Pre-Conference Special Briefings

DON’T BE LATE

WAGE AND HOUR UPDATE

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Don’t Be Late – Wage and Hour Update

Presenters
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Agenda

- US DOL/WHD Developments
  - Administrator Cheryl Stanton confirmed
  - Proposed rulemakings (NPRM) on regular rate and joint employer

- State and Local Wage and Hour Trends and Developments
Regular Rate NPRM

- Update Regulations to Clarify Developments with Benefit Payments
  - Parts 548 and 778 of title 29 of the Code of Federal Regulations
- Published in *Federal Register* March 29, 2019
  - 84 Fed. Reg. 11888
- 60-Day Comment Period
  - Expires May 28, 2019

Regular Rate NPRM

- 3 Clauses of Section 7(e)(2) of FLSA That Exclude a Type of Compensation From the Regular Rate:
  - “Occasional periods when no work is performed” clause;
  - “Reimbursable expenses” clause; and
  - “Other similar payments” clause.
Regular Rate NPRM

Categories of Compensation or Benefit Practices:

- Compensation Excluded by Clauses of Section 7(e)(2)
  - Pay to forgo holiday or leave
  - Compensation for bona fide meal periods
  - Reimbursable expenses incurred on behalf of employer’s interests

Regular Rate NPRM

Categories of Compensation or Benefit Practices (cont.):

- Other Similar Payments Clause Could Exclude:
  - Specialist treatment provided onsite
  - Fitness classes, gym memberships, gym access
  - Wellness programs
  - Employee discounts
  - Tuition and continuing education benefits
Regular Rate NPRM

Categories of Compensation or Benefit Practices (cont.):

- Compensation Excluded by Other Similar Payments Clause of Section 7(e)(2)
  - Call back and other similar payments that are not prearranged
- Show-up or reporting pay excluded by occasional periods when no work performed clause
- Scheduling laws of states and localities

- Discretionary Bonus
  - Neither name nor reason determines if bonus is discretionary
- Excludable Benefits
  - Examples of types of modern benefit plans
- Exclusion of Certain Overtime Premiums
- Basic Rate Calculations in Section 7(g)(3)
  - Part 548 lists requirements for using basic rate to compute overtime pay
Joint Employer NPRM

- Revisions to Clarify How to Determine Joint Employer Status
  - Part 791 of title 29 of the Code of Federal Regulations
- Published in *Federal Register* April 9, 2019
  - 84 Fed. Reg. 14043
- 60-Day Comment Period
  - Expires June 10, 2019

Joint Employer NPRM

- Proposes a 4-factor Balancing Test as Standard
  - Replaces test of whether 2 or more employers are “not completely disassociated” in employing an employee
- Proposed Test Would Assess Whether Another Employer:
  - Hires or fires an employee
  - Supervises and controls work schedule or conditions
  - Determines employee’s wage rate and method of payment
  - Maintains employment records
Joint Employer NPRM (cont.)

- Proposed Test Based on Ninth Circuit Decision
  - Other appellate circuits use similar multi-factor tests that focus on economic realities
- Explains Additional Factors May Be Considered If They Indicate:
  - Potential joint employer exercises significant control over terms and conditions of work, or
  - Potential joint employer acts directly or indirectly in the interest of the employer

Joint Employer NPRM (cont.)

- Economic Dependence on Potential Joint Employers Does Not Determine Joint Employer Status
  - Examples provided where economic dependence does not establish joint employer liability
- Other Factors Not Relevant to Determining Joint Employer Liability
  - Employer’s ability, power, or reserved right to act
Joint Employer NPRM

- Clarifies That Indirect Action Can Establish Joint Employer Status
- Business Model, Certain Business Practices, or Certain Business Agreements
  - Do not render joint employer status more or less likely
- Joint Employer Status Narrowed – But Remains Fact-Specific

Wage & Hour Laws – State/Local Trends
Why So Much State and Local Activity?

- The FLSA expressly provides that states and localities can establish:
  - A higher minimum wage
  - Shorter periods before overtime is required
- Approximately 29 states have established higher minimum wages
- Ballot initiatives on the rise

Here They Are...
Regulating *How* Employees Are Paid

- Beyond *how much* employees are paid, states and localities regulate how they are paid
- For example:
  - Frequency of payment
  - Form of payment
  - Payment on termination
  - Paystubs/wage statements

States/Territories With Meal Period Laws According to U.S. DOL
States With Rest Period Laws

- California
- Colorado
- Illinois
- Kentucky
- Minnesota
- Nevada
- Oregon
- Vermont
- Washington
State/Local Paid Sick Leave Laws

- Clearly on the rise
- At least 9 states, 30 cities have paid sick leave laws/regulations
- Different places, different requirements
  - Accrual
  - Carryover
  - Limitations on use
  - Eligibility

Preemption of Local Wage/Hour Laws

- 24 states prohibit local governments from passing various forms of wage requirements
- Attempt to avoid a patchwork of local laws
Growing Trend of “Don’t Ask” Laws

- 11 states
- 10 local governments
- Prohibit inquiries about compensation history

Extra-Territorial Effect of State Wage Laws?

- Nonresident employees working in state for resident employer?
- Resident employees working out-of-state for resident employers?
- Resident employees working in state for non-resident employer?
What’s Next at DOL?

- Opinion letters expand to 35
  - 4.29.19 Opinion Letter “Gig” economy
- P.A.I.D program continues
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