Employment Law Advisor

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New Treble Damages Requirement Makes Compliance with Wage/Hour Laws Even More Critical

Law Now Requires Triple Damages for Wage Violations

Effective July 15, 2008, all violations of Massachusetts wage and hour laws will be subject to mandatory treble (triple) damages, even when employers have acted in good faith and took reasonable steps to comply with wage payment laws. This new law contrasts with federal law under the Fair Labor Standards Act ("FLSA"), which provides employers with a defense for good faith violations.

This new law is likely to cause more litigation as it provides employees an incentive to file claims for a variety of types of wage payment claims. Pay practices subject to claims include overtime pay, minimum wage, vacation pay, pay to independent contractors, prompt payment of wages for current and terminated employees, Sunday/holiday pay under Massachusetts "Blue Laws," and tip pooling. Because of this heightened risk, this edition of the Employment Law Advisor reviews several of these pay practices and provides practical advice on how to avoid wage hour problems.

- ✔ Are you aware of recent legislation that requires triple damages for pay practice violations, even if made in good faith?
- ✔ Are you interested in learning about common pay practice pitfalls?

Read on to learn about how to avoid pay practice violations...

Salary Payment Does Not Guarantee Exempt Status

Under the FLSA and Massachusetts law all employees must be paid overtime (time and a half) for any hours worked over forty in one week, unless the employee is exempt from this requirement. Generally, in order to be exempt an employee: (1) must be paid on a "salary" basis of at least $455 per week; and (2) must be classified as an executive, administrative, professional, computer or outside sales employee on the basis of the specific job duties he or she performs (commonly referred to as the "white collar exemptions"). Payment of a salary alone does not provide an exemption from overtime as the employee's job responsibilities must also fall within one of the exempt categories. Relying solely upon whether an employee is paid a salary in categorizing them as exempt or non-exempt will almost certainly result in misclassifications and exposure to claims for unpaid overtime. As such, employers should review employee classifications and determine whether they fit within the exemptions listed above.

Loss of "Exempt" Status Through Improper Salary Deductions

Determining whether an employee meets the criteria for exemption based on job duties can be difficult, as it involves a fact-specific inquiry

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concerning the employee's day-to-day activities. However, the first test – whether the employee is paid on a salary basis – is sometimes overlooked by employers, and failure to meet this test will also result in loss of exempt status. Payment of wages on a "salary" basis means that an employee regularly receives a predetermined amount of compensation each pay period regardless of variations in the quantity or quality of an employee's work. If an employer fails to pay "salaried" employees properly, exempt status will be lost and the employer may be obligated to pay overtime for the entire class of employees involved (note, however, that an employee who qualifies for the "computer employee exemption" may be paid on an hourly basis of not less than $27.63 an hour).

This means, for example, that an employer may not make deductions from an employee's predetermined salary because of the operating requirements of the business, such as lack of work. Similarly, employers may not make deductions from pay of exempt employees for partial day absences. There are some exceptions to the general rule that employees must be paid their full salary for any week in which they perform work, which include:

- offsetting amounts employees receive as jury or witness fees, or for military pay;
- absences for one or more full days due to personal reasons (other than sickness or disability) or in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness;
- penalties imposed in good faith for infractions of safety rules of major significance;
- unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions;
- the initial or terminal week of employment; or
- weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act.

Employers may reduce the risk caused by improper salary deductions by (1) establishing a clearly communicated policy prohibiting improper deductions and including a complaint mechanism, (2) reimbursing employees for any improper deductions, and (3) making a good faith commitment to comply in the future.

Payment of Wages Upon Termination

The Massachusetts Payment of Wages Act provides that any employee discharged from employment must be paid his or her wages in full (including any accrued but unused vacation pay) on the date of discharge. Many employers are unaware of this provision or choose to ignore it, as it may be difficult to generate an accurate final paycheck on the employee's last day of employment. Regardless, employers should make every effort to comply, and should not delay payment of a final paycheck for administrative reasons or until deductions for amounts possibly owed by the employee have been determined. Even when payments are delayed by only a few days, there is a technical violation of the Wage Act which may result in treble damages, an award of attorneys' fees, and personal liability of corporate officers. If preparing a final paycheck on the date of a termination is not practical or has been overlooked, one solution is to continue with the termination and advise the employee that the termination will be effective on a future date (when a paycheck can be available) but the employee will not need to (or be allowed to) report to work during the intervening period.

An employee who leaves employment voluntarily, however, is not owed his or her final paycheck until the next regular pay period. This paycheck must also include pay for any accrued but unused vacation.

Non-Payment or Deferral of Wages May Violate the Wage Act

Postponing employee compensation may be a tempting practice, especially in a cash-strapped start-up, but doing so violates the Wage Act, which provides that all employees must be paid at least the minimum wage on a regular basis. Even if a portion of an employee's compensation is deferred (over and above the minimum wage), this can create an unexpected problem if the employee quits or is terminated, at which time the employee must be paid the entire balance of monies owed.

Pay Period Misconceptions

Massachusetts law governs how frequently employees must be paid, yet many employers find that they have inadvertently violated these rules. Under Massachusetts law all employees must be paid at least weekly or biweekly (every two weeks) and within six days of the end of the pay period during which wages were earned. Employers who instead pay their employees only semi-monthly (twice a month) violate these rules in two ways: by paying less frequently than biweekly, and by failing to pay

within six days of the end of the pay period. While exempt employees may be paid semi-monthly, or elect to be paid monthly, there is no exception to the biweekly payment rule for non-exempt employees.

Meal Breaks

The common practice of working through lunch could be a violation of Massachusetts law, which provides that any employee who works more than six hours a day must be allowed at least thirty minutes unpaid time for a meal. Employers also must be careful to pay employees if they work during a meal break. According to the Massachusetts Attorney General, if an employee is restricted in movement during the break or if the employee must perform a job function during the break, compensation must be paid. While an employee can waive such a break, any waiver must be voluntary.

Misclassification of Workers As Independent Contractors

Amendments made to the Massachusetts Independent Contractor Law ("MICL") in 2004 made it difficult to classify a worker as an independent contractor without exposure to liability. Misclassification of employees as independent contractors can result in liability and penalties for failure to pay overtime and other pay practices (as well as for FICA and FUTA contributions, unemployment insurance payments, and workers compensation insurance premiums). Generally, under Massachusetts law (which is significantly more stringent than federal law), in order to classify a worker properly as an independent contractor for pay practice purposes, an employer must meet a three-pronged test. The employer must establish:

1. The worker is free from control and direction in connection with the performance of the service, both under contract and in fact;
2. The worker provides a service that is performed outside the usual course of the business of the employer; and
3. The worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.

The "prong two" language requiring that the service involved be "outside the usual course of business of the employer" significantly reduces the ability of employers to classify workers as independent contractors. An example is the use of 1099 contractors to assist in technology development, such as software. A violation would generally occur when a software firm brings in independent contractors to complete a customized software package for a client when the company already employs others with similar skills performing similar duties.

The Massachusetts Attorney General issued a new Advisory in May 2008 to explain how her office will apply MICL. According to the Advisory, the Attorney General will consider whether the service the individual is performing is "necessary to the business" of the employing unit or "merely incidental" in determining whether the individual may be properly classified as other than an employee under prong two.

As examples of how the Attorney General will apply prong two, the Advisory states that a drywall company that classifies an individual who is installing drywall as an independent contractor would violate MICL because the individual is performing an essential part of the employer's business. Similarly, a company in the business of providing motor vehicle appraisals that classifies an individual appraiser as an independent contractor would violate prong two because the individual is performing an essential part of the appraisal company's business. On the other hand, however, an accounting firm that hires an individual to move office furniture would not violate prong two by classifying the individual as an independent contractor because the moving of furniture is incidental and not necessary to the accounting firm's business. (Note that prongs one and three must still be met to avoid a MICL violation.)

The Advisory also sets out some general enforcement guidelines, including "certain factors" the Attorney General considers to be "strong indications of misclassification that warrant further investigation and may result in enforcement." These factors include:

- individuals providing services for an employer that are not reflected on the employer's business records;
- individuals providing services that are paid "off the books", "under the table", in cash or provided no documents reflecting payment;
- insufficient or no workers' compensation coverage exists;
- individuals providing services are not provided 1099s or W-2s by any entity;

- the contracting entity provides equipment, tools and supplies to individuals or requires the purchase of such materials directly from the contracting entity; and
- alleged independent contractors do not pay income taxes or employer contributions to the Division of Unemployment Assistance.

Because the risk created by misclassification is significant, employers are advised to review their classifications. A more detailed article can be found at http://www.mbbp.com/resources/employment/independent_contractor.html. Employers who remain uncertain about the proper categorization of contract workers are advised to consult counsel.

Compliance With "Blue" Laws

Massachusetts has a number of arcane "Blue" laws which are complicated and difficult to interpret, yet they can expose employers to claim of treble damages. The Blue laws include a requirement that all employees must be given one day of rest out of every seven, the prohibition of Sunday work for many employers (and the requirement of payment of time and one half to non-exempt employees who work in many retail businesses), and restrictions on most businesses from opening or employing workers on holidays (including Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans Day (until 1 p.m.), Thanksgiving and Christmas).

Tip Pooling Issues

It is extremely important that employers in hospitality industries comply with laws regulating tips and tip payment. In recent years, a number of Massachusetts employers (including restaurants and airlines) have been hit with class actions claiming wage law violations over tip handling practices. Generally, under Massachusetts law an employer may establish a tip pool for service workers, but the employer must ensure that the tips are paid to the service workers themselves, and not to any manager or supervisor. Further, employers should be extremely careful in charging any form of "service" charge, or taking a share of a service charge (for example, on a bill that imposed a mandatory service charge). Employers with tipped employees should carefully review their tipping policies and practices to avoid becoming the target of tip pooling claims.

Conclusion

The recent passage of the law requiring treble damages for even innocent wage law violations should cause employers to review their pay practices carefully. While mistakes have always been potentially costly in this area, this development makes violations even more dangerous.

The Morse, Barnes-Brown & Pendleton, PC, **Employment & Immigration Practice Group** provides sophisticated legal services and practical advice to employers of all sizes, ranging from technology start-ups to Fortune 1000 companies.

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