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Client Bulletin #470

**FORUM SELECTION CLAUSE MAY OPERATE
AS SPECIAL CONTRACT IN VIOLATION
OF MASSACHUSETTS WAGE ACT**

By Jeff Rosin and Angela Rapko
Boston Office

The Massachusetts Supreme Judicial Court held this week that, where certain criteria are met, an out-of-state forum selection clause in an employment contract will violate the Massachusetts Wage Act.

The Employment Contract – New York forum, New York law

In *Melia v. Zenhire, Inc.*, the defendant, a developer of web-based pre-employment tools and services for the recruiting industry, entered into an employment contract with plaintiff Edward Melia to be its vice president of product and business development. Zenhire, a Delaware corporation, was based in New York, and Melia lived and worked in Massachusetts. The employment contract contained a choice-of-law clause providing that it would be governed and construed in accordance with the laws of New York. The contract also contained a forum selection clause requiring disputes to be resolved by the courts in Erie County, New York. After five months, Zenhire began to experience financial difficulties and failed to pay Melia compensation due under the contract. Melia brought suit in the Massachusetts Superior Court alleging that Zenhire violated the Massachusetts Wage Act.

The Employee's Argument – The forum selection clause is an illegal special contract

It is well settled that parties may not attempt to avoid application of the Wage Act by entering into a "special contract," regardless of whether the parties voluntarily agree to do so. Melia argued that the forum selection clause in his employment contract was an illegal special contract; and, therefore, that the forum selection clause should not be enforced so he could pursue his Wage Act claim in a Massachusetts court. He was concerned that if the forum selection and choice-of-law clauses were enforced, a New York court might have applied New York wage laws instead of the Wage Act, thereby depriving him of the ability to recover the higher damages available under the Wage Act.

The Court's Decision – If three conditions are present, forum selection clauses are unlawful . . . but not in this case.

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The Massachusetts court said that a New York court should apply Massachusetts law to Melia's claims - it was clear that Melia had at all times lived and worked in Massachusetts. Thus, the court reasoned, New York choice-of-laws analysis strongly indicated a New York court would apply Massachusetts law.

The Massachusetts court also disagreed with Melia that his forum selection clause was an illegal special contract. The court held that a forum selection clause would be a special contract in violation of the Wage Act only under three conditions:

1. the employee's claim was covered by the Wage Act;
2. the court of the forum state, applying its choice-of-law principles, would choose a law other than that of Massachusetts to govern the dispute; and
3. application of the foreign (non-Massachusetts) law would deprive the employee of a substantive right guaranteed by the Wage Act.

Because the second of these three conditions did not apply in Melia's case, the court affirmed dismissal of his claims. Melia may now bring his claims in New York; and, according to the Massachusetts court, the New York court will certainly apply the Massachusetts Wage Act.

Guidance for Employers

At the most basic level, the court's new standard aims to ensure that forum selection clauses will not be used to evade the requirements of the Wage Act. Massachusetts employers and out-of-state employers hiring Massachusetts employees should seek advice before assuming that an employment contract with an out-of-state choice-of-law or forum selection clause is going to be enforced as written. As illustrated by this case, despite the existence of such clauses, the Massachusetts Wage Act may still be applicable.

It remains to be seen, of course, whether the New York courts will agree with the Massachusetts court's interpretation of New York choice-of-law rules. Moreover, the Massachusetts court recognized that "[w]hen choice-of-law principles dictate application of a particular law, New York courts may still refuse to enforce that law if it conflicts with fundamental New York policy." If, for any reason, the New York court does not apply the Wage Act to his claims, Melia may be prejudiced. Although he could try again to pursue his Wage Act claims in a Massachusetts court, the statute of limitations may have run by the time he has a reason to do so.

Employers should also be mindful that a forum selection clause in an employment contract (even if it is enforced and the dispute is litigated elsewhere) does not in any way affect the ability of the Massachusetts Attorney General to investigate complaints or enforce the Wage Act. Thus, employers still cannot escape application of the strict Massachusetts Wage Act under these circumstances.

If you have questions regarding the new legislation or any other labor or employment matter, please contact any member of Constangy's **Boston Office** or the Constangy attorney of your choice.

About Constangy, Brooks & Smith, LLP

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