Federal Wage Claims? That's The Easy Part!

Insights
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Retailers are all too familiar with collective actions filed under the Fair Labor Standards Act (FLSA) making claims for unpaid overtime based on alleged misclassification of employees as exempt, working off the clock, or not counting all hours worked. But complying with the FLSA is a relatively simple task when compared to complying with the myriad of different state wage and hour laws that impact everything from paydays to vacation time.

For example, in January, Petsmart announced that it was settling a class action under California law related to its use of pay cards to provide employees' final wages. The amount of the settlement was $1.1 million to a class of 1100 employees. According to the complaint, Petsmart's pay-card practice did not comply with California labor code's requirements for using pay cards for wages. Disney was also hit with a California class-action lawsuit alleging it improperly failed to pay terminated employees for unused vacation time.

While California probably has the greatest number of state law wage lawsuits, it is far from the only state to have various standards relating to the payment of wages. State laws may cover areas such as how often employees must be paid, limiting the length from the time of work to the time of payment, whether employees can be fined, when terminated employees must receive their wages, restrictions on the use of pay cards, and whether vacation must be paid.

Violations of state wage laws are accompanied by penalties and fines and the right to attorneys' fees. These can quickly turn a claim for a few hundred dollars for vacation pay into a claim for multiple thousands of dollars. Because most employers have standard practices, where those practices violate a state law, they violate it as to all the employees in the state. This can make class-action status an easy question.

Here are some areas to review prior to beginning operations in a new state.

How Much To Pay: *Minimum wage and overtime*

The first area many retailers will need to consider is whether or not states have minimum wage and overtime laws that are more generous than the FLSA. Currently, 29 states and the District of Columbia have a minimum wage higher than the federal minimum wage. The amounts range from $7.50 an hour (New Mexico) to $9.50 (Washington D.C.). Further complicating matters are the existence of even higher minimum wages in various municipalities. For example, San Francisco has approved a minimum-wage ordinance that will raise the minimum wage there to $15.00 an hour by 2018.

Some states also have laws that require overtime be calculated on a daily basis. For example, Alaska, California, and Nevada require overtime for nonexempt employees who work more than eight hours in single day. Rhode Island has a law specific to retailers requiring they pay their employees 1.5 times their regular rate of pay for hours worked on a Sunday or a holiday. It further requires that the employee must get a least four hours of work on these days.

How To Pay: *Pay cards and direct deposit*

Since the earliest days of the industrial age when employers paid employees with scrip redeemable only at the company store, states have been enacting laws to govern the method of payment. Most states have a law requiring that wages be paid by check or in U.S. currency.

But with the advent of electronic banking, paper checks and cash are not nearly so common. The first widely used non-paper method of payment was through direct deposit into an individual's bank account. While the vast majority of employees enjoy the convenience of this method, it was attacked because many low-wage earners were unable to qualify for a free checking account. As such, they were being charged monthly fees to be able to accept the direct deposit. In response, many states passed laws prohibiting employers from using direct deposit without the employee's consent.

The latest common method of payment is the pay card. These cards are not connected to a specific bank account and the employer can place the wages on the card. The employees access their wages through ATM machines. Critics of this method of payment observed that using ATM machines carries heavy fees leaving employees with less money than they had earned.

In response, several states passed laws governing the use of this method of payment. Most of these provide requirements such as the employee must be able to withdraw 100% of the funds on the card without a fee in one transaction (Illinois). Other limitations include that the employer cannot force an employee to accept payment on a pay card (Hawaii), that fees must be disclosed in advance (Maryland), or that there be no fees (New Jersey).

When To Pay: *Frequency and timeliness of wage payment*

How often employees are paid is regulated in many states. The most common regulation is to prohibit monthly pay periods and require that employees be paid at least twice a month. This can include requirements that the paydays be approximately 15 days apart.

Industries with heavy concentrations of nonexempt employees whose hours routinely fluctuate, such as retail, tend to pay in arrears. That is, it takes several days after the end of a pay period to properly calculate the wages owed and to issue payment. But state laws can limit the amount of time between these events.

Connecticut, for example, requires that the payday be no later than eight days following the close of the pay period. California requires regular wages for the first half of a month to be paid no later than the 26th of the month and wages for the second half of the month be paid no later than the 10th of the following month. Wages earned in excess of the normal work period must be paid by the next regular payday.

Final Wages: *Payment upon termination*

States vary significantly on requirements related to the final pay of an employee who has been terminated. Some are complex, such as Louisiana where different periods apply to employees who have resigned and those who have been discharged. Some states have very short time periods such as Alaska that requires a discharged employee be paid within three days of the date of discharge. These create the headache of manually issuing payment at times when payroll is not even being run.

Just as the timing of final wages differs among states, so too do the penalties for failing to pay in a timely manner. Some states have fines – and even jail time – for paying late. Penalties available to the employee who has not been paid range from triple the amount of the wages to 90 days wages. Laws usually include provisions for the prevailing employee to recover his attorneys' fees.

Laws regulating whether employees must be paid for unused vacation time also vary widely. Many states such as Mississippi defer to the employer's policy. Thus, if an employer's policy provides that unused vacation time is not paid out on termination, it will be upheld by the courts. But other states such as Arizona, include pay for unused vacation as an amount due upon termination of employment.

Summing It Up

The above examples are but a few of the many wage topics regulated by state law. Other areas that might come into play would include wage forfeiture, fines, treatment of sick leave upon termination, wage statements, and impermissible deductions. The key to compliance is knowledge. A company cannot assume that because it complies with the FLSA it is in compliance with the wage laws of the states in which it operates.

In the Internet age, educating yourself on state wage laws is not difficult. The websites of states' departments of labor often have publications explaining the state's particular rules. Likewise, state statutes are available for free online. The Fisher Phillips website has links to many state-specific law guides that include explanations of the wage laws in those states. Spending some time understanding these laws before moving operations into a new state is significantly less costly than the wage lawsuits that will follow innocent failures.

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