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East Coast Edition

A Littler Mendelson East Coast-specific Newsletter

Connecticut Supreme Court Upholds Criminal Conviction for Failure to Pay Wages, Despite Employees' Agreement to Defer Payment

By Gregory B. Reilly and Lisa R. Norman

In another rare decision on compensation issues, the Connecticut Supreme Court upheld the criminal conviction of an employer who failed to pay wages. In *State v. Lynch*, 287 Conn. 464 (2008), the court held that an employee's agreement to defer the accrual of wages, until the employer can afford to pay them, does not absolve the employer from criminal liability for wages that are already past due at the time of the agreement.

The defendant, Daniel P. Lynch, was the majority owner and managing member of Wireless Communications Products, L.L.C., a small start-up company specializing in the development of infrared communications systems. In 1999, Wireless began experiencing cash flow problems, and in 2001, it began to miss its biweekly payroll. In October 2002, Lynch met with four of Wireless' employees and informed them that, although the company had no source of revenue, it was trying to secure an important government contract. Lynch told the employees that if Wireless was awarded the contract, it would be able to pay both their past and future wages. At Lynch's request, each of the four employees continued working for Wireless, and each signed a written agreement that their wages would not become due unless and until Wireless acquired sufficient revenue to pay them. Eventually, each of the four employees resigned and filed claims with the Connecticut Department of Labor for unpaid wages totaling more than \$250,000. The Department of Labor asked the state's attorney's office to prosecute Lynch under section 31-71g of the Connecticut General Statutes, which authorizes criminal penalties of imprisonment and

fines to the individual who is responsible for the employer's failure to pay wages.

At trial, Lynch presented evidence of the employees' agreement to defer accrual of their wages, and he asked the court to instruct the jury that the agreement absolves him from criminal liability. The trial judge refused to charge the jury with Lynch's requested instruction, and the jury convicted Lynch on four counts of failure to pay wages. The Connecticut Supreme Court affirmed the trial court's judgment and upheld the conviction. The supreme court drew a distinction between employees' agreements to defer the accrual of *future wages*, which the court previously has held are valid, and agreements to defer the accrual of *past due*, previously accrued wages, which are invalid because they violate public policy. Because Lynch's agreement with his employees did not distinguish between future wages and the wages that already were past due, it was invalid and could not absolve Lynch of criminal liability for failure to pay the past due wages. The supreme court clarified its recent statement, in *Ravetto v. Triton Thalassic Technologies, Inc.*, 285 Conn. 716 (2008), that agreements to defer future wages do not violate public policy.

In light of *Lynch*, employers should be extremely careful when considering whether, and how, to request employees to agree to the deferral of wages. Even requesting that employees agree to the deferral of just their future wages can be a risky proposition. Therefore, a Connecticut employer should first consider whether there are other, more reasonable alternatives to such an agreement. If the employer decides that deferral of future

wages is the best option, it should consider the following points:

- Under Connecticut law, the individual who is responsible for paying wages can be prosecuted criminally for failing to do so, even if he or she is not technically the employer. In addition, that individual could be subject to personal civil liability, regardless of the corporate form of the employing entity. To avoid possible civil or criminal liability, an owner or a manager of a business must ensure that all employees are paid the wages they have already earned. Past wages must be paid ahead of most other financial obligations. Any person who is trying to decide which financial obligations to pay on behalf of an employer that cannot afford to pay all of its debts, would be well advised to consult with legal counsel.
- Any agreement altering the method by which wages will accrue should be clear, thorough, accurate and in writing. The agreement should clearly state that it applies to future wages only, and that past wages are not included in the agreement. Once an agreement is in place, the employer is obligated to abide by it.
- If any past due wages are owed to an employee, those wages must be paid immediately. The employee's agreement to defer the accrual of wages will not absolve the employer from criminal or civil liability for its failure to pay wages that have already accrued.
- An employee's agreement to defer the accrual of future wages may create other issues with respect to compensation and benefits. Because of the complexities inherent in the interaction between an agreement to defer the accrual of wages and the Connecticut Department of Labor's regulations, any employer who is considering such an agreement would be well advised to consult with legal counsel.

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