The Employment Law Counselor Episode 2

PLUS Staff: [00:00:00] Welcome to this PLUS Podcast. Before we get started, we'd like to remind everyone that the information and opinions expressed by our speakers today are their own and do not necessarily represent the views of their employers, or of PLUS. The contents of these materials may not be relied upon as legal advice.

Jeff Stewart: Hello everyone and welcome to the Employment Law Counselor Podcast. I'm your host, Jeff Stewart, and each episode a guest will join me as we delve into a different area of employment law. Today we'll be covering potential liability in the world of wages and wage payment. While our podcast is not legal advice, it is a practical discussion between two attorneys that deal with the maze and minefield of labor and employment laws on a daily basis.

If you like what you hear, please give us a five star review and subscribe so you never miss an episode. Today I am joined by one of my colleagues here at White and Williams, Ryan Warden, who's the head of our Wage and Hour division. How are you doing today, Ryan?

Ryan Warden: I'm doing great, Jeff. Thanks for having me on.

Jeff Stewart: Oh, glad to have you. I'm glad you could join us for what I hope [00:01:00] will be a very interesting discussion. Now, you and I know that wage and hour claims have exploded in the last five to ten years. What would you attribute that?

Ryan Warden: I would say that the largest contributor from my perspective, has been changes in state law.

I practice primarily in New Jersey, and in New Jersey for example, there has been significant changes in the standard applicable to independent contractor relationships. Significantly increased statute of limitations for wage statutes. Um, significantly expanded liquidated damages available. And attorney's fees of course are available under the wage statute.

So it used to be that an attorney bringing a claim for wages in New Jersey would be wise to bring it under the FLSA, which had a longer statute of limitations and previously more liquidated damages. But over the last several years, changes in state law have really increased the number of wage and hour class actions we've seen in in certain states.

Jeff Stewart: Absolutely. And I think [00:02:00] one of the things, and you mentioned it in there, is the ability of plaintiff's attorneys to collect their attorney's fees if they are successful, which I think has emboldened the plaintiff's bar to the point where these are claims that they want because not only are, if they go into court and are successful, do they get their attorney's fees, but that's a very big bargaining chip when discussing potential settlement.

Ryan Warden: That's absolutely right, Jeff. What we're seeing is plaintiff's attorneys will typically use the newly available liquidated damages, as well as under the wage payment statute, the ability to recover attorney's fees, and that drives the litigation infrequently is the plaintiff's trying to recover their own fees.

Jeff Stewart: Now we're talking attorney's fees here, and this is an area where a lot of my clients I know, and yours as well, have insurance, not for the claim itself, not for the underlying wage [00:03:00] payment claim, but will cover the defense costs of a wage claim.

Ryan Warden: That's right, Jeff. The way I see it, there's essentially three ways in which insurance coverage is implicated by wage and hour claims.

And the first is, as you mentioned, there are insurance companies that are covering the cost of defense of wage and hour matters up to a certain amount. The second manner in which it might be covered is under a D&O policy when claims are brought, not just against an employer or a company, but also against individuals who might be covered by the D&O policy.

And the final instance may be when wage and hour claims are asserted in addition to covered claims such as discrimination, retaliation, or harassment.

Jeff Stewart: Absolutely. So let's talk for a few minutes. What are the most common wage and hour violations or lawsuits that you see in your practice?

Ryan Warden: I would say there are, there are three areas that are the most common, [00:04:00] and those would be, minimum wage, a failure to pay overtime wages as required by law and alleged unlawful deductions from wages.

Jeff Stewart: Okay, let's talk about each of those. So let, let me start with minimum wage because you know, when I talk to people and I, I mention that there's minimum wage issues, most people think, how could there possibly be minimum wage issues? Minimum wage has not changed in 15 years now. At this point, every day is the longest we have ever gone since minimum wage was implemented without an increase in minimum wage.

So, how are people still having minimum wage violations? And I tell them, well, while the federal minimum wage hasn't increased, many states and municipalities have increased their minimum wages. You need to stay on top of it. But, when we say minimum wage violations, it's not just a failure to pay an hourly rate of, you know, seven and a quarter or an [00:05:00] hour if you're talking the federal minimum wage, but something else.

Ryan Warden: Yeah. So I, Jeff, I see two ways in which minimum wage claims still arise. The first, as you mentioned, is in the context of a higher minimum wage for a specific state or municipality. Well, you're absolutely right. FLSA minimum wage has been 7.25 for almost two decades. State laws are rampantly increasing their minimum wage.

For example, in New Jersey for this year, the minimum wage is $14 and 13 cents an hour. In New York City, the minimum wage is $14 and 20 cents an hour. So one way in which these minimum wage claims arise is employers not keeping on top of the minimum wages required by state and municipal law. And it's important to keep in mind, just like with most employment laws, the employer always has to comply with the most restrictive standard, whether that be federal, state, or local.

Jeff Stewart: And when you say most restrictive, uh, the other way to put that [00:06:00] is most generous to the employee.

Ryan Warden: Absolutely right. Absolutely right. And I'm sorry, there's one other. I said there were two ways in which minimum wage violations arise. One, as I mentioned, is failure to keep on top of the state and local increases, which by the way, are increasing all the time, and employers should be looking at even on six month to one year basis to ensure that they're not increasing beyond that which they are currently. The other way in which minimum wage claims arise is when there's what's called off the clock work, where employers think they're paying correctly minimum wage for the hours worked, but there are hours that have been worked but not recorded by the employee.

Therefore, even if minimum is paid for the hours that are recorded, the failure to record certain hours means that the total payment for the week is insufficient to compensate at minimum wage for each hour worked.

Jeff Stewart: And we've frankly have seen that a lot as technology has changed over the years. I mean, if I send an email or a text to [00:07:00] an employee and ask them questions and start to start a back and forth, you know, frankly, if that's more than a minute or so, that's compensable time.

I mean, there's a de minimus exception, but if I'm doing this on a regular basis, that's compensable time and it needs to be recorded and paid.

Ryan Warden: Absolutely. And Jeff, I would go a step further and say that even if it's a minute under certain state laws new, again, I'll use New Jersey as an example. It is unclear whether New Jersey will follow the de minimus exception.

So even if time is only, if work is only performed in increments of one minute, those could potentially add up to a larger amount, but also they'll be accompanied by liquidated damages and and attorney's fees. This problem that you've mentioned became much bigger during the pandemic with remote work on the rise and employers sort of having a difficulty ensuring that they're capturing every minute of work time.

But as a best practice, employers should definitely make sure that they're capturing and paying every minute of work time [00:08:00] for non-exempt employees.

Jeff Stewart: Absolutely. Now, one of the other areas that you said you've seen a, a lot of claims and litigation regarding is unpaid overtime. Where do you see that primarily?

Ryan Warden: So I see unpaid overtime. Let me just start out by saying that overtime claims are the biggest in the wage and hour realm. They're the most prominent and they arise, I would say, in three primary scenarios. The first is what we call exempt misclassification. So under federal law and under many state laws, certain employees are exempt from overtime, which normally requires that employees be paid a time and a half their regular hourly rate for hours worked in excess of 40 in a work. Exempt employees do not need to be paid overtime. Exemptions include executives, administrative exemption, professional exemption, and can include things like the Federal Motor Carrier Act exemption. So when employers [00:09:00] wrongly classify these individuals as exempt and fail to pay them overtime, overtime claims naturally arise.

Another manner in which, another scenario in which we see overtime claims relates to, as we mentioned before, off the clock work, if work is being performed off the clock, it can result in hours being worked over 40, which are unpaid. So off the clock work also leads to unpaid overtime.

And the third common scenario in which we see un unpaid overtime claims is a failure to properly calculate the regular hourly rate. As I said earlier, overtime needs to be paid to non-exempt employees at time and a half the regular hourly rate, which is calculated by taking the total comp that needs to be included divided by the number of hours worked, and then you pay the halftime on top of that, if an employer fails to incorporate certain elements of compensation, such as a non-discretionary bonus or a shift differential into that compensation, that can result in underpayment of overtime.

Jeff Stewart: And it can be as simple as making [00:10:00] somebody work through their lunch break and never changing the, you know, still taking a deduction for their lunch break and things like that, which happen. I have seen, and I know you have as well, lead to potential class actions where employees say, look, it's not just me that has been treated this way and paid improperly, but it's 50, 100, maybe 500 people, and that's where these wage and hour claims can really explode.

Ryan Warden: That's absolutely right. Jeff, I don't think I'm stepping outta school saying that the wage and hour class actions are the single greatest liability that employers face today.

Jeff Stewart: I don't think it's close.

Ryan Warden: I don't either.

Jeff Stewart: Yeah, and, and we have seen a tremendous increase in them in the last 10 years, I would say.

Ryan Warden: I would say so as well. The last five to 10 years, certain, what I've noticed in the last 10 years has been a significant increase in FLSA cases in New York and Florida, and then a significant [00:11:00] increase of state law class actions in states like New Jersey, California, and Massachusetts, where there's a perfect storm of disadvantageous statutes in the wage, from a wage perspective.

Jeff Stewart: Disadvantageous to the employer.

Ryan Warden: Yes, I should correct that. Whenever I say disadvantageous, I'm referring to the employer. So for example, New Jersey and Massachusetts and California all follow what's called the ABC test for determining employee status for purposes of wage laws, which essentially assumes employee status unless the employer can prove three things.

So things like that. Or for example, in New Jersey, in 2019, a Wage Theft Act was passed, which increased the statute of limitations to six years and provided for attorney's fees under the wage payment statute and provided for trouble damages for the first time. Changes in state law like this are incentivizing plaintiff's attorneys to really attack on a class basis, uh, alleged wage violations like the ones we're discussing.

Jeff Stewart: Now, one of the things you just mentioned was a [00:12:00] state wage payment act, and most states have wage payment acts, which essentially make it illegal for an employer not to pay an employee on a regular payday. It will set forth the method of payment, either cash or check or other, but many of those statutes have very heavy handed penalties that are associated with them.

Ryan Warden: That's absolutely right, and it kind of goes across the spectrum, the wage payment statutes. As you mentioned, they regulate the time and mode of payment, which can be imposition of a regular payday. Which frequently has to be a certain number of days past the end of the work week in which the wages were earned.

Wage payment statutes also frequently prohibit deductions from wages, and that's another one of the main claims that we see is state law wage deduction claims, which relate to, for example, if somebody, if an employee breaks something and there's [00:13:00] a deduction taken from their wages for the cost, if that's prohibited by a state wage statute, the employee may have a claim which may carry attorney's fees and treble damages.

So it's important to stay on top of the state wage payment statutes to ensure that any deductions that are being taken are acceptable in the jurisdiction in which they are being taken. In addition, you mentioned in addition to the time of payment, the wage payment statutes also regulate the mode of payment.

In New Jersey, for example, wages must be paid either in US money, or by check. And the check must be, arrangements must be made by the employers such that the check can be cashed for its full amount without any check, hidden check fees or anything like that.

Jeff Stewart: And Pennsylvania has a similar law, and I, I practice primarily in Pennsylvania, but it practice elsewhere as well.

With regard to debit cards, if you're going to use a debit card to pay an employee that they must be able to cash it out completely with no fees. They must be able to be able to check the balance of it with no [00:14:00] fees, and they must be able to do that on a regular basis. Uh, and there's certain other very specific rules if you want to pay by debit card, which some employers have taken to doing rather than issuing a check every week.

Ryan Warden: That's exactly right Jeff. I think it's just important for our audience to know that when they're, when they're paying employees, they need to ensure that the time and mode payment is consistent with that required by the state, and if any local requirements, the local law as well.

Jeff Stewart: And I always tell my clients, look, if there is one area that you don't wanna mess up, it's paying your people right, and in a reliable way. Because if you ever get in front of a jury and they're gonna say, well, wait a minute, this person wasn't sure when their payday was, that's not gonna play well.

Ryan Warden: I couldn't agree with you more.

Jeff Stewart: So one of the other things that is included many times in these wage payment laws, but sometimes in ancillary laws, are specific requirements as to what your wage statement, what your [00:15:00] paycheck stub has to have on it.

You know, for example, it has to include in many states the address of the employer, the a phone number for the employer. So if there's any issues with a, with a paycheck, employee knows who to contact, a statement of what the hourly rate is, how many hours, what their overtime rate was, how that was paid, and all of those things.

And if it's not there, many times there are penalties and in some cases $250 or $500 per pay period or per paycheck up to a maximum of $5,000, I believe New York is $5,000 per employee. Which, if you've got a hundred employees, that's half a million dollars right there. You know, if you, if you have an inaccurate pay stub for a period of time, and that's, like I said, those damages can add up very quickly.

Ryan Warden: Absolutely, Jeff. I'm in New York. You mentioned New York, and that's exactly the statute that I was thinking of along with California. They have very draconian penalties for [00:16:00] failure to comply with wage statement requirements, but I would actually take it a step further and say that even where it's not specifically required by the wage payment statute, it is in an employer's best interest and a best practice to include certain information on a wage statement such as.

The number of hours worked, the number of overtime, hours worked and information sufficient to determine whether overtime was calculated correctly. And the reason I say that is when an auditor comes in from a Department of Labor and is looking at your records, it feels a lot better and the employer's a lot better positioned to be presenting clear evidence of how much somebody was paid, which the auditor can easily reference and determine whether it's accurate and whether it's correct, rather than having them go through 15 different documents to try to determine that. Absolutely.

Jeff Stewart: So Ryan, one of the other things you mentioned a minute ago was deductions, uh, and improper deductions under state law, but the FLSA also has some [00:17:00] prohibitions on improper deductions. Correct?

Ryan Warden: That's absolutely right, Jeff. So when we're talking about deductions under state law, we're talking about after the gross pay is established or the net pay is established for a pay period, taking deductions from that amount. The problem under the, the issue under the FLSA is if you have an exempt employee, who is salaried, to reduce that amount for any reason other than those that are specified in the statute, and there's about, I think four of them, you run the risk of losing the exemption, not only for that employee, but for any employee who's similarly situated for the time period at issue. So it's extremely important that employers pay salaried exempt employees, their full salary, unless it falls within one of those specified exceptions.

Jeff Stewart: And that is an area of incredible potential liability for an employer because if someone loses the exemption, well, the employer doesn't have time records, most of the time, because they haven't kept track [00:18:00] of an exempt employee's time.

So if they are determined that they should not have been exempt, but instead should have been non-exempt and should have been entitled to overtime, what happens is the Department of Labor investigator, whoever is assigned to the matter, literally interviews the employee and says, how many hours do you think you've worked?

And the employer does not have the ability to really rebut that. So you are left, frankly, at the mercy of that employee.

Ryan Warden: That's absolutely right Jeff. And what we've seen is in instances where such records are not kept, is we're, we're left scrambling to identify security log details to determine when somebody came on the premises and when they left the premises.

The bottom line here is ensure that exempt employees are properly classified as exempt and properly record all the time of your non-exempt employees.

Jeff Stewart: Yes. And the, the other risk here is that [00:19:00] if you are making improper deductions from an exempt employee from their pay, you can lose the exemption, not just for that employee, but for others in the same or similar job classification and exemption within your organization.

So instead of just a a one employee problem, this could become a 20 employee problem.

Ryan Warden: Or it could be a 40 or more employee problem, which could implicate class action concerns. Absolutely. So Brian, uh, we've talked a lot about potential liability here. How do you advise your clients to mitigate some of these risks?

There's really two ways in which we assist our clients in mitigating the risk associated with wage claims. The first is to conduct voluntary internal wage audits where we examine the client's practices and procedures to ensure that they're complying with all applicable federal, state, and local laws to try to eliminate these [00:20:00] problems before they occur. The other way that we try to mitigate risk is the implementation of arbitration agreements with class action waivers. And the reason for that is if you have a potential class and the members are all subject to enforceable arbitration agreements with class action waivers, then the risk of a class action is greatly diminished.

Um, we've been successful and, and oftentimes what you'll find is when you have an arbitration agreement with a class action waiver, plaintiff's lawyers aren't even interested in pursuing the claim. So it can have a value beyond being able to thwart the class action insofar as it can dissuade a plaintiff's attorney for even pursuing the claim in the first place.

Jeff Stewart: Absolutely. I, I dealt with one not too long ago, in which with a proposed class action, the initial demand was well over a million dollars. Once we showed that there was a valid arbitration agreement in there, the damages were, you know, roughly $5,000. So, I [00:21:00] mean, it's a huge, huge difference for everyone involved in what you're dealing with.

Ryan Warden: Absolutely Jeff. I've had similar experiences myself, and in fact, we've had an experience relatively recently where we rolled out. An arbitration agreement with class action waivers to punitive class members while a class action was ongoing. And we were successful in obtaining a sufficient number of members to sign on to the arbitration program that it brought the number of punitive class numbers below that, which is required for numerosity.

So arbitration agreements are something that can be used, uh, very effectively by employers to navigate class action risk.

Jeff Stewart: Yeah, and let me take a minute to talk about the, the internal compliance audits that you mentioned briefly, because I've done a number of these for, for clients over the years, and a lot of times people don't know what that, in, what it involves. And what it really is, is going in, getting an understanding of one, what [00:22:00] is your timekeeping system? Are people literally writing their time in, time out and signing it each week? Do you have a time clock? Do you use something on your computer? How is that monitored? What are you doing there? And then how does that time get transferred to your payroll system?

So let's make sure that that's being done right. Let's look at actual paychecks, pay stubs, what information is there? Let's make sure everything that's required, not just for where your headquarters is, but where your employees are. Because if we are in 10 different states, we need to make sure that we are compliant with all of those state's rules.

And that's very important. And a lot of times that gets overlooked.

Ryan Warden: That's absolutely right, Jeff. And that's exactly what I would recommend myself is to get in there, review the relevant documentation, conduct interviews with, with those, with knowledge and stakeholders, and get to the bottom of the, the processes as quickly as [00:23:00] possible, and then work with the client to ensure that any warts are smoothed out.

Jeff Stewart: And the other piece of that that I always do is say, look, it's very clear that certain people are non-exempt, and it's very clear that certain people are exempt, but there's usually a gray area. Mm-hmm. And I say, give me the job descriptions of everyone in that gray area, and let's make sure we know whether they should be exempt or non-exempt.

Ryan Warden: You're absolutely right, Jeff. Things that come to mind is that gray area are assistant store managers. Things like that, like, so like your CEO of the company is typically gonna be exempt so long as the salary basis and salary level requirements are adhered to, your average, uh, manufacturing worker on a line is going to be non-exempt.

And you know, then the question is, what happens to everybody in between? And there's frequent litigation on positions similar to assistant store managers or other middle management as to whether they meet the requisite exemptions.

Jeff Stewart: Absolutely. So Ryan, every time I do an episode of the podcast, I like to [00:24:00] give our listeners one or two key takeaways.

What would you say would be your number one key takeaway in this area?

Ryan Warden: Be on top of the laws that apply to you and your employees and ensure that you're complying with them.

Jeff Stewart: That's a good one. And, and I would say that you need to know that the law is slanted in favor of employees. And you need to be on top of it.

This is not a 50 50 type of a thing. You don't want to be seen as not paying someone. Or people can't rely on their paycheck because not only is that a legal problem and you will have legal problems, it's not one that people ignore. If they don't get their paycheck or they their paycheck is wrong. I guarantee you, you will hear about it and you will have problems.

And if multiple employees are talking about it to the potential where you have a class action, you are talking hundreds of thousands, if not millions [00:25:00] of dollars of potential legal fees and damages, and it's not an area to mess around with.

Ryan Warden: I couldn't agree more, Jeff.

Jeff Stewart: Okay. So with that, Ryan, I want to thank you for joining me.

Um, I want to thank all of our listeners for joining us here on the Employment Law Counselor Podcast, where we try to make some sense of the world of labor and employment law. On behalf of myself and Ryan Warden, we thank you for listening. If you enjoyed this episode, please leave us a five star review, tell your friends and subscribe to the podcast.

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