

## In Defense of AIG Employees

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It has been nearly impossible to open a newspaper, turn on the television or even attend a social function without being exposed to the public anger over American International Group (AIG) employees who recently received a total of \$165 million in “bonuses.” However, the public’s uproar over these payments, which has been fueled by the media and elected officials, is based on a fundamental misunderstanding of the nature of these payments, namely, that they are “bonuses” in the conventional sense and money rewarding employees for the failure of a bankrupt company.

As counsel for almost 20 of these employees, we must set the record straight. These payments were not “bonuses” at all. Rather, they were retention payments made by AIG’s Financial Products Division (AIGFP) pursuant to legally binding retention agreements with the hard working, honest and dedicated professionals retained by the company over one year ago, whose expertise was needed to unwind the extremely complex credit default swaps (CDS) entered by a few employees, virtually all of whom are now long gone from AIG.

Towards the end of 2007, the financial products division faced possible disaster after it became evident that its credit default swaps portfolio was not properly hedged, exposing the division to potentially billions of dollars in losses. Because of these potential losses, the decision makers who entered into these transactions, led by then AIG Financial Products President Joe Cassano, were forced out of the company in February 2008. At that time, the future viability of the financial products division was in serious doubt, as the company had approximately \$2.7 trillion of derivative positions on its books, and was facing a mass exodus, both voluntary and involuntary, of several senior executives.

In March 2008, many months before AIG received any federal bailout money, AIG’s financial products division attempted to avoid losing other key professionals by exercising its business judgment to adopt an Employee Retention Plan (ERP), which provided approximately 400 AIGFP employees in the United States, Asia and Europe with Guaranteed Retention Awards (GRA) for 2008 and 2009. Notably, virtually all of the employees offered participation in the retention plan had nothing to do with the credit default swap transactions that led to AIG’s financial crisis and required billions of taxpayer dollars to be injected into the company.

Moreover, none of the current participants negotiated their retention agreements; rather the retention plan was presented to them on a “take it or leave it” basis. The amount of each employee’s retention payment for 2008 was based on a percentage of the employee’s total compensation in 2007.<sup>1</sup> Each participant executed individual written agreements confirming

their participation in the plan. This type of contractual arrangement for payment of compensation is binding under the Connecticut Wage Act.<sup>2</sup>

Under the retention plan, AIGFP had a clear contractual obligation to pay each participant his or her retention payment “not later than March 15th of the calendar year next following the end of such Compensation Year,” provided that such participant, prior to such scheduled payment date, (a) did not resign without good reason, (b) was not terminated for cause, or (c) was not terminated for failure to meet performance standards (which would result in forfeiture of their retention for 2009 only).<sup>3</sup> The amount of each participant’s retention payment was not dependent on performance, and was not within AIGFP’s discretion. Instead, the payments were mandated by the express terms of the employee retention plan.<sup>4</sup> Indeed, under the plan, each participant also was eligible to receive a performance-based bonus, which was not awarded for 2008 due to AIG’s financial situation.<sup>5</sup>

In reliance on their retention agreements and subsequent confirmation in writing on at least three occasions after AIG received taxpayer bailout money to timely make the retention payments, AIGFP’s employees remained at the company and worked hard throughout 2008 to stabilize its cash position, wind down AIGFP’s business, and reduce its credit default swap exposure from \$2.7 trillion to \$1.6 trillion.<sup>6</sup> Because the employees completely fulfilled their contractual obligations by remaining at AIGFP and performing valuable services in winding down its affairs, if AIGFP had failed to make the retention payments on or before March 15, the participants would have had very strong breach of contract claims against the company, potentially subjecting it to attorney’s fees and costs for such “wanton and malicious” breach.<sup>7</sup>

Moreover, such a breach by AIGFP likely would have allowed employees to assert that they were constructively discharged.<sup>8</sup> Without the assistance of the retained employees who had institutional knowledge of the complex transactions, AIGFP likely would have failed, thereby preventing taxpayers from recouping our enormous investment in AIG.

In addition to contractual remedies, AIGFP’s failure to timely pay the retention payments would have allowed employees to possibly recover double the amount of damages under the Wage Act, which provides for such relief when an employer withholds wages in bad faith, arbitrarily or unreasonably.<sup>9</sup> This liquidated damages and fee shifting provision was added to the Wage Act in 1967, likely to deter companies from infringing on a worker’s fundamental right to be paid his or her earned wages for the performance of services, without the attendant expense of legal fees.<sup>10</sup>

The Wage Act defines “wages” as “compensation for labor or services rendered by an employee, whether the amount is determined on a time, task, piece, commission or other basis of calculation.”<sup>11</sup> And, where such payments are “promised upon work or services the employee has performed,” as opposed to the performance of the company, they are deemed “wages” under the Wage Act, subject to the protection against an employer improperly withholding such payment.<sup>12</sup>

Here, the retention payments are a fixed amount based solely on the participant performing services for AIGFP through the payment date, and are not contingent on the performance of the company, or subject to the discretion of AIGFP.<sup>13</sup> This guaranteed payment arrangement is standard in retention programs because they generally are utilized where the future performance of a company is in doubt. Thus, they are “wages” under the Wage Act. Indeed, AIG admitted its contractual obligation and exposure under the Wage Act in a white paper submitted to Congress in advance of Chief Executive Officer Ed Liddy’s testimony on March 18.

In a tacit acknowledgement of the lack of any legal recourse to recover the money from the employees who earned their retention payments, the federal and local governments have applied

an enormous amount of pressure to convince the participants to “voluntarily” return the money they earned under the contracts.

By way of example only, Senator Charles Grassley, R-Iowa, the ranking Republican member of the Senate Finance Committee, publicly stated that the AIG employees who received retention payments should “follow the Japanese model and come before the American people and take that deep bow and say I’m sorry, and then either do one of two things—resign, or go commit suicide.”<sup>14</sup> This statement by a sitting U.S. Senator is dangerous and ignores the fact that the hard working employees at AIG earned the retention payments at issue pursuant to enforceable written contracts that the Federal Reserve, Treasury Department and members of Congress all knew about prior to the payments being made.<sup>15</sup>

It also fails to take into account that no one ever approached any of these employees and asked them to renegotiate their contracts after the billions of taxpayer dollars were injected into AIG. Had anyone even attempted to renegotiate these agreements in good faith back in 2008, the tremendous amount of time, resources and public misunderstanding and outrage may have all been avoided.

Instead, AIG employees have been attacked unfairly by all sides. Not only are they facing a punitive tax bill passed by the House of Representatives, apparently in a fit of anger, but their payments are also being subjected to state investigations. There have been reports that the attorneys general of New York and Connecticut have threatened to release the names of employees who received retention payments and who refuse to “voluntarily” return their money, purportedly based on “the public’s right to know how their tax dollars are spent.”<sup>16</sup> If such an action was taken by these top law enforcement officials, employees and their families would be exposed to grave danger, which is evidenced by thousands of e-mails and other threatening communications sent to AIG, many of which contained death threats.<sup>17</sup> Indeed, these hard working and honest employees have been instructed by AIG security experts to take different routes home from work and not to wear any clothing that could identify them as employees of AIG. Many of our clients are living in a state of fear.

Bowing to the pressure and threats from the government and the public at large, AIG “requested” that its employees return their rightly earned retention payments. Indeed, near the end of the workday on Friday, March 20, AIGFP e-mailed all of its employees a written “commitment letter” to state their commitment to return at least half (and many all) of their retention payments by the close of business on Monday, March 23, 2009. Not only did the proposed commitment letters lack any consideration, but they omitted the material terms of any such “commitment” and failed to explain the process for any return of money (including the multitude of tax implications of an employee simply returning earned wages to his or her employer).

However, AIGFP did reiterate implied threats by elected officials to publicly identify AIG employees who received the retention payments by stating “[t]o the extent that we meet certain participation targets, it is not expected that the names would be released, if at all.” This implicit threat certainly teeters on the brink of an independent violation of the Wage Act.<sup>18</sup>

It is clear that the government must do something to regulate excessive executive compensation at companies that receive federal bailout money. However, the current effort to force AIG employees to return their hard-earned retention payments have unfairly and publicly vilified these employees and jeopardized their very lives. These employees passed up other employment opportunities to help stabilize AIG at a time when the company’s future was in

doubt, and they have worked tirelessly to help us all recoup our substantial investment. The resulting retention agreements that were executed months before AIG received any bailout money are enforceable contracts, and the company, government and country should honor their contracts.



1. ERP §3.01. Under the ERP, a percentage of each participant's GRA systematically was deferred, and a percentage was to be paid in cash. ERP §3.05. It is important to note that the entire deferred portion of each participant's GRA is worthless.

2. See, e.g., *Barry v. Posi-Seal Int'l*, 36 Conn. App. 1, 7 (Conn. App. Ct. 1994) (holding that description of employer's obligations to employee in employment manual constituted unilateral contract).

3. ERP §3.05. For purposes of this Section, "good reason" is defined to mean "a material reduction in base salary, a material reduction in title, duties or responsibilities, or transfer to a geographic location that is more than 50 miles from the Covered Person's current location" (§3.04(a)), and "cause" is defined to mean "conduct involving intentional wrongdoing, fraud, dishonesty, gross negligence, material breach of the AIG Code of Conduct or other policies of AIG-FP or AIG, or conviction of or entry of a plea of guilty or no contest to a criminal offense" (§3.04(b)).

4. ERP §3.05.

5. ERP §3.02.

6. See Testimony of Ed Liddy before Congress, March 18, 2009.

7. *L.F. Pace & Sons Inc. v. Travelers Indem. Co.*, 9 Conn. App. 30, 48-49 (Conn. App. Ct. 1986) (finding that attorney's fee award appropriate where defendant engaged in willful and malicious breach of contract).

8. *Bernstein v. Nemeyer*, 213 Conn. 665, 673 (1990) (holding that "[i]t follows from an uncured material failure of performance that the other party to the contract is discharged from any further duty to render performances yet to be exchanged").

9. *Petronella ex rel. Maiorano v. Venture Partners, Ltd.*, 60 Conn. App. 205, 215 (Conn. App. Ct. 2000) (holding that double damages and attorney's fees should be awarded upon a "finding of bad faith, arbitrariness or unreasonableness" in failure to pay wages).

10. The New York Labor Law similarly provides for liquidated damages for willful violations, as well as fee shifting. N.Y. Labor Law §198.

11. Conn. Gen. Stat. §31-71a.

12. *Feigelbogen v. AIG Trading Group Inc.*, 03 Civ. 1642, 2006 U.S. Dist. LEXIS 29184, at \*26-29 (D. Conn. May 15, 2006).

13. ERP §3.05.

14. David Lazarus, "When Outrage Fatigue Sets In," L.A. Times, March 18, 2009 at B1.

15. The details of the ERP also was publicly reported in AIG's Forms 10-Q and 10-K throughout 2008. See Forms 10-Q, dated May 8, 2008, Aug. 8, 2008, Nov. 10, 2008 and March 2, 2009.

16. Walter Hamilton, "The AIG Bailout: Outrage Over Bonuses: AIG Gives Bonus Recipients' Names to Cuomo," L.A. Times, March 20, 2009 at A26; Lynn Doan & Eric Gershon, "An Unwelcome Spotlight: State's AIG Wilton Office Workers Caught in Glare of Public Outrage," Hartford Courant, March 21, 2009 at A1.

17. Attorney General Cuomo also has stated an intention to recoup the GRAs through the courts on a fraudulent conveyance theory. See Grant McCool & Lilla Zuill, "AIG employees hand over bonuses: NYAG Cuomo," REUTERS, March 24, 2009, at <http://www.reuters.com/articlePrint?articleId=USN2344988120090324>. However, this theory likely would fail, as the elements for such claim are not present here. See generally N.Y. DEBT. & CRED. LAW §276 (2009) (Requiring that fraudulent conveyance law requires actual intent to defraud creditors). Similarly, members of the Connecticut House and Senate have announced their intention to amend the Wage Act to focus on companies that receive federal bailout assistance and exempt bonuses and retention bonuses from coming under the Wage Act. See, e.g., Eric Gershon, Lynn Doan & Jon "Lender, a Struggle for Answers; AIG Resists Having Employees Testify on Payments; Bonuses," HARTFORD COURANT, March 24, 2009, at A1.

18. Conn. Gen. Stat. §31-73.

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