

Board Members May Face Personal Liability for Unpaid Wages

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Williams Kastner Labor & Employment Advisor, Summer 2011

Washington has among the country's strongest protection for the payment of wages. When companies become insolvent, employees often look to former company managers and owners to pay their earned wages. The recent decision of *Zimmerman v. W8Less Prods., LLC*, 160 Wn. App. 678 (2011) should raise flags for employers.

In *W8Less Prods.*, the company manufactured low cost automobile and motorcycle brakes. On the verge of bankruptcy with \$2.5 million in debt and no revenue, the company's managing member formed a board of directors to oversee operations and hired a former business advisor as the VP of Marketing. The board objected to the hiring as an unacceptable additional liability, but later accepted him after much internal wrangling at a meeting with several hiring contingencies. The VP of Marketing received a letter outlining his employment benefits, though it was not signed by either the company or the new hire. The board objected to the start date and the salary and stock options in the letter and refused to approve the employment contract. The board terminated the managing member and determined that it would not extend an offer to the new hire. In response, the new hire filed a lawsuit against the company, the board members and their marital communities. The company became insolvent and went out of business. The new hire continued the case against the individual board members (and coincidentally did not sue the managing member).

The board members argued that the new hire was not covered under the Washington wage and hour statutes because he was never "employed" in that they had not approved his hiring, the managing member lacked the authority to hire, and the new hire had not met the

board's conditions. In addition, the board disagreed with the monthly salary amount as an unacceptable liability.

The *W8Less Prods.* court held that the existence of an employment relationship and the agreed-upon salary (if any) was a fact issue for the jury to determine, not the trial court. The *W8Less Prods.* court acknowledged that the company's negative bank balance did lend credence to the board's argument that they would not in fact have hired this individual. However, if he was hired as an employee, the *W8Less Prods.* court indicated that the individual board members would be liable for failure to pay his wages and double damages for having willfully failed to pay them (along with attorneys' fees and costs and 12% prejudgment interest). As there was a dispute as to whether he was hired, the jury would have to determine that issue. The *W8Less Prods.* court also remanded that issue for the jury to determine.

The take-aways from *W8Less Prods.* are that individual board members and managers (and their marital communities) may have personal liability for unpaid wages, double damages, reasonable attorneys' fees and costs, and prejudgment interest **if** they allow authorized agents such as a managing member to create employment relationships—even if the board objects to that relationship. The board must do more than merely object. It must fire that new hire and communicate said decision while at the same time paying any outstanding compensation.