

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

**TRIAL COURT FOR THE
COMMONWEALTH
SUPERIOR COURT
DEPARTMENT
DOCKET #:
16-84-CR00751
16-84-CR00752
16-84-CR00906**

**COMMONWEALTH
v.
JOSEPH KERRISSEY III
&
J. KERRISSEY LLC.
&
SUNRISE EQUIPMENT & EXCAVATION INC.**

**MEMORANDUM TO AID THE COURT REGARDING
EMPLOYMENT CHARGE SENTENCING GUIDELINES**

The Commonwealth, and respectfully submits this Memorandum for the Court's consideration:

Joseph Kerrissey and his two corporations, J Kerrissey LLC. and Sunrise Construction, (“defendants”) were indicted in September of 2016 and again in October 2017. They are charged with violation of the wage and hour laws including, larceny by check, non-payment of wages, failure to pay overtime, and failure to pay prevailing wage. In addition, the defendants are charged with failing to submit certified payroll records and failure to contribute employer tax to the Division of Unemployment Assistance.

By statute, the possible penalties which may be imposed by this Court per

Indictment are:

A. Larceny (by check) Over \$250: G.L. c. 266, § 30 and 37

not more than 5 years in the state prison or not more than 2 years in a jail, and a fine of not more than twenty-five thousand dollars, (\$25,000).

B. Non Payment of Wages: G.L. c. 149, § 148

Willful: Not more than 1 year in jail and/or a maximum \$25,000 fine per violation.

Non-Willful: Not more than 6 months in jail and/or a maximum fine of \$10,000 per violation.

C. Failure to Pay Overtime Wages: G.L. c. 151, § 1B

Willful: Not more than 1 year in jail and/or a maximum \$25,000 fine per violation.

Non-Willful: Not more than 6 months in jail and/or a maximum fine of \$10,000 per violation.

D. Failure to Pay Prevailing Wage: G.L. c. 149, § 27

Willful: Not more than 1 year in jail and/or a maximum \$25,000 fine per violation.

Non-Willful: Not more than 6 months in jail and/or a maximum fine of \$10,000 per violation, and not more than a 6 month debarment.

E. Failure to Submit Certified Payroll Records - G.L. c. 149, § 27B

Willful: Not more than 1 year in jail and/or a maximum \$25,000 fine per violation, and a 5-year debarment

Non-Willful: Not more than 6 months in jail and/or a maximum fine of \$10,000 per violation, and not more than 6-month debarment

F. Non-payment of Employer Contributions: G.L. c. 151A, § 47

Not more than 1 year in the HOC and/or a \$2,500.00 - \$10,000.00 fine.

G. Restitution¹ of approximately \$92,813 to employees.

¹ M.G.L. c. 258B describes the rights of victims of crime. Included among those are the right to

Guidelines Levels and Ranges

For an individual without a significant prior record of convictions:

A. Larceny Up to \$10,000 Dollars

Larceny up to \$10,000, the Massachusetts Sentencing Guidelines recommend a sentence of 0-12 months (Level 3).

B. Failure to Make Employer Contributions

Failure to make employer contribution to the DUA, the Massachusetts Sentencing Guidelines recommend a term of probation, with financial accountability, and standard supervision or daily accountability (Level 2).

C. All Employment Practice Charges:

Failure to pay overtime, Failure to pay wages, and Failure to pay prevailing wage, the Massachusetts Sentencing Guidelines recommend a term of probation, with financial accountability, and standard supervision (Level 1).

Proposed Jury Instructions:

Commonwealth's proposed jury Instructions include definitions relative to wage and hour violations and a proposed instruction on "non-willful" violations.

A. Parties responsible for violations of the Wage & Hour Laws (G.L. c. 149 and 151)

Liability under each of the Wage & Hour Laws at issue here extends to "[a]ny employer, contractor, or subcontractor, or any officer, agent, superintendent, foreman, or employee thereof," pursuant to G.L. c. 149, § 27C(a)(1) and (2).

request that restitution be an element of the final disposition of a case, and noting that restitution may be ordered as part of the disposition of a case.

B. Meaning of “employer” under the Wage & Hour Laws (G.L. c. 149 and 151)

For purposes of chapter 151, which includes the Overtime Law (G.L. c. 151, § 1B), an “employer” includes “[a]n individual, corporation, partnership or other entity, including any agent thereof, that engages the services of an employee or employees for wages, remuneration or other compensation.” 454 C.M.R. 27.02.

For purposes of chapter 149, which includes Timely Payment of Wage, Prevailing Wage, Suitable Paystub, and Certified Payroll Record Laws, “Section 148 defines ‘employer’ as a ‘person having employees in his [or her] service.’ G. L. c. 149, § 148. For corporations, such persons are the ‘president and treasurer of [the] corporation and any officers or agents having the management of such corporation,’ in addition to the corporation itself.”² *Segal*, 2017 WL 6615166 at 5 (citing G.L. c. 149, § 148). Therefore, a corporation, its president and treasurer, and any other officers or agents having management of the corporation, are collectively the “employer” of the corporation’s employees. *Wiedmann, v. The Bradford Grp., Inc.*, 444 Mass. 698, 710-11 (2005).

The Wage Act makes express reference to the president and treasurer: “high level officers in the corporation with individual responsibility for its over-all management, particularly its financial affairs.” *Segal*, 2017 WL 6615166 at 5, *citing Lydia E. Pinkham*

² Section 148, ¶ 6 provides: The president and treasurer of a corporation and any officers or agents having the management of such corporation shall be deemed to be the employers of the employees of the corporation within the meaning of this section.

Med. Co. v. Gove, 303 Mass. 1, 9 (1939).

And, it also refers to certain “officers or agents”. In order for a corporate officer or agent to be held liable under the Wage Act, requires proof that such a person “must both be [A] an agent and [B] have the management of the company.” *Segal*, 2017 WL 6615166 at 5.

C. Meaning for the term “willful” under the Wage & Hour Laws

The Defendants are charged with “willfully” failing to pay prevailing wage, failing to pay overtime wages, failing to make timely payment and to provide suitable paystubs, and failing to submit true and accurate certified payroll records to the Awarding Authority. An “intentional” or “willful” violation means that the Commonwealth must prove that the Defendant acted voluntarily and purposefully with the intent either to undertake an action, or to fail to do something which the law requires to be done, with the deliberate purpose either to disobey or to disregard the law. *Commonwealth v. Moore*, 44 Mass. App. Ct. 129, 134 (1998), *citing Cheek v. United States*, 498 U.S. 192, 201 (1991).

Lesser Included “Non-Willful”

The Defendants here are charged with “willfully” failing to pay prevailing wage and overtime, failing to make timely payment and to provide suitable paystubs, and failing to submit certified payroll records to the Awarding Authority and to the Attorney General. If you do not find the Defendants guilty of “willfully” violating these Wage & Hour Laws, “you shall consider whether the Commonwealth has proved the Defendants guilty beyond a reasonable doubt of the lesser offenses of:”³ failing to pay prevailing

³ See *Commonwealth v. Figueroa*, 468 Mass. 204, 229 n.11 (2014).

wage and overtime, failing to make timely payment and to provide suitable paystubs, and failing to submit certified payroll records to the Awarding Authority and to the Attorney General, “without a willful intent to do so” (G.L. c. 149, § 27C(a)(2)).

D. Meaning of “working time” under the Wage & Hour Laws

“Working time” includes all time during which an employee is required to be on the employer’s premises or to be on duty, or to be at the prescribed work site or at any other location, and any time worked before or after the end of the normal shift to complete the work. Working time does not include meal times during which an employee is relieved of all work-related duties. Working time includes rest periods of short duration, usually 20 minutes or less. 454 C.M.R. 27.02.

E. Meaning of “without specific intent” under the Wage & Hour Laws

The Defendants are charged with failing to pay prevailing wage, failing to pay overtime wages, failing to make timely payment and to provide suitable paystubs, and failing to submit true and accurate certified payroll records to the Awarding Authority, all “without specific intent.” These statutes are strict liability offenses if charged “without specific intent.” Meaning, if the Commonwealth proves the elements beyond a reasonable doubt, the employer, whether acting in good faith or bad, must suffer the consequences. *Somers v. Converged Access, Inc.*, 454 Mass. 582, 591 (2009).

This the 1st day of June, 2018

Respectfully submitted,
For the Commonwealth,
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