What To Know About 2020's Top Wage And Hour Law Updates

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From workplace safety to new leave provisions, the employment law landscape was rocked in many unexpected ways this year.

The pandemic has left an indelible mark on the way employers will conduct their businesses going forward. Wage and hour compliance is a key area that has presented challenges to employers grappling with the impact of COVID-19.

Furthermore, federal and state enforcement agencies and legislatures have continued to press forward with laws, opinion letters and guidance that must be understood and acted upon. To be sure, 2020 has presented employers with several impactful wage and hour developments. Here are some of the most significant developments.

Remote Work Changes to Compensation and Reimbursement: Pandemic and Beyond

The pandemic swiftly changed the way many employers conduct their businesses, with many companies having to quickly transition thousands of employees to remote working conditions. With the sudden advent of remote work, employers immediately had to adapt to a new normal and many workplaces now have experienced permanent changes.

Employers received some guidance from the U.S. Department of Labor regarding compensation of remote workers and must comply with both federal and state laws impacting compensation of remote workers.

Remote Work and Tracking Hours

In August, the DOL issued a field assistance bulletin, or FAB, to provide employers with guidance regarding the obligation to track hours of employees working remotely or teleworking. Though the guidance was issued to address the sudden influx of teleworkers amid COVID-19, it applies to all other telework and remote work arrangements.

The FAB guidance recognized the challenge that remote and telework presents to employers who are required to compensate employees for work that the employer knows or has reason to believe is being performed. Importantly, the FAB clarified that employers are not required to compensate employees for work they do not know about and have no reason to know about.

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Rather, employers are only required to compensate employees for hours worked based on actual knowledge or constructive knowledge of that work. Employers will be deemed to have actual knowledge of employees' regularly scheduled hours and through employee reports or other notifications. Employers might be deemed to have constructive knowledge if they could have acquired information regarding additional work done through the exercise of reasonable diligence.

Importantly, the FAB clarifies that reasonable diligence is limited to what the employer should have known, not what it could have known. This means employers are not necessarily required to cross-reference phone records or otherwise review other nonpayroll records to determine whether or not employees were working beyond their scheduled hours, especially during a time where telework arrangements are at an all-time high.

This clarification — especially as it relates to the reasonable diligence standard — is an extremely helpful note for employers as they struggle with identifying compensation issues during remote work. The key takeaway for remote work is that compensation is required for all hours that an employer has knowledge of work being performed, and employers should keep records of those hours and pay.

Remote Work and Reimbursement Concerns

Employers were also faced with the question of whether they should reimburse employees for expenses associated with working from home, including cell phone and internet usage.

Under federal law, employers are generally obligated to reimburse expenses incurred by their employees only to the extent that those expenses would otherwise cut into wages protected under the Fair Labor Standards Act — for example, minimum wage and overtime.

Under the FLSA and corresponding regulations, if an employee incurs expenses on the employer's behalf or for the benefit of the employer, the employee is entitled to reimbursement to the extent their earnings would otherwise fall below the FLSA protected wages. Many employers encountered this nuance of the FLSA for the first time with their remote workers and were unsure about its application.

Practically speaking, however, because many remote workers have wages above the federal minimum wage — currently $7.25 per hour — affected employers typically face limited risk of running afoul of FLSA's reimbursement obligations in that context. However, many states have minimum wage rates significantly above the federal minimum, so it is prudent to review expenses incurred by employees to ensure that those expenses do not reduce their pay below the state or federal minimum wage.

Moreover, some states — such as California and Illinois — have enacted laws requiring reimbursement of employees' expenses. As employers move to more permanent remote work arrangements, employers should ensure that they have legally compliant reimbursement policies.

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paying close attention to state and local laws. The key takeaway is that employers should review their expense reimbursement policies, paying close attention to state law mandates and minimum wage thresholds.

Fluctuating Workweek Method of Pay and Bonus Pay

In July, the DOL released final regulations addressing the FLSA's fluctuating workweek, or FWW, compensation structure. Generally, this rule applies to employees who have work schedules that vary from week to week, such that the total number of hours they work fluctuates from one week to the next.

Prior to this final rule, some courts and the DOL interpreted the FWW compensation methodology as foreclosing employers from paying bonuses, commissions or other compensation in addition to the salary payment. However, with the new regulations, the FWW method of compensation expressly permits an employer to pay employees additional forms of compensation in the form of bonuses, commissions, etc.

The FWW can provide a useful tool for businesses that employ workers with fluctuating hours, but implementation of this method of compensation is somewhat complex. Pursuant to the FWW method, nonexempt employees receive a set weekly salary, plus additional overtime pay when they work more than 40 hours in one workweek.

The benefit to the employer is that it already has paid the straight time — the "one" of the "one and a half" — for all hours worked including those over 40 and the benefit to the employee is that they are paid a set weekly salary. To fully leverage the principles, the FWW requires an agreement that the employee's salary constitutes compensation for all of the hours worked in a workweek, including all hours worked over 40.

Further, the overtime rate will fluctuate from week to week because it is based on the average hourly rate produced by dividing the employee's fixed salary plus additional pay — e.g., commissions, bonuses or hazard pay — by the number of hours actually worked in a specific workweek.

The key takeaway is that the FWW regulation provides organizations that employ workers whose hours vary from week to week with a useful tool to manage overtime expenses and provide employees with a steady salary. However, employers must pay attention to the overtime rate and other requirements of the FWW regulation to ensure compliance.

New Rules on Joint Employment

The topic of joint employment certainly was hot in 2020 and will remain unsettled as we move into 2021.

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In January, the DOL issued a new rule with a four-factor test businesses can use to determine whether they are a joint employer with another business entity.

The test looks to whether the entity (1) has the ability to hire or fire the employee; (2) supervises and controls the employee's work schedule or conditions of employment to a substantial degree; (3) determines the employee's rate and method of pay; and (4) maintains the employee's employment records.

However, in September, a federal judge in New York struck down key portions of the DOL's final rule, ruling that it did not comport with the FLSA, finding it had "major flaws." It is unclear whether the DOL will attempt to resurrect the rule in the waning days of the Trump administration.

As we enter 2021, affected employers are on not-so-sturdy ground as it relates to evaluating whether they will be deemed a joint employer in their employment situations. There continue to be a number of lawsuits regularly filed throughout the country attacking the gig economy business model with varied results.

Moreover, the issue of joint employment will be influenced by the Biden administration's policies and regulatory stance. No doubt the topic of joint employment will be something to keep an eye on in the new year.

Conclusion

Without question, 2020 was a challenging year for obvious reasons. Wage and hour issues continue to present challenges to companies throughout the country. Employers gained clarity in some areas with DOL guidance and regulations, but other areas remained murky.

In terms of predictions for 2021, expect to see employers continuing to deal with the practical and legal ramifications of the pandemic. And, the ushering in of the Biden administration will likely see more regulation and a very active DOL.

Overall, 2020 has been an active year for wage and hour issues and 2021 will continue to present challenges to employers as well.

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Related People

Copyright © 2024 Fisher Phillips LLP. All Rights Reserved.

Kathleen McLeod Caminiti
Partner
908.516.1062
Email

Sheila M. Abron
Partner
803.740.7676
Email

Service Focus

Wage and Hour

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