

## **Employees Denied Wages Should Be Awarded Attorneys' Fees**

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A gaping and unusual hole exists in the laws protecting employees in this State. The hole exists in the New Jersey Wage Payment Law, the statute which insures that New Jersey employees are paid their full wages for work performed. The Wage Payment Law is New Jersey's only employee protection statute that does not provide for the payment of attorney's fees to an employee who prevails in a lawsuit against his or her employer to collect wages owed to him or her.

Under every other New Jersey law regulating employment, a prevailing employee may recover both his damages and attorneys' fees. This is true, for example, under the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, the Prevailing Wage and Minimum Wage laws and even the New Jersey Smoking Law.

However, the New Jersey Wage Payment Law, *N.J.S.A.* 34:11-2 - 34:11-33.6, contains no such attorneys' fee provision. The Wage Payment Law is derived from two separate laws adopted in 1896 and 1899, laws that sought to eliminate the practice prevalent among factory owners in the late 1800's, particularly by owners of glass factories in southern New Jersey, of paying wages in the form of order books or scrip, redeemable only at company-owned stores. The Wage Payment Law requires employers to pay the full amount of wages due to their employees at least twice monthly and on designated pay days, without diverting or withholding wages unless authorized to do so by law or by the employee. If an employer wrongfully refuses to

pay wages that are due, or withholds pay beyond the period permitted by the Statute, an employee possesses a private right of action against the employer. The Department of Labor's Wage and Hour Division may also pursue the wages on the employee's behalf, but the Department is only authorized to seek wages owed up to a maximum of \$10,000.

If the intent of the Law is to make employees whole, for the employee represented by counsel -- whether paid by the hour or, more likely, upon a contingent success fee -- this will never be the case.

Given the New Jersey Supreme Court's pronouncement that the Wage and Hour laws of this State are remedial legislation subject to liberal judicial construction, *N.J. Dept. of Labor v. Pepsi-Cola Co.*, 170 N.J. 59 (2001), it seems patently unfair to make employees pay their attorneys out of wages wrongfully withheld by their employers. Individuals employed in Pennsylvania are not similarly penalized, as the Pennsylvania Wage Payment and Collection Law unambiguously provides that “the court in any action brought under this section shall, in addition to any judgment awarded to the plaintiff, [...] allow costs for reasonable attorneys’ fees of any nature to be paid by the defendant.” 43 P.S. 260.9(a). Likewise, New York employees suffer no such penalty, as the New York Labor Law § 198 permits courts to award both attorneys’ fees and liquidated damages for illegal wage withholding.

Some New Jersey litigants have sought to base an attorney fee award claim on *N.J.S.A.* 34:11-56a25, which permits courts to award attorneys’ fees and costs when the employer is found to have paid them “less than the minimum fair wage” under the New Jersey Minimum Wage Law. However, reliance on this statute is

questionable, as the Minimum Wage Law and the Wage Payment Law, although contained in the same chapter but different articles of the New Jersey statutes, are separate Acts, adopted by the Legislature at different times and intended to remedy similar but clearly distinct grievances. Indeed, in an April 2005 unreported decision, *Schmitt v. Fucci*, an Appellate Division panel expressed doubt as to whether the Minimum Wage Law provides a basis for an attorneys' fees award for Wage Payment Law violations, vacating the fee award and remanding to the trial court for a determination as to whether and why the Minimum Wage Law's attorneys' fee provision was applicable to Wage Payment Law Claims. Although, on remand, the trial court held that it was, at least one other trial court, in an unreported decision in *Kelly v. Karmich, et al.*, explicitly rejected that view.

Employees who have not been paid what they have earned and what they are owed should not have to figure out whether going after those monies is "worth it," after paying their lawyers. Common sense, fairness and the remedial nature of the Wage Payment Law dictates that the Law should be amended to allow workers to recover their attorneys' fees when their employers wrongfully withhold their pay. The New Jersey Legislature should plug this hole in New Jersey's employee protection laws.