COVID 19 and the Impact on Wage and Hour Claims

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Meet Your Presenters

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Agenda

• Overview of Law
• Covid-19 Wage and Hour Exposures
• Risk Management
• Coverage
Fair Labor Standards Act (FLSA)

- FLSA is the Federal Law governing the payment of overtime & minimum wages, record keeping, and youth employment.

- Applies to employers:
  - Whose annual sales total $500,000 or more, and
  - Are engaged in Interstate Commerce

- General Exemptions from Overtime Pay
  - Executive
  - Administrative
  - Professional
  - Outside Sales
Fair Labor Standards Act (FLSA)

- **Minimum Wage**
  - Covered Non-Exempt workers entitled to $7.25 per hour

- **Overtime Wage**
  - Non-exempt workers entitled to overtime pay at a rate of not less than one and half times their regular rate of pay after 40 hours of work in a workweek.
  
  - Example: A non-exempt worker earning $8 per hour works 50 hours. The pay for the week would be $320 ($8 x 40 hours) + $120 ($12 x 10) = $440

- **State laws may vary significantly.**
Families First Coronavirus Response Act

- Families First Coronavirus Response Act
  - Applies to nearly every US business with less than 500 employees
  - Provides for 80 hours of paid emergency sick leave for specified Covid-19 reasons.
  - Provides 12 weeks of job protected paid emergency family medical leave for those unable to work due to childcare obligations from closed schools or daycare

- Act does not apply to:
  - Healthcare Providers
    - Including contractors to maintain operations, or manufacture equipment or drugs
  - Emergency Responders

- Limited Exemptions for
  - Small Business with less than 50 employees from 1) expanded FMLA, and 2) paid sick leave provisions with regard to childcare/school closure,
    - if leave “would jeopardize viability of the business as a going concern”
Families First Coronavirus Response Act

• Qualifying Reasons for Paid Sick Leave
  • Subject to Federal, State, or local Covid-19 quarantine or isolation order
  • Subject to Covid-19 self-quarantine advised by healthcare provider
  • Experiencing Covid-19 symptoms and seeking medical diagnosis
  • Caring for another individual who is subject to quarantine or isolation order or health care provider advised self-quarantine
  • Caring for a son/daughter because school or daycare closed due to Covid-19 precautions
  • Experiencing “any other substantially similar condition” specified by the Secretary of Health & Human Services

• Qualifying Reasons for Paid Emergency Family Medical Leave
  • Employee is unable to work or telework due to need to care for a child (son or daughter) because the child’s school or place of care has been closed or childcare is unavailable
TYPES OF WAGE & HOUR VIOLATIONS

- Delayed or denied pay
- Accounting errors
- Unpaid leave
- Unreimbursed job expenses
- Prohibited work
TYPES OF WAGE & HOUR VIOLATIONS

• Off-the-clock work
  • Not *de minimis* time
  • Not preliminary & postliminary activities under Portal-to-Portal Act

• Exemption misclassification

• Other violations
TYPES OF WAGE & HOUR CLAIMS

• Individual demand or action
• Administrative & civil enforcement by govt. agency
• Collective action under FLSA and/or FFCRA (Emergency Paid Sick Leave Act claims only)
  • Claimants opt in
• Class action under state law
  • Plaintiff represents putative class
WAGE & HOUR EXPOSURES

FLSA & FFCRA (Emergency Paid Sick leave Act)
• Unpaid wages or sick leave for each claimant
• Liquidated damages for each claimant
• Attorney’s fees

State Law
RISK FACTORS WITH COVID 19 DECISIONS

- Haste
- Desperation
- Reduced staff
- Emotion
- Constant change
- Misinformation
- Renewed attention to old issues
DELAYED OR DENIED PAY FROM COVID 19 SHUTDOWNS

*Olsen v. Ratner Cos., LLC, d/b/a Hair Cuttery, D.N.J.* (April 7, 2020)

- On March 21, 2020, in response to COVID 19 Crisis, Ratner ceased operations at all of its retail salons across the country.
- The shutdown occurred in the middle of a pay period.
- Class and collective action filed under FLSA and New Jersey law for six days of delayed or denied pay
ACCOUNTING ERRORS FROM COVID 19 PAY CHANGES


- Allen promises its employees increased hourly rates for work performed during COVID 19 pandemic.
- Accounting errors led to omission of increased hourly rates in calculating overtime pay.
- Accounting errors led to omission of increased hourly rates in calculating sick pay.
- Class and collective action filed under FLSA and California Labor Code.
ACCOUNTING ERRORS FROM COVID 19 PAY CHANGES

Gateway Grill, Inc. v. Davenport, Pa. (June 21, 2020)

• Restaurant responded to COVID 19 by changing server wages from $2.83/hour plus tips to $7.25/hour plus a share of tips from takeout service.

• Accounting error led to some employees being denied pay change.

• Employees waged social media campaign disparaging restaurant sparking suit.
Mackie v. Coconut Joe’s IOP, LLC, D.S.C. (July 8, 2020)

- Plaintiff alleged he was fired when he left work to seek a medical diagnosis as to COVID 19 symptoms.
- Plaintiff filed individual action alleging retaliation in violation of FFCRA.
- Plaintiff also filed collective action under FLSA alleging an illegal tip pool in violation of the Act’s minimum wage mandate.
UNREIMBURSED JOB EXPENSES RELATED TO COVID 19


- Allen implemented a requirement that each employee wear a mask at work, but did not reimburse any employees for cost of mask.
- Class action alleges violation of California Labor Code § 2802(a), which requires indemnification of employees for expenditures incurred in discharge of duties.
Other Potential Job Related Expenses

• Equipment necessary to work from home.
• Services necessary to work from home.
Evans v. Thomas J. Dart, N.D.Ill. (April 21, 2020)

• Cook County Dept. of Corrections implemented off-the-clock COVID 19 procedures which included (a) sanitizing wardrobe & equipment after each shift, (b) sanitizing vehicles before and/or after each shift, and (c) showering and hygiene activity after each shift.

• Class and collective action filed under FLSA and Illinois law for minimum and overtime pay violations.
Off-The-Clock Work Related to COVID 19

Other Potential Off-the-Clock Issues

- Pre-shift COVID 19 temperature checks.
- Work from home related to maintenance of equipment and services.
IMPACT OF COVID 19 JOB CHANGES ON EXEMPTIONS

- Is outside sales employee exemption still available to an employee who now works primarily at home or the office?
- Is executive employee exemption still available to an employee who is no longer working at the same location as subordinate employees?
- Is an exemption still available to an employee whose job duties have changed?
IMPACT OF COVID 19 JOB CHANGES ON EXEMPTIONS

- Is an exemption still available to an employee whose salary has been reduced?
- Is an exemption still available to an employee whose salary has been subject to deductions for expenses?
- Is an exemption still available to an employee who is working a reduced schedule?
Risk Control - Furloughs and Layoffs

If a business must furlough or layoff employees because of economic reasons or state shelter in place orders, ensure proper and timely payment of wages, consistent with state law requirements.

- Exempt employees should be paid for the entire week if they worked any time during the week of the furlough or layoff.
  - Ensure prompt and accurate payment for accrued paid time off or final wages if required by contract or state law.

Generally, under the FLSA, an employee may not “volunteer” their services for a private, for-profit employer.
Risk Control – Pay for Hours Worked

Ensure that non-exempt employees are not working off the clock and are paid for all time worked.
- Communicate clearly regarding hours to be worked and provide a way for them to record their hours and meal/rest break periods.
- Ensure timekeeping system can handle teleworking and/or consider time tracking/recording software.
- Consider a written policy requiring contemporaneous recording of all time worked and prohibiting unauthorized overtime.
- Consider requiring employees to certify that their record of time worked is accurate.
- Prohibit hourly employees from working during any unpaid meal breaks; remind employees and supervisors that reviewing and responding to emails constitutes work.
- Encourage regularly scheduled hours and train managers to refrain from requesting work outside of regularly scheduled hours.
- Monitor for compliance and discipline for any violations.

7/22/2020
Risk Control - Exemptions

Review the type of work that all exempt employees are currently doing to determine whether they still qualify for the exemption

- exempt work must be “primary duty”
- Minimize the reallocation of nonexempt duties to exempt employees.

If salary reductions are contemplated, ensure that employees will still earning more than the minimum salary level to qualify as exempt under both federal and state law.
Exemptions (continued)

Employers should be mindful if attempting to reduce an exempt employee’s salary

- reduction in weekly hours may not permit the employer to reduce the employee’s salary

- An exempt employee may be furloughed for a full week
  - If an exempt employee is on an unpaid leave, do not permit them to work, even if from home, or they must be paid their full weekly salary.

- Employer may implement a prospective proportional salary reduction in advance and must provide the employee with notice of the change.
  - Review state and local laws and regulations for written notice requirements for salary reductions.
Risk Control - Expenses

Ensure additional telecommuting costs, such as computers, WiFi, equipment, and/or office supplies do not cause an employee to earn below minimum wage.

- Certain states, such as California, may require reimbursement of expenses even if they do not decrease the employee’s wages below minimum wage.

- Employers may not require employees to pay or reimburse the employer for such additional costs if telework is being provided to a qualified individual with a disability as a reasonable accommodation under the Americans with Disabilities Act.
Risk Control – Health Screenings, Protective Equipment and Waiting Time

Fact specific inquiry to determine whether time spent conducting temperature and health screenings, donning and doffing personal protective equipment (PPE), and cleaning PPE and other equipment, is compensable.

- Depends upon whether part of the employee’s principal activity

Waiting time is not compensable if it is determined to be pre- or post-liminary.

Employers should consult with an employment attorney to determine the best course of action and communicate with employees

- As these are novel issues without clear answers, companies may consider erring on the side of caution and paying employees for the time
Risk Control – FFCRA (Emergency Paid Sick Leave Act)

Train employees responsible for leave matters regarding the FFCRA
- Monitor developments closely

Train managers regarding the FFCRA and their obligation to avoid retaliation

Update leave policies
- Ensure leave policies are coordinated to meet federal, state and local laws and regulations.

Guard against retaliation
Coverage Considerations

Coverage availability of Sub-Limited Defense Coverage for Wage and Hour Claims
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