

Working through the Kansas Wage Payment Act

by Boyd A. Byers

Work. Get paid. Simple, right? If modern life was so straightforward, human resources professionals, and lawyers would be lining up at the unemployment office in droves.

With the federal Fair Labor Standards Act (FLSA) at the forefront of most employers' wage payment concerns, the Kansas Wage Payment Act (KWPA) is often overlooked or misunderstood. The KWPA controls many important aspects of wages not covered by the FLSA, such as when they must be paid, the manner in which they must be paid, and the circumstances under which they can be withheld. The most problematic areas involve the circumstances under which wages can be withheld and the requirement that wages (including benefits, bonuses, and commissions), once earned, can't be forfeited because of subsequent acts.

Who's covered?

The KWPA's definition of an employer is extremely broad and will encompass nearly every individual or entity that does business. The law defines an employee as "any person allowed or permitted to work by an employer."

Employers and employees may not agree to waive any rights created by the KWPA, and any provision in an employment agreement that violates the law is unenforceable. Parties to an employment relationship may not redefine the term "employee" or otherwise contract around the law's requirements. For example, an employment contract provision allowing you to withhold a commissioned salesperson's earned commission as liquidated damages for the salesperson terminating his employment violates the law and is unenforceable.

When and how must wages be paid?

The KWPA governs the payment of "wages," which include all compensation for all labor or services provided by an employee, whether the amount is determined on a time, task, piece, commission, or other basis, minus any authorized withholdings and deductions. That compensation may include profit sharing and fringe benefits such as vacation pay and retirement plans.

You must pay your employees all wages due at least once each calendar month on regular paydays designated in advance. The regular payday can't be more than 15 days after the end of the pay period. Wages must be paid in cash, by check, or, with the written consent of the employee, by electronic deposit to the employee's account at a financial institution.

When you fire an employee or an employee quits or resigns, you must pay the employee's earned wages no later than the next regular payday the employee would have been paid if still employed. That payment must be through the regular pay

channels or, if the employee requests payment by mail, by mail postmarked within the deadline. Employees sometimes misunderstand that requirement and demand immediate payment when they're discharged. Their confusion may stem from the fact that, unlike Kansas, a number of other states require expedited payment of wages upon termination of employment.

When there's a dispute over the amount of wages due to an employee, you must pay all the wages you concede are due. The employee retains all available remedies with regard to any balance claimed. Unless there's a binding settlement agreement approved by the Kansas Department of Labor (KDOL), an employee's acceptance of partial payment of wages doesn't release his claim to the balance of the wages. For example, a release on the back of a check to an employee for partial payment of disputed wages is unlawful and void.

When can wages be withheld?

One of the most problematic issues under the KWPA is the manner and circumstances in which employers can legally deduct or withhold wages from an employee's paycheck. There are limited circumstances in which you may withhold, deduct, or divert an employee's wages:

- when you're required or empowered to do so by state or federal law, such as withholdings for payroll taxes or garnishments;
- if the deductions are for medical care or service;
- if the employee has signed an authorization for contributions to charitable organizations or deductions by check-off of dues to labor organizations;
- to correct wage overpayments that resulted from your error if the error resulted in the overpayment (but if the deduction rate exceeds the overpayment rate, you must have a signed authorization from the employee);
- deductions for cash advances that were requested in writing by the employee and were made as a partial payment of future wages to be earned;
- deductions for excess cash expense allowances or advances made to the employee when the employee hasn't justified the amount by expense receipts; or
- if you have a signed authorization from the employee for deductions for a lawful purpose "accruing to the benefit of the employee," which KDOL regulations limit to such payments as those into thrift, stock option, or retirement plans or savings accounts.

The regulations also specify deductions that don't accrue to the benefit of the employee and thus can't be made under any circumstances, even with the written consent of the employee:

- deductions for cash and inventory shortages, breakage, returned checks, or bad credit card sales;
- losses resulting from burglaries, robberies, or alleged negligent acts;

- deductions for uniforms, special tools, or special equipment that aren't necessary to the performance of the assigned duties and that are customarily supplied by you; or
- any other deduction not specified by the KWPA or the KDOL regulations.

Why is 'forfeiture' a dirty word?

Once an employee "earns" wages (including commissions, profit sharing, retirement plans, vacation pay, and other fringe benefits), you can't cause them to be forfeited by a subsequent act of the employee. Wages are considered earned once the employee has met all conditions required to be eligible for that compensation. You can't impose a "condition subsequent" to an employee's entitlement to compensation resulting in a forfeiture or loss of the employee's earned wages.

In drafting or revising your pay and benefit policies, be aware of any conditions precedent to the earning of compensation or conditions subsequent that could result in an impermissible forfeiture. The issue of what is a condition subsequent, as opposed to a condition precedent, often comes down to a matter of semantics. The wording of the condition may determine whether you're required to pay. You should consult with legal counsel to ensure that your wage and benefit policies are properly worded so as not to constitute a forfeiture of earned wages.

In one recent case, the employer had a written policy providing that a fired employee would receive a cash payment for any accrued vacation time if (1) employment was terminated because of death; (2) employment was terminated because of retirement; or (3) the employee voluntarily terminated his employment, provided written two weeks' notice before termination, and worked all hours scheduled during that two-week period. The policy further provided that employees who were involuntarily discharged for cause weren't eligible for vacation pay.

The court noted that the employer's policy clearly listed three categories of employees who were entitled to vacation pay and one category of employees who weren't but didn't address employees who voluntarily resigned without giving two weeks' notice or employees who were involuntarily discharged without cause. By stating that employees who voluntarily resigned with two weeks' notice were entitled to vacation pay, the court reasoned, the employer implied that employees who voluntarily resigned without two weeks' notice weren't entitled to vacation pay. Similarly, the policy stated that employees who were involuntarily discharged for cause weren't eligible for vacation pay, so by implication, employees who were involuntarily discharged without cause were eligible for vacation pay. This case illustrates the importance of thoughtfully and thoroughly drafting provisions regarding payment of wages and benefits.

When are you liable for unpaid wages under subcontracts?

If you're responsible for the performance of work under a contract and then you subcontract all or any part of the work, you're responsible for payment of wages to employees of the subcontractor if the subcontractor fails to pay the wages to the

employees. You need to be aware of the potential for contractor liability and should seek lawyer assistance when drafting subcontractor agreements. If you're required to pay wages to a subcontractor's employees, you have a right to reimbursement from the subcontractor.

What notice requirements exist?

In addition to its wage payment obligations, the KWPA imposes several notification requirements. Upon an employee's request, you must furnish the following information:

- rate of pay and day and place of payment;
- any changes in rate of pay or day and place of payment before the date of such changes;
- employment practices and policies regarding vacation pay, sick leave, and any other benefits to which the employee is entitled that have a direct bearing on wages payable; and
- an itemized statement of deductions made from the employee's wages for each pay period deductions are made.

That notification must be in writing, through a posted notice maintained in a place accessible to employees, or as required by a collective bargaining agreement.

How do employees enforce their rights?

Employees may file claims with the KDOL or directly in court. If the KDOL makes a finding of liability, it can take an assignment of the claim and pursue it in court on the employee's behalf.

If you fail to pay an employee's wages, you're potentially liable for (1) the amount of the wages due, (2) interest, (3) a penalty for willful violations, and (4) the KDOL's attorneys' fees. The penalty for willful violations is one percent of the unpaid wages for each day (except Sundays and legal holidays) that the failure to pay continues after the eighth day after the payment was due, up to a maximum of 100 percent of the unpaid wages.

To prove a willful violation, an employee must show not only that you knew or intended to withhold wages but also that your act of withholding wages indicated a design, purpose, or intent to do wrong or cause injury. Therefore, in the event of a legitimate wage dispute, you should withhold only the amount of wages actually in dispute, not all wages due to the employee, because withholding amounts not in dispute could result in a penalty.

What's the bottom line?

The Bible says, "You shall not withhold the wages of poor and needy laborers" (Deuteronomy 24:14). That's good advice in Kansas, regardless of your religious persuasion.