

# Knowledge of Administrative Law Trilogy Adds Value

By Tyra L. Wright



## Fast Facts

Employers risk up to \$1,000 as penalty for failure to timely pay wages or fringe benefits due to an employee.

Employers who fail to obtain workers' compensation insurance and are not self-insured can be fined up to \$1,000 and face imprisonment for up to 60 days.

Employers engaged in unemployment tax evasion face an increase to the maximum tax rate allowable and a fine of four times the savings received by the evasive practice.

Michigan's response to losing nearly one million jobs since the mid-2000s includes encouraging the entrepreneurial spirit. As many heed the call to start companies, some Michigan attorneys who lack experience in business formation may find themselves working with first-time entrepreneurs. Attorneys should understand three administrative laws their entrepreneur clients cannot afford to ignore: the Payment of Wages and Fringe Benefits Act, Workers' Disability Compensation Act, and Michigan Employment Security Act, all of which are administered by the Department of Energy, Labor and Economic Growth (DELEG).

The administrative law trilogy need not be a nightmare for clients. Informed attorneys can help clients avoid violations or costly missteps with some preventive counseling. This article provides a brief summary of each law, highlights employers' responsibilities, identifies potential fines and penalties for violations, and describes hearing and appeal rights. What follows is not intended to be a comprehensive review of these three complicated administrative areas, but a general overview and introductory primer.

## The Payment of Wages and Fringe Benefits Act

Uninformed employers or those experiencing cash flow problems can easily stumble into wage violations. According to the DELEG, the Wage Hour Division investigated more than 6,600 complaints in 2009. The Payment of Wages and Fringe Benefits Act,<sup>1</sup> also known as Act 390, protects the wages and fringe benefits of workers in Michigan. The law covers hourly and salaried employees and applies only to those engaged in an employer-employee relationship.<sup>2</sup> Act 390 requires that workers are paid wages regularly on scheduled paydays determined by the employer. It also requires payment of fringe benefits under certain circumstances.

### Employer Responsibilities

Employers are responsible for adhering to Act 390 despite economic challenges to their businesses or industry. While employers

may elect to pay employees on a weekly, biweekly, bimonthly, or monthly basis, they must do so regularly on the selected basis without exception. Financial hardship or bankruptcy may affect a worker's ability to collect wages due, but not the worker's right to those wages.

Employers must pay workers for fringe benefits such as bonuses, holiday and vacation pay, and other perquisites according to a written contract or written policy.<sup>3</sup> An employer's past practice with regard to paying fringe benefits is not controlling no matter how extensive; the written policy or contract will govern.

Act 390 places several other duties on employers. For instance, employers must provide employees with payment statements,<sup>4</sup> maintain specific employment records,<sup>5</sup> and provide employment records to the Wage Hour Division upon request. Employers must maintain employment records for three years.<sup>6</sup>

### Hearings and Appeal Rights

Workers who believe their employers have violated the act may file a complaint with the Wage Hour Division within 30 days or a year, depending on the alleged violation. Filing a complaint starts an investigation. At the conclusion of an investigation, the Wage Hour Division issues a determination order that states whether an employer has violated the act and the amount of wages or fringe benefits owed to a claimant.

A party who disagrees with the determination order can request a hearing before an administrative law judge (ALJ). ALJs who conduct wage hour hearings are civil servant employees of the State Office of Administrative Hearings and Rules (SOAHR).<sup>7</sup> Attorneys and nonattorneys can represent parties in wage hour hearings.<sup>8</sup> In addition to orders to pay wages and fringe benefits, employers also can be ordered to pay civil penalties, attorney expenses, and other costs.

ALJs' wage hour decisions are appealable to the circuit court. However, ALJs can order monetary awards to claimants only. Employers who contend that an employee owes money must initiate and pursue their claim in district or circuit court. Both claimants and employers can appeal a determination order, but if an appellant does not appear for a hearing, the ALJ will dismiss the matter.

### Penalties

Employers who are found to have violated Act 390 by failure to pay wages or fringe benefits will be ordered to pay the specific amount improperly withheld from the employee plus 10 percent per annum interest. Employers who fail to pay the ordered amount in a timely manner risk paying up to \$1,000 as a penalty in addition to the amount owed to the claimant.<sup>9</sup>

Further, employers who fail to timely provide the Wage Hour Division with a claimant's employment records will also be assessed a civil penalty of \$300.<sup>10</sup> The penalty is assessed even in cases in which no violation is found. Therefore, employers, whether found to have violated Act 390 or not, can easily avoid additional penalties with timeliness and proper recordkeeping.

### Point to Remember

Upon voluntary or involuntary separation of an employee from the employer, an employer must pay an employee all wages owed as soon as the amount due can be determined.<sup>11</sup>

## Workers' Disability Compensation Act

The Workers' Disability Compensation Act<sup>12</sup> is the law supporting an insurance system that provides compensation—lost wages, medical treatment, and some rehabilitation benefits—for disability or death from work-related injury or disease. The Workers' Compensation Agency (WCA) administers the act. Except for some very small businesses, the act covers almost all Michigan public and private employers<sup>13</sup> and includes special provisions that apply to contractors, subcontractors, and sole proprietors.

Employees must give the employer notice of a work-related injury within 90 days after the injury or when the employee becomes aware of the injury. However, failure to give such notice to the employer shall be excused unless the employer can prove that he or she was prejudiced by the failure to provide notice.<sup>14</sup> The notice can be given verbally; written notice is not required.

### Employer Responsibilities

Employers subject to the act must prove an ability to pay benefits if a worker is injured on the job. Consequently, the law requires that employers either purchase insurance from a commercial insurance carrier or be self-insured. Self-insured status requires state approval and maintaining a fund adequate to pay benefits.<sup>15</sup>

### Penalties for Noncompliance

Employers who fail to provide coverage risk severe penalties. The WCA can seek a court order prohibiting the employer from hiring individuals until adequate insurance coverage is secured. In addition, employers who refuse to obtain commercial insurance and are not self-insured face fines of \$1,000 and imprisonment for 30 to 60 days.<sup>16</sup>

Generally, an injured worker who receives workers' compensation benefits cannot also sue the employer in court.<sup>17</sup> However, if no compensation benefits are available because of an employer's failure to obtain insurance or self-insured status, employers face another potential penalty: an injured worker may bring a civil suit for damages against the employer.<sup>18</sup>

Similar to Act 390, timeliness is important in workers' compensation matters. If benefits are not paid within 30 days after the date benefits are due, the Workers' Disability Compensation Act allows for a \$50-a-day penalty up to a maximum of \$1,500 against employers.<sup>19</sup> This Section 801 penalty provision does not apply if the employer is disputing a worker's right to benefits.

### Disputed Claims

According to the WCA, only about 25 percent of claims are disputed.<sup>20</sup> However, a worker can start a dispute by filing an

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application for mediation or hearing. Mediation hearings are scheduled in certain cases, including those in which the worker has no legal representation.<sup>21</sup> If a dispute is not resolved by mediation, a trial is scheduled before a workers' compensation magistrate. These magistrates, appointed by the governor, hear only workers' compensation disputes. Nonattorneys are not allowed to represent parties. Parties must hire an attorney or represent themselves.

### Appeal Rights

Parties may appeal a magistrate's decision to the Workers' Compensation Appellate Commission. If dissatisfied with the commission's decision, a party can appeal to the Michigan Court of Appeals or seek permission to be heard before the Michigan Supreme Court.<sup>22</sup>

In 1985, Section 864 was added to the Workers' Disability Compensation Act to allow for arbitration. Under this section, the parties can agree to use an independent arbitrator to hear disputes instead of appearing before a magistrate or the Appellate Commission. Arbitration is voluntary and the parties must agree on the selected arbitrator.<sup>23</sup>

### Point to Remember

An employee cannot receive full workers' compensation benefits and unemployment compensation benefits from the same employer for the same period.<sup>24</sup>

## Michigan Employment Security Act

In certain industries or circumstances, high employee turnover or frequent layoffs are commonplace. Today, many employers have reduced or are considering workforce reduction in response to a faltering economy. The Michigan Employment Security Act<sup>25</sup> is the primary protection against massive, prolonged social dependency.<sup>26</sup> The Unemployment Insurance Agency (UIA) administers this unique federal-state program intended to help workers who become unemployed through no fault of their own. Generally, tax contributions from employers fund the unemployment compensation program.<sup>27</sup>

In Michigan, payments are made directly to claimants by direct deposit or a debit card. The monthly benefit amount is based on a benefit year and an analysis and calculation of the wages a claimant earned in the first four of the last five completed quarters. Eligible unemployed or underemployed claimants can receive a maximum of \$362 weekly.

### Employer Responsibilities

Liable employers have one main responsibility under the act: funding the system through paying the appropriate amount of taxes. Employers pay two taxes on their payroll to support the employment compensation system. The first tax is paid to the UIA to fund Michigan's unemployment trust fund. The federal government keeps these funds in an account designated for each state, and unemployment benefits are paid from this fund. An employer is taxed according to how many claims are charged to that employer. Consequently, an employer's UIA tax rate could range from 0.06 to 10.3 percent on the first \$9,000 of each employee's wages.<sup>28</sup>

The Federal Unemployment Tax Act (FUTA) allows the federal government to assess a second tax on employers to pay for administration, finance the federal portion of extended benefits, and fund a loan account (states sometimes borrow from this fund). The current FUTA tax rate is 6.2 percent on the first \$7,000 of an employee's wages. "Employers who have paid their state unemployment taxes for the year by the due date of January 31" are entitled to a 5.4 percent tax credit.<sup>29</sup>

### Potential Pitfalls

In unemployment matters, common pitfalls for employers include failing to challenge an award of benefits, attend a hearing, or obtain representation; and failing to disclose to the UIA any transfer of employees to another business.

Some employers, especially those who have had relatively little employee turnover, may not realize the importance of failing to challenge an award of employment benefits to a former employee who has resigned for personal reasons or been terminated for misconduct, which are the most common reasons for disqualification for benefits. Skipping a hearing at which an employer bears the burden of proof, as in cases in which termination for

misconduct is alleged, almost always results in a decision adverse to the employer. Consequently, employers who wish not to participate in a hearing should only do so after being fully advised.

Failing to obtain or use a skilled nonattorney advocate or attorney at hearings also can result in a poor outcome. Both employers and claimants may be eligible to participate in the advocacy program, which provides free legal assistance to parties that qualify for the program.

Failing to disclose the transfer of employees is a costly mistake that can result in allegations of attempting to avoid taxes by violating the state unemployment tax act (SUTA). Generally, “SUTA dumping” refers to a tax evasion practice that involves transferring payroll away from an existing company to a new or different company in an effort to pay less unemployment tax.<sup>30</sup> The penalties for employers who engage in SUTA dumping can include paying four times the savings received by manipulating the tax rate and an increase in the company’s unemployment tax rate to the maximum rate for up to three years.<sup>31</sup>

### Hearing and Appeal Rights

An employer or claimant who disagrees with a determination made by the UIA can request a redetermination. A written request must be made within 30 days. If a party disagrees with the redetermination, parties may appeal the redetermination in writing within 30 days to get a hearing before an administrative law judge. If a protest is made after 30 days, a party must show good cause for the late protest to get a hearing on the merits of the decision.

Parties may request in-person or telephone hearings. Moreover, parties can be represented by an attorney, nonattorney advocate, or agent and are given 10 days’ notice of the hearing and the issues involved. Parties who disagree with the hearing decision may ask the ALJ in writing to grant a rehearing or file an appeal with the Board of Review, which usually does not take new testimony from witnesses. If either party disagrees with the board’s decision, then an appeal can be made to the appropriate circuit court.

### Point to Remember

Employers can subscribe to the *Michigan Employer Advisor* newsletter and inquire about any scheduled UIA Employer Seminars at [www.michigan.gov/uiia/](http://www.michigan.gov/uiia/).

### Conclusion

Competition for customers who are questioning every purchase and expense makes any unchecked waste of money more likely to turn a company’s bottom line from black to red. This is especially true for new entrepreneurs. Lawyers representing these clients can help them avoid unnecessary expenses, costly fines and penalties, and tax increases by becoming familiar with this important administrative law trilogy: the Payment of Wages and Fringe Benefits Act, Workers’ Disability and Compensation Act, and Michigan Employment Security Act. ■



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### FOOTNOTES

- 1978 PA 390, as amended; MCL 408.471 *et seq.*
- See *Askew v Macomber*, 398 Mich 212; 247 NW2d 288 (1976).
- MCL 408.473. See also *Carpenter v School Dist of City of Flint*, 115 Mich App 683; 321 NW2d 772 (1982).
- MCL 408.479(2).
- MCL 408.479(1).
- MCL 408.479(3).
- See Plummer, *State Office of Administrative Hearings and Rules: The centralization of Michigan’s administrative law hearings*, 89 Mich B J 9 (November 2006).
- Mich Admin Code, R 408.22956.
- MCL 408.9033.
- Mich Admin Code, R 408.9033(4).
- MCL 408.475.
- 1969 PA 217, as amended; MCL 418.101 *et seq.*
- Michigan Dept of Economic Labor & Growth, *An Overview of Workers’ Compensation in Michigan* (August 2006), available at <[http://www.michigan.gov/documents/wca\\_PUB-004\\_135317\\_7.pdf](http://www.michigan.gov/documents/wca_PUB-004_135317_7.pdf)>. All websites cited in this article were accessed November 14, 2010.
- MCL 418.381(1).
- MCL 418.501 through 418.561.
- See n 13 *supra* at 6.
- MCL 418.131.
- MCL 418.641(2).
- MCL 418.801, as amended; MCL 408.471 *et seq.*
- See n 13 *supra* at 28.
- MCL 418.847.
- See n 12 *supra*.
- MCL 418.864.
- Michigan Dept of Economic Labor & Growth, *A Summary of Your Rights and Responsibilities under Workers’ Compensation* (August 2009), available at <[http://michigan.gov/documents/wca/wca\\_WC-PUB-001\\_306927\\_7.pdf](http://michigan.gov/documents/wca/wca_WC-PUB-001_306927_7.pdf)>.
- 1936 PA 1; MCL 421.1 *et seq.*
- Michigan Dept of Economic Labor & Growth, *About UIA and Unemployment Insurance in Michigan*, available at <<http://www.michigan.gov/uiia/0,1607,7-118-1328-137908--,00.html>>.
- Michigan Dept of Economic Labor & Growth, *Emergency Unemployment Compensation (EUC) in Michigan* (August 2010), available at <[http://www.michigan.gov/documents/uiia/EUC\\_Fact\\_Sheet\\_120\\_240939\\_7.pdf](http://www.michigan.gov/documents/uiia/EUC_Fact_Sheet_120_240939_7.pdf)>.
- See n 26 *supra*.
- See n 1 *supra*.
- Michigan Dept of Economic Labor & Growth, *SUTA Dumping: Manipulating unemployment tax rates to pay less in taxes* (August 2008), available at <[http://www.michigan.gov/documents/uiia\\_FS114-SUTAdumping\\_103447\\_7.pdf](http://www.michigan.gov/documents/uiia_FS114-SUTAdumping_103447_7.pdf)>.
- Id.*

