. *Id.* at 42. What “put the company over the edge was a \$700,000 legal settlement paid out in 2008” to two Massachusetts managers who filed a lawsuit claiming that they were actually line employees and not managers, thus entitling them to overtime compensation. *Id.* at 42, 44. “Because [the lawsuit] was in ‘business unfriendly Massachusetts’ and subject to treble damages, [the owner] opted to settle.” *Id.* at 42 (quoting Fred Bramante, Former CEO of Daddy’s Junky Music); see also *Private Actions in Competition Law: A Consultation on Options For Reform*, DEPARTMENT FOR BUS. INNOVATION & SKILLS 56 (Apr. 2012), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf) (“The existence of treble damages . . . is commonly regarded as creating a ‘litigation culture’, in which claimants are able to bring speculative cases and defendants are forced to settle simply to avoid the risk.”). The risk of treble damages alters the usual incentives between fighting a case and settling, unfairly penalizing defendants. *Private Actions in Competition Law*, *supra*, at 56.

## IV. SCRUTINY OF THE WAGE ACT

*A. Practical Legislative Alternatives*

There are countless alternative mechanisms to deter wage theft and simultaneously punish wrongdoers, and the Massachusetts Legislature is the best body to effect this change.<sup>102</sup> For example, the Wage Act's damages provision could impose mandatory treble damages, but only when the employer is a prior offender or only after the employer fails to satisfy a judgment for unpaid wages.<sup>103</sup> Alternatively, the Massachusetts Legislature could require that plaintiffs have the burden to prove that an employer's violation was willful or flagrant before imposing a treble damages award.<sup>104</sup> Additionally, the legislature could provide greater protection for employees by providing for further compensation for past wage theft through an increased civil statute of limitations for non-payment of wage violations from three years to six years for willful violations, in line with the criminal statute of limitations for failure to pay wages in Massachusetts.<sup>105</sup> The standard civil statute of limitations for wage payment and minimum wage laws across federal jurisdictions and the

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<sup>102</sup> See *Winning Wage Justice*, *supra* note 6, at 17-123 (analyzing twenty-eight different policies that fight wage theft).

<sup>103</sup> *Id.* at 19 (listing policy exceptions and alternatives).

<sup>104</sup> See *id.* Damages that vary according to the defendant's culpability is akin to the damage's provision in Massachusetts Unfair Trade Practices Act, which is the state's consumer protection statute. See *Rini v. United Van Lines*, 903 F. Supp. 224, 233 (D. Mass. 1995) ("Given the degree of culpability, this court will award treble damages under 93A."); *Kattar v. Demoulas*, 739 N.E.2d 246, 259 (Mass. 2000) (stating chapter 93A "ties liability for multiple damages to the degree of the defendant's culpability"). The multiple damages provision of chapter 93A is designed to impose a penalty that varies with the culpability or egregiousness of the defendant's conduct. See MASS. GEN. LAWS ch. 93, § 12 (2010):

Any person who shall be injured in his business or property by reason of a violation of the provisions of this chapter may sue therefor and recover the actual damages sustained, together with the costs of suit, including reasonable attorney fees. If the court finds that the violation was engaged in with malicious intent to injure said person, the court may award up to three times the amount of actual damages sustained, together with the costs of suit, including reasonable attorneys fees.

*Id.*

<sup>105</sup> See *Winning Wage Justice*, *supra* note 6, at 21-22 (advocating suspension or extension of statute of limitations to help workers recover damages owed). Interestingly, under the Florida Minimum Wage Act, the statute of limitations is four years for a typical claim and five years for willful violations. See FLA. CONST. art. X, § 24(e).

majority of state jurisdictions is two-to-three years.<sup>106</sup> Increasing the time to file a claim for from three years to six for willful violations will help employees collect more back wages owed, and simultaneously deter employers with bad intentions from committing “wage theft.”<sup>107</sup> The risk of lawsuits from older complaints will expose employers to the potential for greater scrutiny and will discourage employer violations, while providing a remedy to a greater number of victims with stale complaints under the current scheme.<sup>108</sup> Finally, the legislature could increase the damages multiplier to something greater than three for seriously egregious conduct.<sup>109</sup> A higher multiplier would both deter violations and punish those who truly deserve punishment, but in a majority of tort cases a multiplier has never been the law.<sup>110</sup>

### *B. Due Process Challenge*

If the legislature does not take initiative to amend the Massachusetts Wage Act’s treble damages provision, employers’ counsel could challenge the constitutionality of the provision on the grounds that it does not require a finding of heightened culpability and the treble damages it requires are, at least in part, punitive.<sup>111</sup> Generally, treble-damages

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<sup>106</sup> See *Winning Wage Justice*, *supra* note 6, at 21 (suggesting to suspend or lengthen statute of limitations).

<sup>107</sup> See *id.* at 22.

<sup>108</sup> *Id.* (explaining challenges to achieving this type of policy).

<sup>109</sup> See Shapiro, *supra* note 8, at 455 (arguing for damage multipliers in suits).

<sup>110</sup> See *id.* (explaining rationales for using damage multipliers).

<sup>111</sup> See Appellant’s Opening Brief at 52-57, *Matamoros v. Starbucks Corp.*, 699 F.3d 129 (1st Cir. 2012) (Nos. 12-1277, 12-1189), 2012 WL 1653022, at \*52-57. As the Supreme Judicial Court has continuously acknowledged, “[m]ultiple damages such as . . . treble damages . . . ‘are essentially punitive in nature.’” *Goodrow v. Lane Bryant, Inc.*, 732 N.E.2d 289, 299 (Mass. 2000) (quoting *Fontaine v. Ebtec Corp.*, 613 N.E.2d 881, 889 (Mass. 1993)); *Wiedmann v. Bradford Group, Inc.*, 831 N.E.2d 304, 313 (Mass. 2005) (reiterating proposition from *Goodrow* “that treble damages are punitive in nature”); see also *Killeen v. Westban Hotel Venture, LP.*, 872 N.E.2d 731, 735 (Mass. App. Ct. 2007) (“multiple damages are essentially punitive damages”). But see *Martin v. Cooper Elec. Supply Co.*, 940 F.2d 896, 907 (3rd Cir. 1991) (indicating multiple damages compensatory rather than punitive). “Under the [FLSA], liquidated damages are compensatory, not punitive in nature” because they are intended to “compensate employees for losses they might suffer by reason of not receiving their lawful wage at the time it was due,” serving “the same purpose” as prejudgment interest. *Id.* at 907-10; *Morse Diesel Int’l, Inc. v. United States*, 79 Fed. Cl. 116, 126-27 (Fed. Cl. 2007) (holding mandatory treble damages provision of federal False Claims Act constitutional); Plaintiff-Appellees/Cross-Appellants’ Principal & Response Brief at 38-40, *Matamoros v. Starbucks Corp.*, 699 F.3d 129 (1st Cir. 2012) (Nos. 12-1189, 12-1277), 2012 WL 2872253, at \*38-40 (arguing mandatory treble damages under Wage Act constitutional). The False Claims Act was deemed constitutional because the “parameters of lawful monetary relief [were] prescribed by Congress and the amount in each case is determined by the court; therefore, there is little risk of the type of arbitrary or imprecise award

statutes are not easily characterized as strictly remedial or strictly punitive; because of their hybrid nature these laws can contain both remedial and punitive elements.<sup>112</sup> The Supreme Court has placed various statutory-treble-damages awards at different points along the spectrum between strictly compensatory and purely punitive.<sup>113</sup> Compensatory damages are intended to redress the concrete loss that the plaintiff has suffered because of the defendant's wrongful conduct, whereas punitive damages "are aimed at deterrence and retribution."<sup>114</sup> The Wage Act's treble damages provision should be characterized as punitive because other provisions in the statute already redress the actual losses suffered by the plaintiff.<sup>115</sup> The statute expressly states, "[a]n employee so aggrieved who prevails in such an action shall be awarded . . . for any lost wages and other benefits and shall also be awarded the costs of the litigation and reasonable attorneys' fees."<sup>116</sup> Therefore, the additional imposition of treble damages must have been intended as more of a punitive measure.<sup>117</sup> Indeed, the damages

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. . . . " *Morse Diesel Int'l, Inc.*, 79 Fed. Cl. at 126.

<sup>112</sup> See Robert S. Murphy, Comment, *Arizona RICO, Treble Damages, and Punitive Damages: Which One Does Not Belong?*, 22 ARIZ. ST. L.J. 299, 302-04 (1990) (examining policies underlying punitive and treble damages).

<sup>113</sup> See *PacificCare Health Sys., Inc. v. Book*, 538 U.S. 401, 405-06 (2003) (referring to several Supreme Court cases that explain nature of treble damages); see, e.g., *Vermont Agency of Nat'l Res. v. United States ex rel. Stevens*, 529 U.S. 765, 784 (2000) (characterizing treble-damages provision of the False Claims Act as "essentially punitive in nature"); *Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 (1982) (noting antitrust private action, which allows treble damages, was created as remedy for victims); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 485 (1977) (stating treble-damages provision of Clayton Act, "is in essence a remedial provision").

<sup>114</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (discussing differences in damages awards).

<sup>115</sup> See BLACK'S LAW DICTIONARY 448 (9th ed. 2009) ("[Punitive damages are damages that are] awarded in addition to actual damages when the defendant acted with recklessness, malice, or deceit" (emphasis added)).

<sup>116</sup> See MASS. GEN. LAWS. ch. 149, § 150 (2010).

<sup>117</sup> See generally *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 125 (1985) (holding liquidated damages punitive because intended to act as deterrent to willful violations); *Southway Corp. v. Metro. Realty & Dev. Co.*, 206 S.W.3d 250, 257 (Ark. Ct. App. 2005) ("Multiple-damage statutes, being penal in nature, must be strictly construed."); *Imperial Merch. Servs., Inc. v. Hunt*, 212 P.3d 736, 744 (Cal. 2009) ("Treble damages are punitive in nature."); *Fink v. Ricoh Corp.*, 839 A.2d 942, 980 (N.J. Super. Ct. Law Div. 2003) ("Treble damages are a form of punitive damages."); *Tri-Tech Corp. of Am. v. Americomp Servs., Inc.*, 646 N.W.2d 822, 827 (Wis. 2002) ("A statute creating a treble damages remedy is regarded as punitive rather than remedial, and is strictly construed."). But see *Matamoros v. Starbucks Corp.*, 699 F.3d 129, 140 (1st Cir. 2012) ("By definition, therefore, liquidated damages are not punitive damages."). "The current treble damages provision in the Massachusetts Wage Act reflects a reasoned legislative judgment." *Id.*; see also *Webb v. Shull*, 270 P.3d 1266, 1271 (Nev. 2012) (holding treble damages awarded under Nevada statute are remedial, not punitive); Plaintiff-Appellants' Principal & Response Brief at 40, *Matamoros v. Starbucks Corp.* 699 F.3d 129 (1st Cir. 2012)

provision does expressly state that the treble damages are “liquidated damages,” however this phrase acts as an illusion to mask the realistic effect of a punitive provision that grants employees unjust enrichment—especially in instances when an employer is forced to pay three times the wages originally due to correct a good faith error.<sup>118</sup> Concededly, in *Matamoros v. Starbucks Corp.*, the First Circuit held that treble damages pursuant to the Massachusetts Wage Act is not an award of punitive damages nor analogous to such an award; however, this does not settle the matter because neither the Massachusetts Supreme Judicial Court nor the United States Supreme Court has ruled on the issue of due process.<sup>119</sup>

The automatic imposition of punitive damages, without the finding of heightened culpability, may not survive a Fourteenth Amendment due-process challenge.<sup>120</sup> The Supreme Judicial Court laid the foundation for this due process argument in *Goodrow*, when it indicated that awarding multiple damages for wage and hour violations “absent evidence of heightened culpability would very likely constitute ‘an arbitrary or irrational deprivation of property,’ . . . and thus would be constitutionally impermissible.”<sup>121</sup> Although states have discretion to award treble

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(Nos. 12-1189, 12-1277), 2012 WL 2872253, at \*40. “[L]iquidated damages in the wage context are intended to ‘constitute[] compensation for the retention of a workman’s pay which might result in damages too obscure and difficult of proof for estimate other than by liquidated damages.’” *Id.* (quoting *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 707 (1945)).

<sup>118</sup> See Charles A. Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV. 17, 65 (1983) (noting “[h]arm to plaintiffs is not necessarily the reciprocal of benefit to the defendant.”).

<sup>119</sup> *Matamoros*, 699 F.3d at 139-40 (indicating treble damages not punitive). Since the First Circuit based its decision on federal constitutional law, employers may be able to invalidate the provision based on state due process principles. See *id.* But see *Goodrow*, 732 N.E.2d at 299 (suggesting “that treble damages are punitive in nature”). The Supreme Judicial Court laid the foundation for this argument in the *Goodrow* case. *Id.* (stating in dicta punitive damages only appropriate for conduct with “evil motive” or “reckless indifference”).

<sup>120</sup> See *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (“The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments . . . .”); Appellant’s Opening Brief at 52-57, *Matamoros v. Starbucks Corp.*, 699 F.3d 129 (1st Cir. 2012) (Nos. 12-1277, 12-1189), 2012 WL 1653022, at \*52-57 (arguing against award of treble damages under an “unconstitutional statute”); Richard Wayne, *Treble Damages for Wage Violation*, LABOR ISSUES 2 (July 2008), <http://www.haslaw.com/wp-content/uploads/publications/Treble%20Damages-RDW.pdf> (suggesting enforcement of treble damages provision could be constitutional violation). The Fourteenth Amendment’s guarantees preclude states from imposing penalties “so plainly arbitrary and oppressive as to be nothing short of a taking of . . . property without due process of law.” *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915). The Wage Act’s treble damages provision, which awards punitive damages absent a showing of heightened culpability, is arguably a taking of property without due process of law. See *Goodrow*, 732 N.E.2d at 299.

<sup>121</sup> See *id.* at 299 (quoting *TXO Prod. Corp. v. Res. Alliance Corp.*, 509 U.S. 443, 467 (1993) (Kennedy, J., concurring)). The Eighth Amendment provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S.

damages via statutory law, “there are procedural and substantive constitutional limitations” that must be considered.<sup>122</sup> Procedural due process guarantees certain procedures designed to protect against random governmental deprivation.<sup>123</sup> “Under this analysis, property may not be taken without providing the minimal protections of notice and an opportunity to be heard.”<sup>124</sup> Accordingly, the judicial proceeding required before treble damages are imposed will go far beyond the threshold requirements of procedural due process.<sup>125</sup> However, because the wage and hour laws in Massachusetts are still evolving, it is easy to imagine a situation where the defendant is not given sufficient notice that the non-payment of wages was illegal under the Wage Act, nor an opportunity to be heard on the merits of intentionality, as treble damages are enforced regardless of the employer’s intent or knowledge of the wrongdoing.<sup>126</sup> Employers are not at fault for the still unsettled provisions of the Wage Act that are likely susceptible to different judicial interpretations.<sup>127</sup> The *most* the law should require from employers is due diligence and good faith efforts to comply with the law, and in return, the law should allow employers the platform to prove that the failure to pay wages was an error made in good faith—anything more than that could be construed as an

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CONST. amend. VIII. The Eighth Amendment’s prohibition of excessive fines applies to the states through the Due Process Clause of the Fourteenth Amendment. *See Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.* 532 U.S. 424, 433-34 (2001) (explaining root of prohibition of excessive fines). *But see* *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257, 259 (1989) (holding excessive fine clause does not apply to punitive damages in cases between private parties).

<sup>122</sup> *Campbell*, 538 U.S. at 416. The Supreme Court held that three guidelines help to determine whether a punitive damages award violates constitutional due process: first, the reprehensibility of the conduct being punished; second, the reasonableness of the relationship between the harm and the award; and third, the difference between the award and the civil penalties authorized in comparable cases. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575-85 (1996) (setting out guidelines and holding award of punitive damages excessive). However, the balancing test articulated in *BMW* and reiterated in *Campbell* was used to evaluate the remedy administered by a jury. *Id.* at 573-85. A jury is vulnerable to impose a grossly disproportionate award based on inadequate guidance, vague instructions, or bias against large corporations. *See id.* at 588. There is far less risk of arbitrary award under the Wage Act because the measure of damages under the Act are established at exactly three times the amount of single damages. *See BMW of N. Am., Inc.*, 517 U.S. at 580-83 (holding damages were excessive because of 500 to 1 ratio between award and actual harm).

<sup>123</sup> *See Wilson P. Abraham Constr. Corp. v. Tex. Indus., Inc.*, 604 F.2d 897, 904 (5th Cir. 1979) (discussing due process and equal protection as guaranteed by Fifth Amendment).

<sup>124</sup> *Id.* (analyzing procedural due process).

<sup>125</sup> *Id.*

<sup>126</sup> *See supra* notes 84-96 and accompanying text (describing unsettled law under Wage Act).

<sup>127</sup> *See supra* notes 84-96 and accompanying text (discussing unsettled areas of law and demonstrating statute’s complexity).



arbitrary governmental deprivation of property.<sup>128</sup>

### C. Not an Effective Deterrent

Multiple damages statutes in response to employer malfeasance or nonfeasance may deter a broad range of *intentional* behaviors.<sup>129</sup> Defendants who exhibit malicious, intentional, or extremely reckless misconduct should be candidates for multiple damages.<sup>130</sup> However, when an employer inadvertently violates the Wage Act, they are not doing so in an intentional, malicious, or reckless manner, and therefore the deterrence effect will be practically non-existent—in other words, there is no way to deter the unknowing.<sup>131</sup> It is impossible to deter a violator from committing an act with punitive measures after the fact if they did not know they were breaking the law in the first place.<sup>132</sup> For example, the majority of antitrust violations are not only intentional, but are also usually a premeditated strategy for financial gain.<sup>133</sup> Accordingly, antitrust

<sup>128</sup> See *infra* notes 142-153 (advocating that incorporating good faith defense into statute would make best public policy).

<sup>129</sup> See Shapiro, *supra* note 8, at 498 (recognizing statutory multiple damages used to deter many kinds of wrongful and intentional conduct).

<sup>130</sup> See *id.* (“If the defendant’s conduct was sufficiently wrongful to warrant deterrence, the court could award additional compensation if it were deemed necessary to deter such conduct.”).

<sup>131</sup> See Shapiro, *supra* note 8, at 457 (recognizing deterrent effect of damages more effective for intentional acts). Damages work best to deter intentional conduct. See, e.g., *Cotita v. Pharma-Plast, U.S.A., Inc.*, 974 F.2d 598, 600-01 (5th Cir. 1992) (determining imposition of comparative negligence would not deter neglectful or inattentive acts); Calum Anderson, *Insurance Coverage for Employment-Related Litigation: Connecticut Law*, 18 W. NEW ENG. L. REV. 199, 244 (1996) (“The basis for such decisions is that, while punitive damages may serve to deter persons from engaging in intentionally harmful behavior, these courts believe that it is purely speculative whether the prohibition of coverage for punitive damages would deter reckless or grossly negligent conduct.”); C. Gregory Ruffennach, *Free Markets, Individual Liberties and Safe Coal Mines: A Post-Sago Perspective*, 111 W. VA. L. REV. 75, 105 (2008) (“While penalties might be presumed to deter intentional conduct, it is questionable whether penalties can effectively deter the ‘ordinary negligence’ that characterizes most MSHA violations.”). But see *Villaman v. Schee*, Nos. 92-15490, 92-15562, 1994 WL 6661, at \*4 (9th Cir. Jan. 10, 1994) (declaring tort law designed to deter negligent conduct); *Travelers Indem. Co. v. PCR, Inc.*, 889 So. 2d 779, 795 (Fla. 2004) (“An equally basic aim of imposing liability for compensatory damages resulting from negligent conduct is to deter such conduct . . .”); DAN B. DOBBS, *THE LAW OF TORTS* 19 (2000) (recognizing goal of tort law is to impose liability when conduct causes harm).

<sup>132</sup> See Carole B. Silver, *Penalizing Insider Trading: A Critical Assessment of the Insider Trading Sanctions Act of 1984*, 1985 DUKE L.J. 960, 1000 (1985) (“[D]efendants cannot alter their behavior as a result of the threat of a treble damages penalty that they cannot foresee.”).

<sup>133</sup> See Shapiro, *supra* note 8, at 477. Since the passage of the Sherman Act in 1890, prevailing plaintiffs in private antitrust lawsuits have been able to recover treble damages. Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61 TUL. L. REV. 777, 778-79 (1987).

violators are especially susceptible to deterrence through the use of statutorily mandated treble damages.<sup>134</sup> Other intentional torts, such as fraud or knowingly failing to fix a dangerous condition or product, can also be effectively deterred by heavy damage provisions.<sup>135</sup> However, the Wage Act does not fit this model well because it can be unintentionally violated—there is no requisite state of mind element.<sup>136</sup>

Arguably, preventative measures—as opposed to reacting with the strict liability imposition of treble damages—may be more appropriate and more beneficial to the employee and to society as a whole.<sup>137</sup> The economic well being of an employee and employer is inextricably intertwined.<sup>138</sup> Thus, if employers had access to more comprehensive educational programs, those who wish to comply will commit violations less often.<sup>139</sup> Additionally, increased targeted investigations and enforcement actions against violators would also decrease violations.<sup>140</sup> Automatic treble damages would not be necessary if the state was aware of, and able to prosecute, most of the violations.<sup>141</sup>

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<sup>134</sup> See Shapiro, *supra* note 8, at 477 (“Since antitrust violations are not only intentional but are usually a planned and thought-out strategy for financial gain (as opposed to intentional yet impulsive activity), they are particularly susceptible to deterrence.”).

<sup>135</sup> See *id.* (examining treble damages provision in antitrust laws and comparing to broader range of intentional torts).

<sup>136</sup> See Shapiro, *supra* note 8, at 457 (“[D]eterrent effect of damages will be stronger on most intentional actions than on negligent actions.”).

<sup>137</sup> See Christopher M. Pardo, *The Cost of Doing Business: Mitigating Increasing Recession Wage and Hour Risks While Promoting Economic Recovery*, 10 J. BUS. & SEC. L. 1, 23-25 (2009) (suggesting increased educational programs would help protect workers); Garry G. Mathaisson, et al., *Total Wage and Hour Compliance: An Initiative to End the Wage and Hour Class Action War*, LITTLER 19 (2008-2009), [http://www.littler.com/files/press/pdf/WP\\_TotalWageHourCompliance\\_6-09\\_F.pdf](http://www.littler.com/files/press/pdf/WP_TotalWageHourCompliance_6-09_F.pdf) (concluding more than half of violations would not occur if sufficient training took place). “[W]age and hour policies and internal complaint procedures will fail if human resources, managers and employees lack an understanding of their roles and obligations.” *Id.*

<sup>138</sup> See Pardo, *supra* note 137, at 5 (“When the employer is doing poorly financially, the worker’s employment is at risk.”).

<sup>139</sup> See Pardo, *supra* note 137, at 23-25. “[E]ducation regarding . . . wage and hour laws . . . is the most effective and immediate step we can take with regard to fulfilling all of our duties to the American worker and—as a result—promoting economic recovery one employee and company at a time.” *Id.* at 26.

<sup>140</sup> See generally *Joint Enforcement Task Force on the Underground Economy and Employee Misclassification*, EXECUTIVE OFF. LAB. & WORKFORCE DEV., <http://www.mass.gov/lwd/eolwd/jtf/> (last visited May 15, 2013). The Joint Enforcement Task Force is “charged with coordinating the efforts of multiple state agencies to stamp out fraudulent employment activities, the Task Force is working to level the playing field in order to increase fair business competition.” *Id.*

<sup>141</sup> *Id.* (suggesting Task Force was established, at least in part, to deter Wage Act violations).

*D. Good Faith Defense*

Chapter 149, section 150 of the Massachusetts General Laws should be amended to allow an employer to raise an affirmative good faith defense where there is a clear dispute as to what the law requires.<sup>142</sup> To be clear, the law would still automatically impose treble damages, but it would allow an employer the opportunity to set forth an affirmative defense to escape treble damages if he or she can prove that the wage and hour violation was committed in good faith.<sup>143</sup> Moreover, good faith is not automatically proven anytime an employer violates an unsettled area of law and the defense may not relieve many employers from the burden of treble damages.<sup>144</sup> However, at least those who put forth a good faith effort to comply with the law will not be unduly penalized.<sup>145</sup> Without a good faith defense, the law is overinclusive.<sup>146</sup> An overinclusive statute burdens more people than necessary to accomplish the legislature's goal.<sup>147</sup> The 2008 amendment mandating treble damages was passed to further deter willful violations of the law.<sup>148</sup> Therefore, a good faith defense can be permitted, while still accomplishing the legislature's goal to deter employers' willful violations of wage and hour laws.<sup>149</sup>

The 2008 amendment was passed over repeated objections from both Governors Romney and Patrick.<sup>150</sup> The legislature may have

<sup>142</sup> See *Winning Wage Justice*, *supra* note 6, at 7 ("Fighting wage theft is not about adding new burdens onto law-abiding employers."); see also sources cited *supra* note 20 and accompanying text (explaining complexity of statute).

<sup>143</sup> See *Reich v. S. New Eng. Telecomms. Corp.*, 121 F.3d 58, 71 (2d Cir. 1997) (discussing liquidated damages under Fair Labor Standards Act). "'Good faith' in this context requires more than ignorance of the prevailing law or uncertainty about its development." *Id.* "It requires that an employer first take active steps to ascertain the dictates of the [Wage Act] and then move to comply with them." *Id.* An accidental violation is not sufficient to establish that an employer acted in good faith. *Id.* Nor is good faith demonstrated by the absence of employee complaints or conformity with industry-wide practices. *Id.* at 71.

<sup>144</sup> See *supra* note 143 and accompanying text.

<sup>145</sup> See *supra* notes 111-128 (arguing mandatory treble damages are unduly punitive).

<sup>146</sup> See BLACK'S LAW DICTIONARY 1213 (9th ed. 2009). Defining "overinclusive" as "extending beyond the class of persons intended to be protected or regulated; burdening more persons than necessary to cure the problem . . ." *Id.*

<sup>147</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 722 (3rd ed. 2009). "A law is overinclusive if it applies to those who need not be included in order for the government to achieve its purpose." *Id.*

<sup>148</sup> See *Alfred*, *supra* note 20, at 5 (alleging 2008 amendment serves no legitimate policy and harms economy).

<sup>149</sup> See *Cheney*, *supra* note 51 (supporting strict enforcement of wage and hour laws).

<sup>150</sup> See LEWIN & SCHAUB, *supra* note 13. "Based upon the discussion by the Supreme Judicial Court in the *Wiedmann* case, enforcement of the treble damages provision may leave room for a constitutional challenge to a mandatory imposition of a treble damages award as two

overstepped its bounds by amending the Wage Act despite clear opposition from both the judicial and executive branches.<sup>151</sup> The treble damages mandate was a drastic departure from the established common law principles and was much more than a mere clarification of legislative intent.<sup>152</sup> The legislature should have enacted a less draconian statute.<sup>153</sup>

## V. CONCLUSION

Defendants should be allowed to raise an affirmative good faith defense before treble damages are imposed for Wage Act violations. Mandatory treble damages are inappropriate in the wage and hour context as a one-size-fits-all remedy. The most fitting and economically efficient statute would allow the employer an opportunity to raise a good faith defense before the imposition of treble damages. This arrangement is most effective because it would still facilitate the objectives of mandatory treble damages: deterrence, incentive for private attorneys to take cases, and victim compensation. However, unlike automatic treble damages, this arrangement does not punish an employer who performs certain due diligence and makes an honest violation in good faith. A good faith defense is an imperative tool for employers because there are still provisions of the Wage Act that are unsettled and comprised of inherent complexities—provisions that even the most knowledgeable and bright legal minds are not able to decipher and agree upon their legal effect.

*Rebekah D. Provost*

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branches of government are in disagreement with the legislature.” *Id.*

<sup>151</sup> See *supra* notes 28-62 and accompanying text (explaining events and opposition leading to 2008 amendment).

<sup>152</sup> See Response & Reply Brief of the Defendant-Appellant/Cross-Appellee American Airlines, Inc. at 51-52, *Difiore v. Am. Airlines, Inc.*, 646 F.3d 81 (1st Cir. 2011) (Nos. 10-1167, 10-1108, 10-1264), 2010 WL 5852036, at \*51-52 (arguing damages provision of Wage Act unambiguous before chapter 80’s enactment). When the legislature first began debating Senate Bill 1059 in January 2007, the draft legislation “stated: ‘This act is intended to clarify the existing law and to reiterate the original intention of the general court that triple damages are mandatory.’” *Id.* This sentence was conspicuously removed from the final version that became law, suggesting that the legislature intended that chapter 80 would amend, as opposed to clarify, the damages provision under the Wage Act. *Id.* But see Nina Joan Kimball, *supra* note 46, at 12-13 (asserting 2008 amendment was not “drastic departure from well established principles”).

<sup>153</sup> See *Winning Wage Justice*, *supra* note 6, at 19-20 (listing options state legislators could introduce as alternatives to treble damages in wage claims).