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Wage and Hour Pitfalls and Solutions for Retail, Restaurant and Hospitality Employers

I. The Fair Labor Standards Act – a Brief History

Purpose of the Act

The Fair Labor Standards Act (FLSA) was established in 1938 under President Roosevelt as part of the New Deal in an effort to protect employees. Enactment of the Act established the forty-hour workweek and overtime, set minimum wage standards, recordkeeping requirements, and child labor rules throughout the United States. Over the years, the Act has been updated slightly and states have enacted their own iterations of wage and hours laws. These changes and inconsistencies burden employers who must stay abreast of the regulations and attempt to comply with wage and hour laws when it comes to tracking and complying with such regulations; from exemptions to leave laws and break requirements, employers in all industries must stay abreast of the changes and continue to work through compliance procedures. The FLSA and its state counterparts continues to be a major hurdle for employers and as legal filings and changes indicate, this is only becoming more burdensome.

Where we are today: 2017

With the recent turn of events regarding expected changes to the White Collar Exemptions (EAP – Executive, Administrative and Executive), otherwise referred to as Section 541 exemptions, employers were frazzled and then, many relieved - many dumbfounded - after the injunction was issued on November 22, 2016 in. As was indicative by the steady rise in lawsuits over the past decade and the Obama Administration's focus on "a fair day's pay for a fair day's work" campaign, employee friendly regulations were certainly on the rise.

On March 13, 2014, President Obama issued a directive to the Department of Labor (DOL) ordering that the agency "revise" the exemptions to the Fair Labor Standards Act. In response, the Department published its final rule on May 23, 2016. The rule put in place a major increase to the salary level for the "white collar exemptions". The salary level that had been set at $455 per week since 2004 was increased to $913 per week

effective December 1, 2016. Furthermore, the new rule created an "automatic indexing mechanism" whereby the level would be automatically reset and tied to the 40th percentile of regular weekly earnings for full time workers in the lowest wage census region of the U.S. every three years beginning in 2020.

To the surprise of many, however, Federal Judge Mazzant issued a mandatory, nationwide injunction prohibiting the Department of Labor's changes to the salary level from taking effect. In *Nevada v. U.S. Department of* Labor Judge Mazzant opined that (1) such emphasis on the salary test for exemption defies Congressional intent in creating exemptions (2) the automatic mechanism put in place was contrary to the Administrative Procedure Act (APA) and (3) exceeded the Department's Constitutional authority under the 10th Amendment.

Federal v. State

Regardless of the current hold on the federal exemption requirements, many states do have their own specific requirements; and the federal law remains unchanged since 2004. (29 C.F.R. 541)

Judge Mazzant used the 10th Amendment of the U.S. Constitution as the basis for staying the DOL overtime rule change, noting that the states have constitutional authority to control costs:

> "…enforcing FLSA and the new overtime rule against the States infringes upon state sovereignty and federalism by dictating the wages that States must pay to those whom they employ in order to carry out their governmental functions, what hours those persons will work, and what compensation will be provided…"

While this decision is huge for employers, and certainly a big win, it doesn't necessarily change the fact that employers have a great burden when it comes to tracking and complying with wage and hour laws throughout the United States. Employers must be vigilant about keeping abreast of federal and local changes. While the salary threshold is not rising at this time at a federal level, misclassification of employees will certainly continue to be a hot-bed for litigious employees and a sore-spot for the Department.

II. Employer obligations for Wage and Hour Compliance

Key Consideration: Recordkeeping

One key aspect of the FLSA as was enacted almost seventy years ago is the importance of records. The Act itself places the burden of recordkeeping squarely on the shoulders of employers. 29 C.F.R. 516 provides that "every employer subject to any provisions of the Fair Labor Standards Act of 1938, as amended (hereinafter referred to as the "Act"), is required to maintain records containing the information and data required by the specific sections of this part." Nothing in the FLSA prohibits employers from

transferring the burden, or duty, to maintain records to the employer. However, it is critical that employers understand that even written policies requiring employees to maintain accurate records will not expunge employers of their legal obligation.

Will the Documentation Help or Hurt?

Today, most employers do keep some sort of documentation of business, personnel and employment records. The question is, if the documentation is not accurate – or is incomplete – what damage can that cause? As the statistics show, wage and hour cases are on the rise. It is standard for any wage and hour cases have multiple allegations and typically the evidence will come down to reviewing the records of the employee's worked hours. For example, in cases of overtime, off-the-clock work, donning and doffing and missed meals and breaks, it is readily apparent what the common thread is: lack of complete or inaccurate records.

Beyond federal and state changes in wage and hour law, decisions by the National Labor Relations Board (NLRB) have significantly affected the joint employer standard. *Browning-Ferris Industries of California, Inc.*, 362 NLRB No. 186 (August 27, 2015.) In January of 2016 the Department's Wage and Hour issued an Administrative Interpretation that essentially stated that *any* jointly-owned entities might constitute joint employers. However, in *Aguiar, et al. v. Subway 39077, Inc., Timothy E. Johnson, et al.*, applying a fairly lenient standard, the judge found that: the plaintiff's attempt to certify the collective failed because (1) the proposed collective was comprised of individuals employed by approximately 38 separate, non-party corporate entities (2) the plaintiff's hadn't opted in appropriately under FLSA standards and (3) the putative plaintiffs were not similarly situated. (16-23399-Civ-Scola)

Examples

In addition to federal wage laws, most states regulate employers based on criteria such as location, industry, number of employees and other specific business facts scenarios. For example, the state of California and cities within the state, long known for being extremely "employee friendly", continue to pass regulations – some specifically aimed at certain industries.

For example, employers in Los Angeles and Long Beach, California are subject to local ordinances. In 2007, the City of Los Angeles adopted an ordinance requiring hotels with 150+ rooms within the Airport Hospitality Enhancement Zone to provide employees at least 96 paid hours off per year for any purpose, and a proportional amount of hours to part-time hotel workers. (L.A. Mun. Code § 186.02.)

In 2012, Long Beach voters approved Measure N, which requires hotel employers to provide at least five days of PSL to certain employees. (Long Beach Mun. Code § 5.48.020).

III. Technology and Other Solutions

Avoiding Red Flags

The best defense for employers is accurate recordkeeping. Without accurate and complete records, courts are likely to side with employees who merely provide statistical samples that shows "the amount and extent of that work as a matter of just and reasonable inference." *Anderson v. Mt. Clemens Pottery Co*., 328 U. S. 680 (1946). Distinguished by *Wal-Mart Stores, Inc. v. Dukes*, 564 U. S. 338 (2011).

Other issues of employees who perform off the clock work have demonstrated the employer's requirement to truly manage their workforce and know whether the employee was performing work that would benefit the employer. Whether at the employee's workstation or elsewhere, employees must be compensated for all hours worked. *Steiner v. Mitchell*, 350 U. S. 247 (1956). "Work not requested but suffered or permitted is work time." 29 C.F.R. § 785.11.

Transparency, Communication, Compliance

Technology

While many employers may accurately classify employees as FLSA -exempt, employers can certainly keep and track records of their employees including when and where the employee is working. Restaurant, retail and hotel chains have an abundance of low-wage workers, thus triggering special enforcement focus by the Labor Department. In 2014 and 2015, the retail industry, saw increased allegations of overtime violations, off-the-clock work, and missed meals and breaks, as well as misclassification. Understanding this, leaders in these industries, understandably, have begun to invest in various sources of technology to track employees.

Specifically, employers focus on donning and doffing opinions (from the Portal-to-Portal Act and beyond), meals and breaks (including state regulations) and classification of employees. *Tyson Foods, Inc. v. Bouaphakeo et al*., (577 U. S. 2016); *IBP, Inc. v. Alvarez*, 546 U. S. 21 (2005); *Murphy v. Kenneth Cole Productions, Inc.* 40 Cal. 4th 1094 (2007). Though the Federal law does not require employees to provide employees with a meal break, many state laws due, thus another area of focus for plaintiff's attorneys. 29 CFR 785.18

IV. Bottom Line: Protect Yourself

Wage and Hour Insurance

There are two basic forms of risk management to mitigate immense wage & hour exposures:

1. Prevention. Careful compliance efforts to reduce wage & hour exposures.
2. Liability insurance. If a wage & hour claim is made, seek coverage under all potentially relevant lines of coverage (EPL, D&O, Fiduciary), and also consider the need for "standalone" Wage and Hour insurance.

Why you need it

Historically, many companies have looked to their Employment Practices Liability insurance policy to provide coverage for wage and hour claims. However, in the majority of cases, EPL insurance is not the answer, as most EPL policies unequivocally exclude coverage for both federal and state wage & hour claims. Courts largely affirm insurers' position of no coverage under EPL policies, for a variety of reasons. First, generally speaking W&H claims do not allege an Employment Practices Wrongful Act, which is a required trigger under nearly all EPL policies. *California Dairies v. RSUI Indemnity Company*, 462 Fed.Appx. 721 (9th Circuit 2011); *Tritech Software Systems v. U.S. Specialty Ins. Co.* 2010 WL 5174371 (C.D. Cal. 2010); *Gauntlett v. Illinois Union Ins.* 2012 WL 4051218 (N.D. Cal. 2012); *Payless Shoesource, Inc. v. Travelers Companies, Inc.* 585 F.3d 1366 (10th Cir. 2009); *Murphy v. Kenneth Cole Productions, Inc.*, 40 Cal.4th 1094, 1114 (2007); *Jeff Tracy, Inc. v. U.S. Specialty Ins. Co.*, 636 F.Supp.2d 995 (C.D.Cal. 2009).

Insurers also assert that it would constitute a moral hazard, or be against public policy, to insure this risk. *Farmers Automobile Ins. Ass'n v. St. Paul Mercury Ins. Co.* (7th Cir. 2007) 482 F.3d 976; *The Cleveland School Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA* (N.D. Miss. 2005) 2005 WL 24060087; *Krueger Int'l, Inc. v. Royal Indem. Co.* (7th Cir. 2007) 481 F.3d 993, 996; *Waste Corp. of America v. Genesis Ins. Co.* (S.D. Fla. 2005) 382 F.Supp.2d 1349, 1354-1355, aff'd (11th Cir. 2006) 209 Fed. Appx. 899. The reason being, "[i]nsurance against a violation of an overtime law, whether federal or state, would enable the employer to refuse to pay overtime and then invoke coverage so that the cost of the overtime would come to rest on to the insurance company." F*armers Auto. Ins. Ass'n v. St. Paul Mercury Ins. Co.*, 482 F.3d 976 (7th Cir. 2007).

Finally, insurers frequently take the position that unpaid wages are equivalent to restitution or a preexisting corporate obligation. *Big 5 Corp. v. Gulf Underwriters Ins. Co.* (C.D. Cal. 2003) 2003 WL 22127029; O*ktibbeha County School Dist. v. Coregis Ins. Co.* (N.D. Miss. 2001) 173 F.Supp.2d 541.

How it was Developed

As the EPL market softened in the 1990s, sublimits for "defense costs only" coverage became available to small companies. However, insurance brokers began to "lobby" Bermuda and London insurers to provide broader coverage, particularly for large companies. The first Wage and Hour policy geared toward large companies was

introduced to the market in early 2013. At that time, large retentions, significant premium and extensive underwriting—including pre-application wage and hour audits—were required in most instances. Now standalone Wage and Hour coverage is available through Bermuda insurers, at least one London insurer, and at least one US insurer.

What it does

Wage and Hour insurance is designed to cover claims alleging violation of the FLSA and state wage and hour laws (including failure to pay overtime, failure to provide meal breaks and rest periods, and misclassification, etc.). The policies also provide coverage for defense costs, statutory relief, including settlements and judgments comprised of wages, civil penalties, attorneys' fees, among other defined "loss." Critically for independent contractor misclassification claims, the definition of "employee" also includes independent contractors. Typically, the policies are non-duty to defend and there is no panel counsel requirement (unlike many EPL policies). Coverage has become increasingly flexible and affordable in the four years that it has been available, and brokers and insurance carriers expect only more interest in Wage and Hour insurance as the legal and regulatory environment continues to worsen.