A Refresher On Employing Minors During COVID-19: What Employers Need To Know

Insights
7.06.20

Summer is here, and for many businesses, that traditionally means hiring minors. Workers under the age of 18 are an important part of the workforce in many industries, including service businesses such as fast-food joints, restaurants, and ice-cream shops. These workplaces and others – such as arcades, amusement parks, and golf courses – often open or experience an increase in volume in summer.

There exist important federal and state rules that govern the employment of minors with respect to work permits, wages, hours of work, and various work restrictions. Further, as businesses begin reopening in this COVID-19 era and hiring such individuals, employers should ensure they are familiar with how return-to-work and similar policies apply to minors under other laws.

Work Permits
Most states require minors to provide a work permit or age certification before they begin working. Typically, it is necessary for a minor to obtain a new one at the beginning of each school year until the minor turns 18 or graduates from high school. An employer should always keep the work permit or age certification on file.

Wages
As a general rule, minors must be paid at least the statutory minimum wage for all hours worked. One exception exists under the Fair Labor and Standards Act (FLSA): The "opportunity wage," which permits an employer to pay a minor $4.25 per hour during their first consecutive 90 calendar days of employment. The exception is rarely used, particularly as state and local laws often call for higher wages these days. Still, employers that can avail themselves of the exception can, as the law intends, provide an opportunity to young workers in exchange for some labor savings for the employer without the potential risks associated with the hotly litigated unpaid internship.

Hours of Work
The U.S. Department of Labor (USDOL) has established minimum labor standards for the hours during which a minor may work and when such minor may work depending on their age.

14- and 15-Year-Olds
Fourteen and 15-year-olds cannot be employed (1) during school hours; (2) before 7:00 a.m. or after 7:00 p.m. (except June 1 through Labor Day when the evening hour is extended to 9:00 p.m.); (3)

more than three hours a day on a school day, including Fridays; (4) more than eight hours on a non-school day; (5) more than 18 hours a week during a school week; and (6) more than 40 hours a week during non-school weeks. Even though, as noted, these children are allowed to work until 9:00 p.m. during the summer, a best practice is to enforce the 7:00 p.m. schedule year-round.

With schools closing and offering virtual learning in the wake of COVID-19, it has been unclear when school is "in session." As a result, the USDOL issued guidance on how virus-driven school closures affect these child-labor protections. School is "in session" during any week in which the school district in which a minor resides requires its students to attend school, *either physically or through virtual or distance learning.* Thus, if the district physically closes schools in response to COVID-19 but requires students to continue instruction through virtual or distance learning for at least one day or part of one day, school is technically "in session" for purposes of the FLSA.

Generally, summer school sessions, held in addition to the regularly scheduled school year, are considered to be *outside of school hours*. However, some school districts may be considering mandatory instruction for all students over the summer to make up for instruction time lost due to COVID-19. Such mandatory summer sessions should be viewed as extensions of the school's regular schedule. Such periods of instruction would be considered "school hours," and school would be considered "in session" during any day and during any week in which the school district requires all students to receive instruction.

16- and 17-Year-Olds

While the FLSA places strict limitations on when and for how long 14- and 15-year-old employees may work, the FLSA does not place similar limitations on 16- and 17-year-olds. However, several states impose limitations on when and for how long 16- and 17-year-old employees may work. Accordingly, employers should check the standards of employment within each state they operate to ensure they are complying with both federal and state laws with regards to employment of minors.

Hazardous Occupations

Federal law strictly prohibits the employment of minors in non-agricultural work falling within any of the USDOL's list of hazardous occupations. These occupations include, but are not limited to, manufacturing or storing explosives, driving a motor vehicle, work as an outside helper on motor vehicles, coal mining, firefighting, using power-driven tools, being exposed to radioactive substances, and many more.

Occupational Restrictions

In additional to the temporal work limitations placed upon minors by the FLSA and various state laws, the FLSA further limits minors in the *type* of work they may perform based on their age group.

14- and 15-Year-Olds

Children that are 14- and 15-years of age generally can perform tasks such as office and clerical work, intellectual or artistically creative work, cashiering, and stocking shelves. They also can

perform limited food service work, maintenance work (buildings or grounds), and, in some instances, lifeguarding, and running errands, among other things.

Within the food service industry, 14- and 15-year-olds may not, however, participate in any cooking that involves cooking over an open flame; cooking with rotisseries, broilers, pressurized equipment; and cooking using devices that operate at extremely high temperatures such as "Neico broilers." They also may not work with power-driven food slicers, grinders, choppers, processors, cutters, or mixers.

16- and 17-Year-Olds

Sixteen and 17-year-olds may perform any task within a quick service restaurant with the exception of power-driven baking machines or meat processing machines.

Employers should clearly outline the job duties associated with any summer job to be performed by a minor. They cannot rely on a job title when determining if an occupation includes prohibited work. Rather, they must consider the actual job duties. Many times, employers mistakenly assume a role is permitted based on its title when, in actuality, the activities carried out in a position are prohibited. Employers should carefully review both the permitted and prohibited work, especially before hiring an individual under 16 years of age.

Further, employers should take time to train management on which tasks can and cannot be assigned to minors. It is important to memorialize such training by distributing a memorandum clearly indicating the child labor limitations for each minor employee. Finally, employers should consider informing other employees who will interact with the minor, and perhaps even the minor.

COVID-19-Related Concerns

Businesses that employ minors should reexamine applicable federal and state laws prior to implementing their return-to-work policies, particularly as related to the following:

- *Health Screening*. Where permitted, many employers are requiring returning employees to submit to a temperature screening to avoid the spread of COVID-19.The EEOC has expressly permitted such screening for adults but has not addressed the issue as it relates to minors. Importantly, this type of medical screening constitutes a "medical examination" under the Americans With Disabilities Act, and most states require parental consent before conducting medical examinations on minor employees. Thus, if a company safety plan involves employee medical screening, employers should seek parental consent before implementing such policy toward minors and consult any other relevant state laws.
- *Working Papers*. Many states require a designated school official issue working papers to a minor only after being satisfied that the working conditions and hours will not interfere with a student's education or damage a student's health. Certain states require that the school review the work papers in person. School closures, however, may impact a minor employee's ability to procure his or her working papers. Some states are making an exception to this requirement.

Employers must review relevant state guidance regarding such requirements and plan for delays in obtaining the requisite paperwork.

Additionally, if employers meet the requirements for minors returning to work, they should ensure each employee is properly supervised. One suggestion is to implement a mentor/mentee system where a seasoned worker is assigned a minor employee to supervise. This can assist management with alleviating the task of micro-managing its summer staff in this COVID-19 era.

The Bottom Line

This is only a general summary of the FLSA's child labor restrictions. Because of more restrictive state laws, federal law might only be the tip of the iceberg. At a minimum, an employer should review its hiring and employment practices – including any relatively new return-to-work policies – with respect to minors and implement a process to ensure compliance with the FLSA and any applicable state laws.

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, any attorney in our Wage and Hour Practice Group, or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

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