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**Employment Law**

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**Illinois Wage Payment and Collection Act-Employment Contract or Agreement**

The Illinois Wage Payment and Collection Act (Act), 820 ILCS 115/5 (2005) provides that "every employer shall pay the final compensation of separated employees in full, at the time of separation, if possible, but in no case later than the next regularly scheduled payday for such employee." 820 ILCS 115/5 (2005). The Act defines "final compensation" as "wages, salaries, earned commissions, earned bonuses, and the monetary equivalent of earned vacation and earned holidays, and any other compensation owed the employee by the employer pursuant to an employment contract or agreement between the 2 parties." (Emphasis added.) 820 ILCS 115/2 (2005). The issue of what constitutes an enforceable "employment contract or agreement between 2 parties" under the Act was recently addressed by the First District Appellate Court in Zabinsky v. Gelber Group, Inc., 347 Ill. App. 3d 243, 807 N.E.2d 666 (1<sup>st</sup>. District 2004) and by the Second District Appellate Court in Landers-Scelfo v. Corporate Office Systems, Inc., 365 Ill. App. 3d 1060, 827 N.E. 2d 1051 (2<sup>nd</sup> Dist. 2005).

In Zabinsky, the plaintiff claimed that his former employer owed him a bonus based on an oral agreement. The matter went to a jury trial where the plaintiff testified that he worked the first quarter of 1990 pursuant to an oral agreement that defendants would pay him a bonus based upon a mutually agreed-upon formula. The court found that the plaintiff's trial testimony was sufficient to establish his right to the bonus under the Act, as well as to the amount of the bonus, and defendants' liability. The trial court noted that although there was some contrary testimony as to whether the agreement existed or whether the plaintiff complied with the terms of the agreement, it was for the trier of fact to evaluate the credibility of the witnesses and weigh the evidence. On appeal, the Defendants argued, that the trial court should have granted a directed verdict or judgment notwithstanding the verdict because the plaintiff failed to prove the existence of an enforceable contract for a bonus as required under the Act. Specifically, the defendants contended that the plaintiff failed to sufficiently identify the parties or terms of the contract, and failed to show that the contract complied with the statute of frauds.

In evaluating whether the plaintiff had presented evidence of an enforceable agreement under the Act, the court found that it was necessary to construe the language of the Act. Particularly, the court found that, "The Act specifically states that an employer shall pay the employee his earned bonus owed "pursuant to an employment contract or agreement between the 2 parties." (Emphasis added.) 820 ILCS 115/2 (West 1994). Citing Black's Law Dictionary and the Restatement (Second) of Contracts, the court stated, "An "agreement" is broader than a contract and requires only a manifestation of mutual assent on the part of two or more persons; parties may enter into an "agreement" without the formalities and accompanying legal protections of a contract. Black's Law Dictionary 35 (abridged 5th ed. 1983); Restatement (Second) of Contracts §3, Comment a, at 13 (1981)."

Accordingly, the Zabinsky court rejected the employers contention that the Act allows recovery of an earned bonus under the Act only if the employee has a valid enforceable contract. The court

found that the employers reading of the Act is counter to the legislative intent of the Act demonstrated by the words of the Act itself since the Act provides an employee with remedies more expansive than a common law breach of contract action when it uses the words "employment contract or agreement." (Emphasis added.) 820 ILCS 115/2 (West 1994). The court reasoned that "to require an employee to have a valid, enforceable contract before invoking the Act would render the Act surplusage."

The Zabinsky holding was recently relied on to support the plaintiff's complaint for unpaid wages under the Act in Landers-Scelfo v. Corporate Office Systems, Inc., 365 Ill. App. 3d 1060, 827 N.E. 2d 1051 (2<sup>nd</sup> Dist. 2005). In Landers-Scelfo, the plaintiff contended that the trial court erred in dismissing the count of her complaint asking for unpaid wages under the Wage Collection Act against defendant, Synergy. The plaintiff claimed that each defendant was liable to her for sales commissions that she earned while working as an account executive for COS. She alleged that she was hired as an account executive in October 2001 and defendants agreed to pay commissions to her according to a formula (the compensation formula) set out in a letter that it sent to her when it hired her. Plaintiff further alleged that defendants' paid commissions consistent with the compensation formula through part of the first quarter of 2002 however, sometime early in the first quarter of 2002, Synergy and COS became co-employers and "part of Synergy's responsibility was to administer all future human resource duties and ensure the continuation and consistent practice of honoring all previous COS employee compensation plans and programs." The plaintiff claimed that from the first quarter of 2002 until the end of the year, Synergy and COS together paid plaintiff commissions consistent with the compensation formula however, the defendants' stopped paying her commissions in January of 2003.

As evidence of the agreement, the plaintiff attached to her complaint COS's calculations of commissions due to its account executives as of April 2003, a printout listing each sale and the commission due along several of her pay stubs. The pay stubs showed payment of commissions which listed Synergy as the "company" and COS as the "client." Finally, she attached a copy of an unsigned letter that she described as the letter laying out the compensation formula, which she said COS sent to her at the outset of her employment.

The Synergy moved to dismiss the complaint arguing that the complaint lacked facts show that it had an agreement with the plaintiff to pay her commissions. The trial court granted the defendant's motion and dismissed the plaintiff's complaint with prejudice ruling that plaintiff had failed to allege that Synergy ever hired her or any other COS employee. Further, it found that plaintiff "consciously" decided not to include a copy of the agreement between COS and Synergy and that "the contract was for Synergy to perform duties for COS which included payroll duties for COS's employees." Moreover, since the plaintiff does not allege that her work was ever supervised or controlled by Synergy, she was not an employee of Synergy.

The Second District reversed the dismissal count under the Act, stating, "The parties do not dispute that, for a person to state a claim under the Wage Collection Act, he or she must plead that wages or final compensation is due to him or her as an employee from an employer under an employment contract or agreement. See 820 ILCS 115/2, 3, 5 (West 2002). On appeal the court considered whether the plaintiff adequately pleaded that she had an employment agreement with

Synergy that required the payment of commissions and whether Synergy was her employer under the Wage Collection Act. The Landers-Scelfo court held that an employment agreement can be entirely implicit and alleging that an entity paid a worker according to a demonstrable formula for work done is sufficient to raise an inference that the entity and the worker had an employment agreement that embodied the formula. Because plaintiff alleged the existence of such a pattern and because the definition of "employer" in the Wage Collection Act is deliberately broad, the court concluded that the necessity to plead that a defendant is an employer does not add any requirement beyond what is necessary to plead the existence of an employment agreement. Particularly, the court found that plaintiff did not need to plead that Synergy exercised control over her work to successfully plead it was her employer.

As to whether the plaintiff properly pleaded the existence of an employment agreement under the Act, the court relied on Zabinsky, stating that in pleading the existence of an employment agreement, the agreement need not be a formally negotiated contract because a contract is not necessary under the Wage Collection Act. Specifically, a worker seeking to recover under the Act does not need to plead all contract elements if she can plead facts showing mutual assent to the terms that support recovery. Citing the Illinois Supreme Court ruling in A.J. Johnson Paving Co. v. Industrial Comm'n, 82 Ill. 2d 341, 350, 412 N.E.2d 477, 45 Ill. Dec. 126 (1980), the court explained that Synergy could have manifested its assent to the commission arrangement simply by paying plaintiff since employees and employers can manifest their assent to conditions of employment by conduct alone. In Johnson, the Illinois Supreme Court has held that a worker could assent to being the loaned employee of an employer other than his regular employer by acquiescing to the supervision of the borrowing employer's foreman. It held that this acquiescence was sufficient to form an implied employment contract. Calling the defendant's argument "far fetched," the court rejected the contention that plaintiff failed to allege that Synergy assumed the duty to pay her according to the compensation formula since it paid the plaintiff per that formula for almost a year.

Next the Landers-Scelfo court considered the defendant's argument that plaintiff failed to properly plead that Synergy was her "employer" under the Act. Turning to the language of the Act, which provides that an "employer" can be any person or entity, and specifically can include employment agencies who make payment for work done for others, the court found that the definition of "employer" under the Act is broader than under common law. 820 ILCS 115/2 (West 2002). As such, the court determined that the plaintiff is not required to plead anything beyond the facts from which one could infer the existence of an employment agreement to properly plead that defendant was the employer. Vacating the dismissal and remanding the case to the trial court, the appellate court explained that although sufficient at the pleading stage, "We leave open the possibility that a showing that Synergy provided nothing but payroll services to COS would defeat the inference that it and plaintiff were parties to an employment agreement and thus that it was plaintiff's employer." The court explained that it was the duty of the defendant on remand to raise this issue as an affirmative matter.

Accordingly, under the Illinois Wage Payment and Collection Act, an employment agreement or contract between the parties need not meet the formal requirements of a contract to be enforceable so as long as the plaintiff can show mutual assent to the terms of the agreement.

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