Welcome and thank you for joining us for today's presentation. Our topic is **“Recent Wage-Hour Developments: COVID-19 & Beyond.”**

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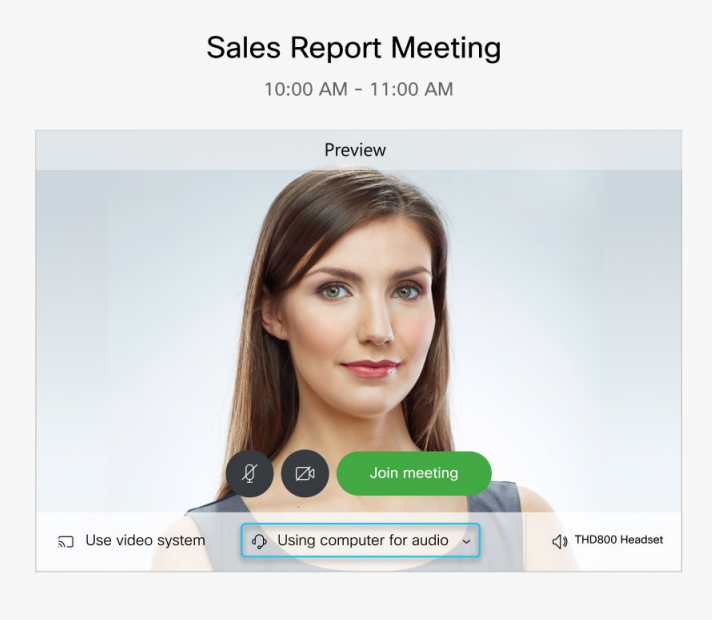

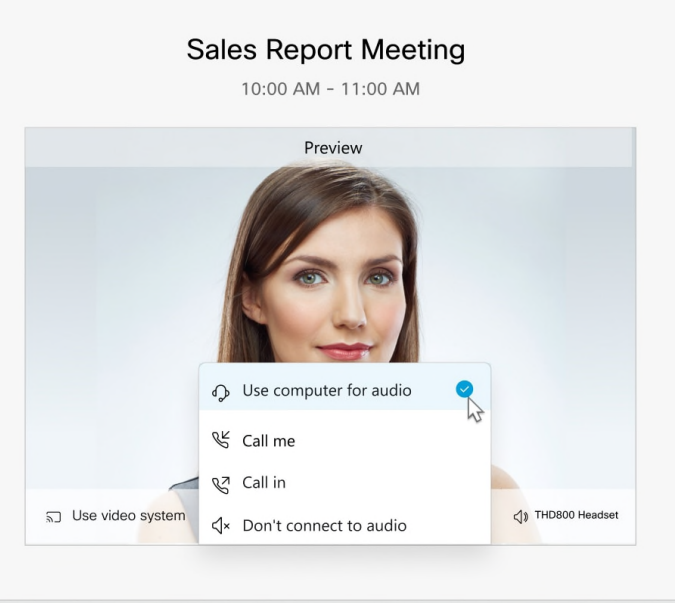

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Recent Wage-Hour Developments: COVID-19 & Beyond

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Paid Sick Leave Under The FFCRA

FFCRA: Paid Sick Leave

Unable to work or telework because employee:

1. Subject to a federal, state or local quarantine or isolation related to COVID-19
2. Advised by HCP to self-quarantine due to concerns related to COVID-19
3. Experiencing symptoms of COVID-19 and seeking medical diagnosis
4. Caring for an individual who is subject to (1) or (2) above
5. Caring for his/her child because school or place of care is closed or child care provider is unable to provide care due to COVID-19 precautions
6. Experiencing any other substantially similar condition specified by Secretary of Health and Human Services

FFCRA

- Which employers are required to provide paid sick and family leave?
  - Private employers with fewer than 500 employees (including not-for-profit employers) and governmental employers (regardless of the number of employees)
  - NOTE: This ***includes*** employers who are otherwise exempt from the FMLA that have fewer than 50 employees
- Are certain employees exempt?
  - The benefits do not apply to certain federal government employees. Employers also may exclude employees who are health care providers and emergency responders

Emergency FMLA Expansion Act

- Under the Emergency Family and Medical Leave Expansion Act (EFMLEA), part of the Families First Coronavirus Recovery Act (FFCRA) an individual may also take expanded FMLA for care of a child or whose school, place of care is closed due to the virus
- Or, if the child care provider (e.g. nanny) is unavailable for a COVID-19 reason
- NOTE: If business closed prior to April 1 effective date of law, this does not apply

Emergency FMLA Expansion Act (Cont'd)

The employer must only grant this leave if a "suitable person" is not available to care for the child.

Emergency FMLA Expansion Act (Cont'd)

- Must only be employed for ***30 days***, instead of the usual one year, to take leave under the EFMLEA
- Need not have worked 1,250 hours

Emergency FMLA Expansion Act (Cont'd)

- First two weeks of this leave is unpaid, but then, the next 10 weeks *is* paid, at 2/3 of the regular of their regular rate, multiplied by the number of hours the employee would have been scheduled to work that day, to a maximum of $200 per day
- A maximum of $10,000 for those 10 weeks
- Cannot use accrued PTO during those first two weeks but can use for the next 10 weeks, if they have

Emergency FMLA Expansion Act (Cont'd)

- Leave may be taken intermittently, but employer agreement is necessary
- Employers and employees urged to collaborate and cooperate on use of intermittent leave

Emergency FMLA Expansion Act (Cont'd)

- Small business exception: If business is less than 50 employees, this expanded leave provision is inapplicable ***if***:
  - Providing the leave would mean that expenses would exceed revenues and cause the small business not to be able to operate at a minimal capacity; or,
  - The employee is a key employee; or,
  - There are not sufficient employees to perform the work that the leave-requesting employee(s) would have performed

Force Majeure: Wage Hour Laws

- Doctrine applies when traumatic, unanticipated events (earthquake, hurricane) occur, which may excuse compliance with a particular contract
- BUT, does not excuse non-compliance with wage-hour laws
- These laws have not put in abeyance and continue to operate at full force, although perhaps “under the surface”

FLSA: COVID-19

- Non-exempt people are usually paid hourly, although there is no legal compulsion to pay non-exempt workers by “the hour”
- Only paid for hours worked (without regard to use of PTO time to supplement weekly income)
- Hours can be reduced without legal exposure or consequences

FLSA: COVID-19 (Cont'd)

- Under the FLSA exemption regulations, which many states have adopted in full, exempt employees must receive a **salary,** which is a pre-determined lump-sum of money, every week. That salary is, as of January 1, 2020, now $684 per week.

- If the minimum salary is not received, then the employee is, by definition, non-exempt

FLSA: COVID-19 (Cont'd)

- However, under the FLSA, an employer can prospectively reduce the pay of exempt employees, providing it is the result of an economic slowdown and not to evade the salary basis requirement under the FLSA.
- Beware – primary duty test still applies so if exempt workers are "expanding" their range of duties to perform non-exempt functions, they must still perform exempt work 51% of the time to remain exempt.
- **If any work done in week (e.g. one hour), employee gets full salary**.

NJ Wage Payment Act

- A lawsuit has already been filed, charging wholesale violations of the New Jersey Wage Payment Act

- This statute is interpreted very narrowly (e.g. harshly) by the NJDOL and the courts

NJ Wage Payment Act (Cont'd)

- A hair stylist has filed a class and collective action, alleging that the employer did not pay workers in violation of the Fair Labor Standards Act and the New Jersey Wage Payment Act, following the closure of its beauty shops due to the virus scare.
- The case is entitled *Olsen v. Ratner Cos. LC d/b/a Hair Cuttery* and was filed in federal court in the District of New Jersey.

NJ Wage Payment Act (Cont'd)

- The Complaint alleges that the Company, prior to the March 21 shutdown, told the employees that they would not receive their pay for work performed in the previous week. The Company maintained that it was waiting for federal funds and employees would be paid once the funding was received or after the Company went back into business. The Complaint then asserts that "subsequently, on April 7, 2020, plaintiff and employees similarly situated were not paid the wages they were due."

FFCRA Lawsuit

- A lawsuit was filed a few weeks ago in federal court alleging the improper denial of paid sick leave. *Spells v Physician and Tactical Healthcare Services*
    - First of many?
    - Why do it: Employee earned $15 per hour so total value of claim is $1,200
    - Retaliation angle is the key here
    - Liquidated damages sought and, naturally, attorneys fees
    - Lawyer's advice: settle quickly

Other Virus Lawsuits

Carmona v. Building Management Assocs., (S.D.N.Y. May 2020)

- Alleged failure to pay wages for meal breaks and work at home after COVID-19 arrives

Other Virus Lawsuits

Evans III, et. al. v. Dart, et. al., (N.D. Illinois, May 2020).

- Alleged failure to pay employees for COVID-19 related "sanitizing" activities at the beginning/end of their shifts

Telecommuting

- Many employers have employees working from home, i.e., telecommuting. For exempt workers, this is an “easier” situation, but when non-exempt employees work from home, there are several issues that arise and must be dealt with.
- Employers must accurately monitor and record the working hours of such employees, as these situations present the great potential for abuse, e.g. padding hours worked at home.
- Or putting in for eight hours, but only working three?
  - Documentation of work done for the day – productivity proof?

Telecommuting (Cont'd)

- Employers might want to have employees call in when they begin work, take lunch and end their shift or record their time electronically. They might want to have them record their time by hand and then submit that time on a daily basis.
- Whatever method is chosen, the employer must remind employees of the need to accurately record all working time and ensure that they record ***when they take lunch and breaks*** so the working hours are not needlessly inflated.

Telecommuting (Cont'd)

- It is also vital that supervisors not contact non-exempt employees after regular hours or encourage any work to be performed outside the normal shifts of the workers. That will be deemed compensable working time and if that extra work takes them above 40 hours in that week, it is then overtime.

Telecommuting: E-mail

- Even reading/responding to an email (or emails) will be working time, and, if more than a minute or two (e.g. *de minimis*), these minutes will add to the weekly total.

- *De minimis* is an overused defense that often does not work
  - Cases standing for the premise that even five minutes, per day, is not *de minimis*

Telecommuting: E-mail

- Wherever there is an element of employer compulsion, even if it is implicit, the resulting minutes spent in performing the function will be considered “working time.”

- Employees often feel pressure to respond to emails (or read an attachment) if their boss sends it to them, even if coupled with a caveat that “it can wait until tomorrow.”

Telecommuting: Overtime

- The suggestion is to pay an employee, the first time, for engaging in unauthorized overtime, so as to avoid a complaint to a Department of Labor, but at the same time warning that employee that this is not authorized and future instances of unauthorized overtime may lead to discipline for any violations.

- Shows reasonableness by doing this **and builds a defense**

Telecommuting: Business Expenses

- Employees who need supplies (e.g. extra phone line, copy paper, computer accoutrements) and the issue is whether they, or the employer, must pay for them
- Wage payment laws may deem these as employer expenses, *not* to be passed on to employees
- If deductions are made from a group of employees, then a class action may ensue!

Temperature Checks: Compensable?

- Only applies to non-exempt workers
- This issue will come to the forefront especially if employees have to spend several minutes waiting their turn for the check. The FLSA states that activities that are an “integral and indispensable part of the principal activities” of an employee are also compensable.
- If the employee cannot perform his “regular” job without first engaging in the preliminary activity, then the preliminary activity becomes integral and indispensable.

Temperature Checks: Compensable?

- An arguable case can be made that temperature screenings protect the workplace against an extreme danger, which could infect the entire workplace, so they *are* for the employer's benefit. In this light, such screenings may be analogized to mandating that employees wear protective gear, in order to protect them and other workers; such donning and doffing activities have been held compensable many times.

- The counter to that is that catching the virus has, ostensibly, nothing to do with the job being performed. It is not a risk that is confined to or inherent in any particular occupation (excepting health care) but rather is a risk applicable to anyone as people might catch the disease anywhere and from anyone, not just, or only, at work.

Temperature Checks: Compensable?

- This is an unsettled question and a court can reasonably come down on either side of the question
- Don’t be the test case, especially as this might well be a class action
- One option may be to pay a designated amount of time, e.g. 10-15 minutes, whether the line is short and the screening takes two minutes or the line is longer and it takes more time. That way, the employer gets out in front of this issue and provides itself with a defense based in reasonableness and good faith.
- *De minimis* – Who knows? Five minute case.
- Spend a nickel to save a dollar…

Vacation: PTO Policies

- Creatures of company policy – no NJ statute mandating vacation or PTO time

- Company can (and should) set conditions for usage of PTO time

Vacation: PTO Policies

- Employers may choose to allow employees to use vacation or PTO time to supplement their weekly pay if their hours have been reduced

- No obligation to do so, but query whether the better practice is to make employees “burn through” their vacation time in scenario of reduction of hours

Vacation: PTO Policies

- Review your policy to see if and how it addresses what happens to accrued but unused PTO time upon separation.
- If not addressed, you must address it (e.g. add a provision or a sentence) in whatever manner you wish (e.g., payout if separated due to virus issues, no payout at all under any circumstances, etc.)

The Issue of Waivers

- Will Congress pass laws limiting employer (big/small) liability in return to work scenario? Likely “no”
- Can employers use waivers or “assumption of risk” agreements with returning employees?
- Courts disfavor such waivers, given the unequal bargaining power between employers and employees
- Workers compensation laws provide remedies and bars to lawsuits (except for intentional acts or gross negligence)
- Trump rally of June 20, 2020 – waiver good? Time will tell …

The Issue of Waivers (Cont'd)

- Some businesses have relied upon waivers for many years, for customers: gyms, skydiving centers, horseback riding schools, etc.
- Could such commonly used waivers be extended to include COVID-19? It is too early to tell!
  - Depends on the steps employer has taken to make the workplace as safe as possible (e.g. cleaning, disinfecting, social distance, etc.)

Prevalence of Lawsuits

- As of June 2020, 2,645 virus-related lawsuits have been filed. Most relate to denials of insurance claims, prisoner and detainee petitions and civil rights cases, including challenges to stay-at-home orders.
- 49 relate to conditions of employment, including exposure to the virus or a lack of PPE
- ***77 relate to unlawful termination***

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New Jersey's Equal Pay Act

Overview

- Expanded the New Jersey Law Against Discrimination (NJLAD) to include the Diane B. Allen Equal Pay Act
- Took effect on July 1, 2018

Overview (Cont'd)

- The law applies to all New Jersey public and private employers.
- Though pay discrimination has been illegal under New Jersey's prior Equal Pay Act, the NJLAD, Title VII, and the federal Equal Pay Act for some time, this new law is much broader and puts a greater burden of proof on the employer to explain and defend differences in wages.
- New Jersey now has what many are calling the most stringent pay equity law in the United States.

Presumption of Illegality

- The equal pay legislation inverts the traditional burden of proof provided by most state and federal laws by creating a presumption of illegal discrimination wherever any employee is paid less in wages/benefits than a similarly situated employee of another protected class.

Who the Equal Pay Act Protects

The law applies not only to gender pay disparity, but also to pay disparity based on any protected class under the NJLAD, which includes:

- Race
- Creed
- Color
- National origin
- Ancestry
- Age
- Marital status
- Civil union status
- Domestic partnership status
- Affectional or sexual orientation
- Genetic information
- Pregnancy or breastfeeding
- Sex
- Gender identity or expression
- Disability
- Service in the Armed Forces
- Nationality
- Refusal to submit to genetic test

Impact on the Burden of Proof

- Before the law:
  - An employee could seek to prove the traditional elements of a disparate treatment claim or they could seek to prove a pay differential between their salary and a similarly-situated employee.
  - An employer had to prove that the pay differential was because of a non-discriminatory reason or a seniority system, merit system, or a factor other than sex.

Analysis of a Claim Under the New Equal Pay Act

- Under the Diane B. Allen Equal Pay Act, the analysis of a claim is similar to the federal Equal Pay Act, **but with an additional burden on the employer**.
- Step 1: Employee must prove he or she does substantially similar work to another employee who is paid more.
  - Whether work is substantially similar is based on a variety of factors, including "skill, effort, and responsibility."
- Step 2: Employer must prove that pay differential results from:
  - 1. A seniority system;
  - 2. A merit system; OR
  - 3. One or more bona fide, legitimate factors – including, but not limited to, training, education, experience, or quality or quantity of production.

Analysis of a Claim Under the New Equal Pay Act (Cont'd)

- Step 3: If the employer attempts to prove that the pay differential is due to one of more of the bona fide legitimate factors, it must also prove ***each*** of the following:
  - A. The factor(s) is not characteristic of protected class members and does not perpetuate a differential that is based upon characteristics of protected class members:
  - B. The factor(s) is applied reasonably;
  - C. The factor(s) accounts for the entire differential; AND
  - D. The factor(s) is job-related to the position in question, based upon legitimate business necessity, and there are no alternative business practices that would serve the same business purpose without producing the differential.

Heavy Burden for Employers

- Employers attempting to defend a claim will be obligated to compare compensation across ***all*** operations or facilities, and not only the complainant-employee's work location.
- Employers will be required to engage in this particularly arduous exercise to justify each purported discriminatory pay decision.
- **NOTE: It will be unlawful to reduce employee wages in order to comply with the law.**

Six-Year Statue of Limitations

- The Act extends the NJLAD's statute of limitations period for compensation-related claims from two years to six years.
- The Act further provides that the limitations period restarts upon the issuance of each discriminatory paycheck.
- In addition, employers cannot attempt to shorten or waive a limitations period of "any of the protections" provided under the NJLAD by written contract with the employee.
- **IMPORTANT**: The law is *not* retroactive. *Perrotto v. Morgan Advanced Materials*, PLC (D.N.J. 2019)

Definition of Retaliation Expanded

- The Act also expands the definition of retaliation under the NJLAD to prohibit employers from taking adverse action against an employee who requests from, discusses with, or discloses to (i) any other employee or former employee, (ii) the employee's lawyer, or (iii) any government agency.
- The prior protections of the NJLAD prohibited retaliation only where the purpose of such request was to assist in investigating or taking legal action regarding potential discriminatory treatment concerning compensation and did not have specifically protected disclosures.

Damages Enhanced

- If a jury determines that an employer has violated the Equal Pay Act, the judge is required to award three times any monetary damages (also know as treble damages) to the employee for the pay differential.
- Where an employee brings a charge before the New Jersey Division of Civil Rights, the director is permitted to award treble damages.

Other Important Things to Know

- Upon discovery of a pay differential, an employer cannot reduce compensation in order to comply with the statute – it may only raise the lower salary to match the higher salary.
- Employers must compare salaries of similarly situated workers across all of their operations and facilities.
  - This standard is undefined, and many believe it could be problematic.

Tips for Employers

- Examine pay structures and ensure that compensation differentials can be justified with strong and objective legitimate, non-discriminatory reasons.
  - Even among employees at different physical locations
  - If you have pay differentials, consider an equity pay analysis of that location
- Keep these considerations in mind at the time that bonuses, merit increases and other benefit changes are issued.

Tips for Employers (Cont'd)

- Revise handbooks, policies and training to prohibit pay discrimination for substantially similar work.
- Add information about these requirements to manager training programs.
- Ensure that compensation is tied to legislatively prescribed "bona fide" factors, such as training, education or experience or the quantity or quality of production;

Tips for Employers (Cont'd)

- Audit employee job titles and job descriptions in concert with the applicable compensation arrangements.
- Document and review pay differentials across "substantially similar" jobs and evaluate whether such differences are justified under the bona fide factors; and
- Train human resources personnel involved in compensation and benefits matters on this new legislation.

NYS EPA

- Enhanced and toughened law signed on July 10, 2019, effective October 2019
- Dramatically expands protected groups, not just women, similar to NJ: race, ethnicity, sexual orientation, etc.
- Eliminates “equal pay for equal work” standard. Now a worker need (only) prove the jobs are “substantially similar,” a lesser standard of proof
- Civil money penalty of $500 per offense

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot!

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot!

Effective August 2019, the New Jersey State Wage Theft Act (WTA) geometrically adds to the existing penalty structure for employers by adding a liquidated damages provision and gives extra protections for employee retaliation claims.

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot! (Cont'd)

There is now a rebuttable presumption against employers who do not maintain records mandated by law or who take disciplinary actions (e.g. firing) against workers who voice internal or external complaints.

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot! (Cont'd)

- The law also increases the ceiling on wage claims that can be filed with the NJDOL Wage Collection Section (Section). The ceiling was $30,000 – now it is **$50,000**.
- The Section can now also take jurisdiction over retaliation claims.

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot! (Cont'd)

- Importantly, the law also now, for the first time ever, imposes liquidated damages on employers who do not properly pay wages.
- These penalties, amazingly, can be **200%** of the wages owed.
- Just as amazingly, the statute of limitations has been extended from the current two years to six years (equal to that of New York)

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot! (Cont'd)

- The rebuttable presumption of retaliation kicks in should an employer fire/discipline a worker within 90 days of his engaging in any conduct or actions protected under the new law.
- The employer is held to the stringent "clear and convincing evidence" standard to prove that the action was for a legitimate, business-based reason.

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot! (Cont'd)

- The penalties have also been stepped up:
  - $1,000 for a first violation (or imprisonment of 10-90 days)
  - $1,000-$2,000 for a second or subsequent violation (or imprisonment of 10-100 days)
  - *These penalties can be assessed, in theory, for every employee and for every week*
- And sometimes, the agency does just that!

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot! (Cont'd)

- Significantly, a first-time offender can escape liquidated damages if that business can show that the violation was "an inadvertent error made in good faith and that the employer had reasonable grounds for believing that the act or omission was not a violation."
- In order to (maybe) get that safe harbor, the Company must admit it violated the law and pay the entire amount of wages claimed as owed in 30 days.

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot! (Cont'd)

Each employee must be given a WTA notice, whether incumbent or new hire. Interestingly, the notice must advise how a claim for wages can be filed.

New Jersey Wage Theft Act Beefs Up Penalties on Employers – A Lot! (Cont'd)

- This law is a quantum leap in terms of enforcement efforts. It also places (as did the NJ Equal Pay Act before it) a heavy burden on employers to prove they were right, e.g. motivated by legitimate business reasons.
- The threat of liquidated damages and the vast increase in penalty assessments puts pressure on employers to settle cases/audits quickly, even if they believe they did nothing wrong.

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Update on New York State Wage Theft Prevention Act

Changes to the Existing Law

- **Enhanced rules against retaliation**

- The WTPA extends the protections under Labor Law Section 215 and gives the DOL the power to enforce this law

Changes to the Existing Law (Cont'd)

- It was always illegal to discharge, penalize and/or discriminate against an employee who makes a complaint. **Threats are now included as a form of retaliation.**
- In the past, we could only cite employers for retaliation. **Now, it is illegal for any person to retaliate.**
- In the past, penalties for breaking this rule meant we could fine an employer up to $10,000. **Now, DOL can order the employer or the person who acted against the employee to pay liquidated damages. The payment can be up to $20,000.**

Changes to the Existing Law (Cont'd)

- DOL may order the employer to reinstate the worker's job.
- Or the employer may have to pay the person for lost salary or pay a lump sum in lieu of reinstatement.
- Retaliation carries criminal penalties for employee complaints about any section of the labor law.

Changes to the Existing Law (Cont'd)

- The protection applies to any worker who alleges that the employer has done something that the employee thinks breaks a labor law or an Order issued by the Commissioner.
- This applies even if the employee is mistaken about the law, if they acted in good faith. It applies even if the employee does not cite a specific part of the labor law.
- **This law protects employees even if the employer incorrectly believes they made a complaint.**

Written Notice Updates

- The law already required employers to give notice to employees of their wage rates at the time of hire. **Now, the WTPA requires employers to give a written notice to each new hire.** The notice must include:
- Rate or rates of pay, including overtime r:ate of pay (if it applies)
  - How the employee is paid – by the hour, shift, day, week, commission, etc.
  - Regular payday
  - Official name of the employer and any other names used for business (DBA)
  - Address and phone allowances taken as part of the minimum wage (tip, meal and lodging deductions)
  - Number of the employer's main office or principal location

Written Notice Updates (Cont'd)

- In the past, the notices were in English**. Now, the notice must appear both in English and in the employee's primary language (if DOL offers a translation).**

- Employers must have each employee sign and date the completed notice. Employers must provide a copy to each employee.

Damages and Other Penalties

The WTPA provides for higher penalties when an employer fails to pay the wages required by law:

- Under prior law, liquidated damages only covered up to 25% of the unpaid wages. **Now, the law provides for liquidated damages on up to 100% of the unpaid wages. Once DOL issues an Order to Comply, it includes 100% liquidated damages, as well as other civil penalties and interest.**
- If the violation is for other than wages, benefits or wage supplements, DOL may assess civil penalties for each violation. This means up to $1,000 for a first violation, $2,000 for a second, and $3,000 for third and subsequent violations.

Damages and Other Penalties (Cont'd)

- If the Labor Commissioner has issued an Order to Comply against an employer who does not pay the money owed, then 10 days after the appeal period ends, DOL can require them to post a bond and/or **provide a list of their assets.** If employers fail to do so, the Commissioner may bring a court case against them. **For failure to provide the list of assets, DOL may impose a penalty of up to $10,000.**
- **The WTPA permits DOL to add 15% in damages to a judgment if the employer fails to pay in full within 90 days of the final Order to Comply.**

The New Jersey DOL is very tough on supposed misclassification of independent contractors.

Independent Contractor Issues

New Jersey and other states are becoming increasingly aggressive on the issue of independent contractor status, i.e. the issue of misclassification.

A number of laws have been recently passed to tighten up the law and to enhance penalties for misclassification.

Independent Contractor Issues (Cont'd)

- Stop Work Orders: Allows DOL to order cessation of all work, penalize up to $5,000 per day in penalties for violation of any wage, benefit or tax law (e.g. independent contractor and UI contributions).
- Fines for misclassification can now range up to $1,000 per misclassified employees and employer may be ordered to pay 5% of the misclassified person's gross wages (in addition to other penalties and fees).
- DOL can now acquire confidential tax information, audit files and other investigative reports to investigate possible misclassification—Big time hammer for NJDOL!

Independent Contractor Poster

- New Jersey now compels employers to post a notice that explains elements of independent contractor law and, essentially, invites workers to file suits and complaints alleging that they are not independent contractors.
- The poster explains that it is a violation of the law for an employer to misclassify its workers. It also explains the A-B-C test, the tri-partite standards in New Jersey, the very difficult tests to meet, for someone to be deemed an independent contractor.

Independent Contractor Poster

- The poster enumerates the various benefits and protections that the state wage, benefit (e.g. paid sick leave, paid Family Leave) and tax laws provide to statutory employees.
- There must also be a delineation of the remedies that misclassified workers may be allowed to recover under state law.
- Last, but by no means least, the poster must give the contact information for how an allegedly aggrieved worker may file a complaint with the NJDOL.

New Jersey DOL Very Tough on Supposed Misclassification of Independent Contractors

- The problem is that, in reality, people who are classified as independent contractors truly want to be and in fact consider themselves as such. The state is taking, as this court reporter decision (and a host of others) demonstrates, a draconian position, painting with the broadest brush possible on who is and who is not an independent contractor.

USDOL/NJDOL Interagency Cooperation

- The U.S. Department of Labor and the NJ Department of Labor have signed a cooperation agreement to target the misclassification of individuals as independent contractors in New Jersey.
- Commissioner Robert Asaro-Angelo stressed that his agency's strong goal is to ensure that workers are shielded from "unscrupulous business practices." He stated that "this partnership with U.S. DOL will help ensure that our business partners and the state's workers all get the protections they deserve." The sectors most amenable to misclassification problems are the construction, transportation and information technology.
- The so-called gig economy is also a focus of these issues.

Federal Update: Liquidated Damages

- The USDOL has now issued a Field Assistance Bulletin (FAB) on June 24, 2020, in which it stated that it “will no longer pursue pre-litigation liquidated damages as its default policy from employers in addition to any back wages found due in its administratively resolved investigations.”
- This is a great thing for employers and I believe it is not only right, but it is the fair thing to do.

Federal Update: Liquidated Damages (Cont'd)

- The agency did this as a hammer to "convince" employers to settle quickly for the "original" amount or face the looming specter of double damages.
- Many employers would accept this situation, rather than risk litigating the case because that, just on fees alone, would be a protracted and daunting proposition.

Federal Update: Liquidated Damages (Cont'd)

- So, going forward, the agency will not assess liquidated damages unless there is a showing of bad faith or willfulness. Equally important, if the employer is a first-time offender **or if the matter involves interpretation of white collar exemption issues and doctrine**, no liquidated damages will be assessed.
- Last, but not by any means least, the agency (e.g. field office) will need to receive the approval from of the Wage & Hour Division Administrator and the Solicitor of Labor.

Federal Update: Use of Opinion Letters

- The USDOL has been issuing a slew of Opinion Letters of late, under the stewardship of Cheryl M. Stanton, Administrator of the Wage and Hour Division. These letters guide employers vis-à-vis their obligations to be compliant with the FLSA.
- This practice had been terminated under the Obama Administration and its return is welcome.

Federal Update: Use of Opinion Letters (Cont'd)

- I have always believed that Opinion Letters serve an important purpose for employers. They are roadmaps and guidelines for businesses who then can fashion their compensation practices within the four corners of the letter and thereby gain a "safe harbor" if the employer is ever sued on the issues contained within the letter.
- They are important not only for the business that obtained the letter, but for other businesses as well who are dealing with similar scenarios.

Joint Employer Doctrine: Update

- On January 12, 2020, the Department of Labor announced a final rule to update its regulations on interpreting “joint employer status” under the Fair Labor Standards Act (FLSA).

Joint Employer Update

- **The DOL set forth some guiding principles concerning Joint Employer status:**
- It specifies that when an employee performs work for the employer that simultaneously benefits another person, that person will be considered a joint employer when that person is acting directly or indirectly in the interest of the employer in relation to the employee;
- provides a four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee;
- clarifies that an employee's "economic dependence" on a potential joint employer does not determine whether it is a joint employer under the FLSA;
- specifies that an employer's franchisor, brand and supply, or similar business model and certain contractual agreements or business practices do not make joint employer status under the FLSA more or less likely; and
- provides several examples applying the Department's guidance for determining FLSA joint employer status in a variety of different factual situations.

Joint Employer Update (Cont'd)

- The four-factor balancing test to determine when a person is acting directly or indirectly in the interest of an employer in relation to the employee, includes the following factors from **Bonnette v. California Health & Welfare Agency** :
  - Whether a business can hire or fire employees
  - Whether it controls their schedules or conditions of employment to a substantial degree
  - Whether it determines workers' pay rates and the methods by which they are paid
  - If it maintains workers' employment records

- No single factor is dispositive in determining joint employer status, and the appropriate weight to give each factor will vary depending on the circumstances.

Fox COVID-19 Resources

Fox Rothschild Coronavirus Resource Page:
https://www.foxrothschild.com/coronavirus-resources/

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