Wage and Hour Developments

A Year in Review

2018

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INTRODUCTION

The law regulating the payment of wages and work hours is a vibrant area: the "fight for $15.00"; battles over who can receive tips (and whether the tip credit should be eliminated entirely); whether workers should be given additional pay when employers cancel shifts and fail to provide "predictive schedules"; and what should happen to that pesky overtime rule. These are just some of the hot button issues addressed in 2018. As 2019 begins, we take a look back at notable wage and hour developments on the federal and state level in 2018.

The federal minimum wage has remained stagnant at $7.25 an hour since 2009. In the absence of an increase to the federal minimum wage, an increasing number of states, cities, and other municipalities have enacted statutes providing for minimum wage rates in excess of (and, in some cases, more than twice as high as) the federal rate. For information about state and local minimum wage changes that took place in 2018, see:

http://www.jacksonlewis.com/publication/2018-minimum-wage-rate-increases-are-you-ready.

For information about upcoming state and local minimum wage changes for 2019, see:

2019 State-by-State Minimum Wage Increases and New York Minimum Wage Increases 2019.

A comprehensive list of all current and upcoming minimum wage rates also is available through the Jackson Lewis workthruIT® App. Information on the App is available here: workthruIT or through any Jackson Lewis attorney.

TABLE OF CONTENTS

Federal

State

Federal Legislation

Congress Enacts Tip Pooling Amendment

In March, President Donald Trump signed an omnibus budget bill that amended the Fair Labor Standards Act (FLSA) affecting all employers who employ tipped workers.

Under the amendment, an employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips. This is true even if the employer does not take a tip credit. The amendment, however, expressly rescinded the portions of Obama-era Department of Labor (DOL) regulations that prohibited employers from requiring servers and other traditionally "tipped" employees to share their tips with traditionally "non-tipped" employees, such as cooks, when the employer is not using a tip credit. Thus, under the FLSA, servers and cooks now can share tips where a tip credit is not used.

Supreme Court Cases

"Narrow Construction" Exemption Principle Rejected, Auto Service Advisors Deemed Exempt from Overtime

The Supreme Court finally put to bed the oft-repeated statement that exemptions from overtime under the FLSA should be "narrowly construed" against the employer. This principle of construction, applied by most circuit courts, often put a heavy thumb on the scale in misclassification cases, making it difficult to overcome. The Supreme Court finally rejected it, explaining that exemptions to the overtime requirements are just as much a part of the statute as the requirement for overtime, and that exemptions should be interpreted fairly, not narrowly.

The case arose in the context of the exemption for automobile dealerships. *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018). In a sharply divided opinion, the majority concluded that a service advisor is covered by the exemption, reversing the Ninth Circuit. While that holding was significant for the industry, the lasting impact is the Court's rejection of the narrow construction principle. A number of subsequent court decisions, including opinions from the Second, Fifth, and Sixth Circuit Courts of Appeals, have already acknowledged the change in the law.

The NLRA Does Not Preclude Class and Collective Action Waivers in Arbitration Agreements

In perhaps the most important decision of its 2017-2018 term, in May, the Supreme Court upheld the enforceability of class and collective action waivers in employment arbitration agreements. *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). The Court's decision resolved a circuit split on whether such waivers violate the National Labor

Relations Act (NLRA). Jackson Lewis was counsel in one of the three above-consolidated cases, where it successfully argued to the Fifth Circuit Court of Appeals that such waivers are enforceable, a ruling that was affirmed by the Supreme Court in *Epic Systems*. Conversely, the decisions of two other circuit courts (the Seventh and the Ninth), which had deemed the waiver provisions unenforceable, were reversed. The Court's ruling is truly "epic" and will likely lead to reduction of class lawsuits as more companies implement arbitration agreements with class waivers.

Other Notable FLSA Cases

Second Circuit Finds Door-to-Door Salesmen and Chauffeur Drivers Overtime-Exempt

In the fall of 2018, the U.S. Court of Appeals for the Second Circuit considered an outside sales exemption case and concluded, applying the Supreme Court's recent "fair reading" dictate, that door-to-door salespersons for an energy supply company fit squarely within the FLSA's outside sales exemption to overtime pay. *Flood v. Just Energy Marketing Corp.*, 904 F.3d 219 (2d Cir. 2018). In Flood, the Second Circuit held that the outside salesperson exemption applies even if a door-to-door salesperson, who makes the sale and takes the order for the sale, might have that order reviewed by the company prior to the order being finalized.

In a separate case, the Court held drivers for a chauffeured limousine company are covered by the FLSA's taxicab exemption, *Munoz-Gonzalez v. D.L.C. Limousine Serv.*, 904 F.3d 208 (2d Cir. 2018).

In *Munoz-Gonzalez*, the Court of Appeals concluded that the taxicab exemption, which applies to passenger vehicles available for hire by members of the public that do not operate on regular routes, included the chauffeured limousine drivers in question, broadening the exemption beyond just yellow cabs.

"Spiritual Coercion" Does Not Convert Church Volunteers to Employees

When, at the request of church leaders, individuals offer to provide food preparation, dishwashing, and cashiering duties at a for-profit restaurant operated by their church, these volunteers do not become employees entitled to minimum wage and overtime pay under the FLSA. *Acosta v. Cathedral Buffet*, 887 F.3d 761 (6th Cir. 2018). In a suit filed by the DOL, the agency claimed that volunteers at a restaurant operated by the Grace Cathedral Church were in fact employees due to the internal pressure and external coercion the individuals felt if they refused to volunteer. Reversing a district court award to the DOL, the Sixth Circuit concluded that because the volunteers neither expected nor received any economic benefit from the restaurant and, in fact, were not even allowed to accept tips from customers, "[t]he type of coercion with which the FLSA is concerned is economic in nature, not societal or spiritual." Accordingly, the FLSA does not apply.

DOL Agency Developments

Opinion Letters are Back

Reviving a program abandoned by the Obama Administration, the DOL's Wage and Hour Division (WHD) began reissuing opinion letters in 2018. In January, the WHD reinstated 17 opinion letters originally issued during the George W. Bush administration, but subsequently withdrawn during the Obama administration. Opinion letters represent official statements of DOL policy. Following the initial reissuance of the previous opinion letters, the WHD has issued 11 new opinion letters and has reinstated one additional earlier letter addressing, within the specific facts presented, the following issues:

- **FLSA2018-18:** Compensable vs. non-compensable time under the FLSA when an employee travels for work beyond routine commuting, particularly if the employee purportedly does not have regular work hours.
- **FLSA2018-19:** Whether 15-minute rest breaks required every hour by an employee's Family and Medical Leave Act (FMLA) serious health condition must be compensated.
- **FLSA2018-20:** Whether time spent by employees voluntarily attending benefit fairs and undertaking wellness activities, such as biometric screening, weight-loss programs, and use of an employer-provided gym, are considered compensable working time.
- **FLSA2018-21:** Whether 29 U.S.C. § 207(i), the commissioned sales employee overtime exemption, applies to a company's sales force that sells an internet payment software platform. This opinion letter was the first published acknowledgement by the DOL of the Supreme Court's recent "fair reading" dictate with respect to FLSA exemptions.
- **FLSA2018-22:** Whether members of a non-profit organization who serve as credentialing examination graders for one to two weeks per year, and who are not paid for their services but are reimbursed for their expenses, may properly be treated as volunteers rather than employees.
- **FLSA2018-23:** Whether 29 U.S.C. § 213(b)(27), which exempts from overtime employees who work at a movie theater establishment, likewise applies to those employees who work at dining services operated by, and accessible only within, the theater.
- **FLSA2018-24:** Whether non-profit, volunteer fire departments that contract with state municipalities and counties to provide fire protection services for the general public are "public agencies" entitled to a partial overtime exemption under Section 7(k) of the FLSA.
- **FLSA2018-25:** What constitutes a "reasonable relationship" between a guaranteed weekly salary and the amount actually earned when an exempt employee is paid additional amounts for hours worked beyond the relevant standard workweek.
- **FLSA2018-26:** Whether a company that operates swimming pools at hotels, motels, and condominiums is subject to the "seasonal amusement and recreation" exemption of the FLSA.
- **FLSA2018-27:** Re-designating and reinstating FLSA2009-23, which interpreted the "dual jobs" provisions of the FLSA regulations. This opinion letter, in which the DOL effectively abandoned the "80/20" tip credit rule, is discussed in greater detail below.
- **FLSA2018-28:** Whether a home health aide employer's calculation of weekly pay based on an average hourly rate complies with the FLSA's minimum wage and overtime calculation requirements.
- **FLSA2018-29:** Whether members of a small religious "community of goods," who work in the community's schools, kitchens, and laundries, are "employees" under the FLSA.

DOL Abandons "80/20" Tip Credit Rule

In late-2018, the DOL reissued a 2009 opinion letter, withdrawing enforcement guidance that made the tip credit under the FLSA unavailable for tipped employees who spend more than 20% of their time performing allegedly non-tip-generating duties. FLSA2018-27. Known as the "80/20" Rule or "20%" Rule, this DOL enforcement guidance had forced employers, particularly in the restaurant and hospitality industries, to recreate, down to the minute, the daily activities of their tipped employees, separating those activities into "tip-generating," "related, but non-tip-generating," and "unrelated" duties.

Abandoning that requirement, the Opinion Letter states that the agency does "not intend to place a limitation on the amount of duties related to a tip-producing occupation that may be performed, so long as they are performed contemporaneously with direct customer-service duties and all other requirements of the Act are met." The Opinion Letter also provides guidance regarding which duties are related to tipped work and which are not. The DOL's reversal does not mean, however, that tipped employees are allowed to spend an unlimited amount of time performing so-called non-tip-generating work. Otherwise, they may be deemed as performing "dual jobs" rather than merely a tipped occupation. Notably, several states do not permit tip credits at all or otherwise might be more restrictive than the FLSA in the application of tip credits.

New Salary Test for "White Collar" Exemptions Delayed until 2019

The DOL has extended, until March 2019, its deadline for proposing new regulations governing the Executive, Administrative, and Professional ("EAP") exemptions from overtime under the FLSA. The DOL's previous rule, established under the Obama administration and set to go into effect in late-2016, was declared unlawful by a federal district court just prior to its effective date. Following the arrival of the new administration in early-2017, the DOL abandoned its appeal of that decision and promised to promulgate a new rule. The new rule, which most prognosticators still believe will establish a minimum salary threshold for the exemptions in the $30,000 neighborhood, initially was expected in late-2017 and certainly no later than sometime in 2018. Should a new rule be proposed this spring, as currently scheduled, the required notice and comment period means that it would not go into effect until mid-to late-2019 at the earliest (barring further challenge).

DOL Adopts "Primary Beneficiary" Intern Test

In January, the DOL adopted the "primary beneficiary" test when conducting the intern-vs.-employee analysis, thereby aligning itself with the majority of federal appellate courts to have addressed the issue and abandoning a stricter analysis adopted during the Obama administration. The primary beneficiary test focuses on the economic realities of the relationship to decide whether the intern/student or the employer is the primary beneficiary of the internship program.

The primary beneficiary test includes seven factors, none of which are preclusive or dispositive. They are:

1. the extent to which the intern and the provider of the internship clearly understand that there is no expectation of compensation;
2. the extent to which the internship provides training similar to that which would be given in an educational environment;
3. the extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit;
4. the extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar;
5. the extent to which the internship's duration is limited to the period in which the internship provides beneficial learning to the intern;
6. the extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern; and
7. the extent to which the intern and the provider of the internship understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

The WHD of the DOL has issued an updated Fact Sheet (No. 71), available on its website, to provide guidance on the recently adopted internship analysis.

New Employer Self-Auditing Program

In March, the DOL announced the Payroll Audit Independent Determination program ("PAID"), a self-auditing program designed to encourage employers to uncover and voluntarily report potential minimum wage and overtime violations and avoid the risk of potential penalties or liquidated damages if the agency discovers the violations in the first instance. The WHD formally began a six-month trial program in April and posted additional guidance, including a "Q & A" section, regarding the program on the DOL's website. In October, the DOL announced that it would extend the trial period another six months. Whether employers will participate in PAID to any great degree still remains to be seen.

Wage and Hour Compliance Outreach Office

In a further expansion of its efforts to adopt a more educational, and perhaps less litigious, approach to wage and hour compliance, in August, the Secretary of Labor announced the creation of the DOL's new Office of Compliance Initiatives (OCI). As part of this compliance initiative, the DOL launched two new websites to provide employers with resources to better assess wage and hour compliance in their workplaces, and to provide employees with information regarding their rights and responsibilities under federal wage and hour law. Those websites are, aptly named, employer.gov and worker.gov, respectively. As part of its agenda, the OCI intends to work with the enforcement agencies to refine their metrics to ensure the efficacy of the DOL's compliance assistance activities.

Arizona

In 2018, the Industrial Commission began enforcement of the Paid Sick Leave statute that went into effect in 2017.

Arkansas

During the November 18 general elections, Issue 5, the Minimum Wage Increase Initiative (2018), was approved by a large majority of the voters. As a result, Arkansas's current minimum wage of $8.50 per hour increased to $9.25 per hour on January 1, 2019, with subsequent increases the following two years. These minimum wage increases are estimated to affect about 300,000 employees.

California

California Supreme Court Broadens Definition of "Employee"

Diverging from decades-old precedent, the California Supreme Court broadened the definition of "employee" in the context of the State's Industrial Work Commission (IWC) wage orders when undertaking the employee-versus-independent contractor analysis. *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, 4 Cal. 5th 903 (2018). The result no doubt will have a significant impact on companies in the Bay Area, Silicon Valley and throughout California that rely on workforce configurations using independent contractors.

Under the new standard, referred to as the "ABC Test" by a number of other state courts, to establish that an individual is in fact an independent contractor, an employer must prove that:

- It does not control how the individual performs the work;
- The individual provides a service that is not part of the employer's usual business; and
- The individual customarily engages in an established business, trade or profession that is independent of the employer's business.

In expanding the definition of employee, the Supreme Court examined at length, but ultimately deemed as non-exclusive, the nearly 30-year-old analysis established in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 796 P.2d 399 (Cal. 1989), previously considered "the seminal California decision on the subject." In adopting the ABC Test, the Court made clear that the employer has the burden of proving all three elements of the test to establish independent contractor status.

Formula for Calculating Overtime Value of a Flat-Sum Bonus Revised

In a costly blow to employers operating in the state, the California Supreme Court held that under state law, when an employee earns a flat sum bonus during a pay period, the overtime

pay rate will be calculated using the actual number of non-overtime hours worked by the employee during the pay period. The Court reversed a lower court of appeals decision which had rejected policy guidance issued by the California Department of Labor Standards Enforcement (DLSE) and instead had adopted the more employer-friendly position taken by the U.S. Department of Labor and federal courts that all hours worked, including overtime hours, should be used in establishing the overtime rate for such bonuses. *Alvarado v. Dart Container Corp.*, 4 Cal. 5th 512 (2018).

In so holding, the Supreme Court concluded that the "state policy favoring an eight-hour workday and a six-day 40-hour workweek, and discouraging employers from imposing work in excess of those limits," along with the state's longstanding position that its labor laws are to be liberally construed in favor of the employees, led to the conclusion that only non-overtime hours should be used in the divisor when calculating the value of the flat-sum bonus. More information on how to calculate the overtime value of a flat-sum bonus under this new formula may be found here:

https://www.jacksonlewis.com/publication/calculating-overtime-value-flat-sum-bonus-must-be-based-actual-non-overtime-hours-worked-california-high-court-holds.

State Minimum Wage

Per the regulations increasing minimum wage for employers, the minimum wage in 2019 is set to increase again. If an employer has 26 or more employees, they must pay their employees a minimum of $12 per hour. If an employer has 25 or less employees, the minimum wage will increase to $11 per hour. *NOTE: Other cities have their own set minimum wage increases for 2019.

San Diego Minimum Wage

Pursuant to a city ordinance, starting January 1, 2019 the city of San Diego will see a new increase in minimum wage. The new minimum wage requirement for San Diego will be $12.00 per hour, which is a fifty-cent increase from the current $11.50 per hour. Employers should be reminded that wage and hour posters must be updated to reflect the new increase in minimum wage. Employers who do not render appropriate wages for employees who work a minimum of two hours per week within San Diego city limits can be subject to penalties for failure to pay.

Payroll Record Reviews (SB 1252)

This new law amends California Labor Code 226, which mandates that an employer furnish his employee with copies of his payroll records. The law no longer states that an employee has a "right to inspect" – the law has now changed to state that an employee has a "right to receive a copy" of their payroll records.

Disability Leave Pay - Paid Family Leave (SB 1123)

This new legislation expands the scope of the temporary disability insurance program to cover people (including the employee's spouse, parent, child, or domestic partner) who are called away on active duty. When an employee makes a request to have time off for this, the Employment Development Department can allow the employer to require the employee to provide documentation of the active duty orders.

This new bill impacts the following portions of the Unemployment Insurance Code: 3301, 3302.1, 3302.2, 3303, 3303.1 and 3307.

Meal Periods For Truck Drivers (AB 2610)

Under Labor Code 512, truck drivers that transport commercial feed to areas considered remote and rural will now be included in an exemption under this code. If the driver is subject to overtime pay and his hourly rate is one and a half times the state's set minimum wage, the driver can take his meal period after the sixth hour. However, a meal period at the tenth hour is still required.

The statute does not provide factors to determine what constitutes an area as rural, however, those sponsoring the bill included factors such as road narrowness, low number of rest stops, low driving speeds, and inability to stop due to road safety.

Rest and Meal Breaks – Petroleum Facilities (AB 2605)

Assembly Bill 2605 now creates an exemption for employees who hold positions deemed to be "safety sensitive" in a petroleum factory to carry communication devices and answer these emergencies while on their rest periods. If an employee tends to an emergency, the employer should permit the employee to take a rest period—uninterrupted—as soon as the opportunity presents itself. If an employer cannot offer the rest period to them, they will need to pay the employee an hour of pay.

Delaware

Minimum Wage Increases

Delaware amended its minimum wage law to provide for two additional increases. The first increase, to $8.75 per hour, went into effect on January 1, 2019, and the second, to $9.25 per hour, will go into effect on October 1, 2019.

District Of Columbia

New Requirements for Tipped Employees

In October, the D.C. Council approved the "Tipped Wage Workers Fairness Amendment Act of 2018." The legislation repealed Initiative 77, a contentious ballot measure that narrowly passed in the summer of 2018 and that would have substantially increased the minimum wage for tipped workers. The Act nonetheless does implement a number of additional

programs and requirements related to tipped employees, including extensive harassment training requirements. Details of those training, notice, and other administrative requirements may be found here.

Mayor Muriel E. Bowser (D) signed the bill on October 23 and it will become law following a 30-day period of Congressional review (beginning in January 2019) and publication in the District of Columbia Register.

Hawaii

Salary History Ban

Hawaii has joined the trend of banning employers from salary history inquiries. Under S.B. 2351, effective January 1, 2019, Hawaii employers with at least one employee in the state may not ask a job applicant about his or her salary history, or rely on the applicant's salary history, in determining salary, benefits, or other compensation during the hiring process or negotiation of an employment contract. Employers also may not bar employees from disclosing their wages or discussing or inquiring about the wages of other employees.

The new law expressly permits certain inquiries. An employer may discuss compensation and benefit expectations with the job applicant and inform the applicant of the proposed or anticipated salary or salary range for the position. The law also provides that an employer may discuss with the applicant "any objective measure of the applicant's productivity, such as revenue, sales or other production reports."

If an applicant "voluntarily and without prompting" discloses salary history information, the employer may consider salary history in determining the applicant's salary and benefits and may verify the salary history. However, employers using such "voluntarily" disclosed salary history information to set compensation must exercise caution because of the risk of litigation over whether the job applicant made a truly voluntary disclosure.

Illinois

Employee Expense Reimbursement

An amendment to the Illinois Wage Payment and Collection Act (IWPCA), imposing an affirmative duty on employers to reimburse employees for certain expenses incurred during their employment, went into effect on January 1, 2019. The amended law (820 ILCS 115/9.5) requires employers to reimburse all "necessary expenditures … incurred by the employee within the employee's scope of employment and directly related to services performed by the employer." It defines "necessary expenditures" as "all reasonable expenditures . . . required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer." Employers in Illinois and other states with expense-reimbursement laws or regulations should ensure they create and implement written policies to address issues such as the types of expenses to be reimbursed and any dollar limits on such expenses under normal circumstances.

Independent Contractor Guidance

The Illinois Department of Labor proposed regulations that would provide more detailed guidance to analyze the distinction between employees and independent contractors under Illinois law. Generally, the proposed regulations do not substantively change the law, but rather codify many factors that are already commonly used by courts in performing this analysis.

Democrats Take Control

As a result of the 2018 elections, in 2019 Illinois will have both a Democratic governor and a Democratic supermajority in the legislature. Thus, we likely will see many pro-employee laws proposed, including minimum-wage increases and other wage-hour bills.

Iowa

Wage Notification Requirements

The Iowa legislature amended Iowa Code Section 91A.6 to clarify employers' notice and recordkeeping requirements. Under the changes, employers must provide all non-exempt employees statements showing:

1. the hours the employee worked;
2. the wages earned by the employee; and
3. any deductions made.

The statements must be provided on each regular payday. The statutory changes also clarify that employers may provide the employee statements by mail, secure electronic transmission, in person at the employee's normal place of employment during normal business hours, or electronically (provided the employee has free and unrestricted access to a printer to print the statement).

Kentucky

Mandatory Arbitration Unlawful

The Kentucky Supreme Court has held that while voluntary arbitration is permissible, employers may not require employees to sign arbitration agreements as a condition of their employment. *Northern Kentucky Area Development District v. Snyder*, 2018 Ky. LEXIS 363 (Sept. 27, 2018). In reaching its conclusion, the court relied upon KRS § 336.700(2), which states in part that "no employer shall require as a condition or precondition of employment that any employee or person seeking employment waive, arbitrate, or otherwise diminish any existing or future claim, right, or benefit to which the employee or person seeking employment would otherwise be entitled under any provision of the Kentucky Revised Statutes or any federal law."

The viability of this holding is questionable if reviewed by the U.S. Supreme Court. Further, a Kentucky federal court might enforce a mandatory arbitration agreement notwithstanding *Snyder* if the agreement makes clear that it is governed by the Federal Arbitration Act (FAA). Prior to *Snyder*, a U.S. District Court for the Western District of Kentucky expressly had found that the

FAA preempted KRS § 336.700 and the Kentucky federal courts had enforced such agreements with regularity based on the FAA. Nevertheless, until *Snyder* is reversed or the statute is amended, employers are cautioned that a mandatory arbitration agreement provision may be held unenforceable.

Maryland

Maryland Healthy Working Families Act

In early-2018, the Maryland General Assembly overrode a gubernatorial veto of the Maryland Healthy Working Families Act of 2017, making the law effective as of February 11, 2018. The law requires employers with at least 15 employees to provide paid sick and safe leave to employees who regularly work at least 12 hours per week, with a few exceptions. Employers with fewer than 15 employees must provide unpaid sick and safe leave. Covered employers must provide at least one hour of leave for every 30 hours worked, up to at least 40 hours of leave per year. Employees who accrue leave must be allowed to carry over at least 40 hours of accrued, unused leave into the next year. Alternately, employers may award at least 40 hours of leave at the start of each year. At a minimum, the employer must allow the sick and safe leave to be used to care for the physical or mental health of the employee or a family member, to take maternity or paternity leave, or to obtain relief in response to domestic or sexual assault of the employee or a family member.

Construction Contractor Liability

Maryland has enacted a law that makes construction general contractors jointly and severally liable for subcontractors' failure to pay wages to the subcontractors' employees. This joint and several liability exists even if there is no direct contractual relationship between the general contractor and the subcontractor failing to pay wages, *i.e.*, a subcontractor of a subcontractor. Under the law, the subcontractor must indemnify the general contractor for any wages, damages, interest, penalties, or attorneys' fees resulting from the subcontractor's failure unless indemnification is provided for in a contract between the two parties or the failure resulted from the general contractor's failure to make prompt payment to the subcontractor under the terms of the subcontract.

New Protections for State Employees

Maryland passed a law that grants employees in the executive branch of state government parental leave with pay immediately following the birth or adoption of a child. In addition, the state passed a law requiring a reasonable, unpaid break time and a private place for state employees to express breast milk for nursing children.

Massachusetts

New Minimum Wage Increases

In June 2018, Massachusetts passed a new wage law that will increase the minimum wage in each of the next five years. The first minimum wage increase went into effect on January 1, 2019, and stepped increases will occur over the next four years, until reaching $15.00 per hour ($6.75 for tipped employees) in 2023.

Paid Family and Medical Leave

Beginning in 2021, most Massachusetts employees will be entitled to up to 12 weeks of paid leave to care for a family member or bond with a new child, and up to 20 weeks of paid leave to address their own serious medical issues. The program will be funded by a new payroll tax, which goes into effect beginning July 1, 2019. Benefit amounts will be determined based on a percentage of the employee's weekly income, up to a maximum of $850.00 per week. The law also creates the Department of Family and Medical Leave, which will publish proposed regulations for comment by March 31, 2019. The regulations are expected to be finalized by July 1, 2019.

Although the right to take leave will begin in 2021, employers must take certain actions much earlier. For example, beginning July 1, 2019, employers must post a notice describing the benefits available under the law and provide each employee, within 30 days of hire, a written explanation of the employee's rights.

Sunday Premium Pay

Massachusetts "blue laws" currently provide that employees in many retail establishments must receive 1.5 times their regular rate of pay on Sundays. This requirement will gradually disappear over the next few years. Effective January 1, 2019, the premium pay rate for Sunday and holiday work will drop to 1.4 times the regular rate. The premium rate will decrease by 0.1 each year until the premium pay requirement is eliminated on January 1, 2023. However, the blue laws' prohibition against requiring these retail employees to work on Sundays and holidays will remain in effect.

Michigan

Michigan Voters Approve, Legislature Amends, New Minimum Wage Law

In September 2018, the Michigan legislature passed a new minimum wage statute adopted from a voter ballot measure. That law would have seen the State's minimum wage increase incrementally to $12.00 an hour by 2022. However, under the quirks of Michigan law, adopting the ballot measure allowed the legislature to amend the law before its effective date, and that's exactly what it did. During the legislature's lame-duck session in December, the annual minimum wage rate increases were extended so that the $12.00 minimum rate ($12.05, actually, under the revised law) will not occur until 2030. Michigan's governor signed the revised law into effect on December 14th and the first increase, to $9.45 an hour, will take place in late March 2019.

Missouri

Pay Rates for Public Projects

The Missouri legislature passed HB 1729, which adjusts the process for calculating the wages that contractors working on public projects have to pay to people in certain job titles who are working on the projects.

New Minimum Wage Increases

During the November elections, Missouri voters approved Proposition B, the $12 Minimum Wage Initiative. With its passage, the minimum wage in Missouri increased from $7.85 per hour to $8.60 per hour on January 1, 2019. Additional increases will go into effect annually until reaching $12.00 per hour in 2023. An estimated 677,000 employees will be impacted by the minimum wage increase.

In addition, Proposition B increased the available damages for an employer's violation of the minimum wage statute, by allowing recovery of liquidated damages in an amount equal to twice the amount of actual damages. Moreover, the new law extends the statute of limitations for bringing a minimum wage claim, from two years to three. Notably, government employers are exempt from the minimum wage increases in Missouri.

Nebraska

Pending Legislation

State Senator Pansing Brooks (D) introduced a number of wage and hour related bills to the Nebraska legislature in 2018, including amendments to the Nebraska Wage Payment and Collection Act prohibiting employers from forbidding employee wage disclosure; a bill implementing anti-retaliation provisions into the Nebraska Wage and Hour Act; and the "Discriminatory Wage Practices Act," which would add to existing provisions prohibiting discriminatory practices in wage payment based on sex. To date, all of these bills have been postponed indefinitely.

New Jersey

Paid Sick Leave

The New Jersey Paid Sick Leave Law went into effect on October 29, 2018. The law allows employees to accrue one hour of earned sick leave for every 30 hours worked, up to 40 hours each year.

The New Jersey Equal Pay Act

The New Jersey Law Against Discrimination (NJLAD) was amended, effective July 1, 2018, to prohibit discrimination with respect to compensation or financial terms of employment on the basis of any protected trait. Such equal pay claims now have a six-year statute of limitations and include treble damages against any business that violates the Act. The amended Act requires equal pay for "substantially similar work" unless the employer can demonstrate the differential resulted from a seniority or merit system or other legitimate, non-discriminatory reason.

New York

New York continued to be a hotbed for wage and hour litigation in 2018. In addition to misclassification and "off-the-clock" claims, litigation relating to tipped employees and recordkeeping violations (*e.g.*, failing to provide accurate wage statements or wage notification forms) have continued at a steady pace. New York also has been at the forefront with respect to regulatory activity relating to payment of wages and regulations of hours, becoming one of the few states to propose "predictive scheduling" regulations on a state-wide basis.

Minimum Wage Increases

The minimum wage continues to rise. In 2019, it will rise to $15.00 per hour for New York City employers who have more than 10 employees, a minimum wage rate that is one of the highest in the country. Due to legislation passed in 2016, the minimum wage rates in the state are fractured based on geography and size, with different rates required of large and small employers in New York City; different rates for employees working in Long Island and Westchester; and different rates for the remainder of the state. The minimum wage for Long Island and Westchester rose to $12.00 per hour, and the state minimum wage rose to $11.10.

Salary Level for Exempt Employees on the Rise

The minimum required salary level for exempt employees in New York is also increasing, with different rates applying depending on where the employees work and whether, in New York City, they are employed by "large" or "small" (10 or less employees) employers. The highest rate for exempt workers in New York City will be $1,125 per week or $58,500 per year, and the lowest will be $900 per week or $46,800 per year, both well above the current federal level of $455 per week or $23,660 per year.

Predictive Scheduling Regulations

The New York State Department of Labor (NYSDOL) issued sweeping proposed regulations addressing worker scheduling practices that will affect most employers in the state and approximately one million workers, according to estimates provided by the Department. Among other things, the proposed regulations will require employers, to provide "call-in-pay" (ranging from two to four hours at the minimum wage) if employers do not provide non-exempt employees 14 days' advance notice of their work shift; cancel employee shifts without at least 14 days' advance notice; require employees to work "on-call"; or require non-exempt employees to report to work but then send them home. There are several exceptions, and employers should carefully review the new proposed regulations to determine whether their workers are covered by the regulations and whether any exceptions apply. The regulations are likely to become effective in the first quarter of 2019.

Tip Credits on Thin Ice?

In 2018, the NYSDOL held hearings from March to June to explore whether New York should eliminate the use of tip credits, *i.e.*, requiring employers of tipped employees to pay workers the full minimum wage, rather than permitting employers to pay tipped employees a direct wage that is below the minimum wage and then take a credit for tips received by employees to satisfy the minimum wage (as is currently the law). In 2019, for example, the direct wage for tipped employees employed by "large" employers in New York City in the hospitality industry is $10.00 per hour, and employers are permitted to take a $5.00 tip credit to satisfy the new $15.00 per hour minimum wage. The hearings were, at times, contentious, and the debate played out not only at the hearings but in the press, with various op-ed submissions from workers opposed to the elimination of tip credits.

Suffolk County Enacts Salary History Ban

In November 2018, Suffolk County became the latest jurisdiction in New York to adopt legislation prohibiting employers from asking about the prior salary histories of prospective employees. The salary history ban, intended to reduce pay inequity for women and minorities, amends the Suffolk County Human Rights Law, applicable to employers of at least four employees. The ban goes into effect on June 30, 2019.

While the State of New York has not yet enacted a salary history ban, several localities within the state have done so, including New York City, Westchester County, and Albany County.

Payroll Debit Card Regulations Remain Invalid (For Now)

The NYSDOL issued final regulations in September 2016, significantly restricting the use of payroll debit cards and imposing disclosure and consent requirements for direct deposit. The regulations were to become effective in March 2017, but, just prior to their effective date, the New York State Industrial Board of Appeals (IBA) held the regulations invalid. The NYSDOL challenged that decision in the state supreme court (New York's lower court) and, in May 2018, the lower court held that the IBA had broadly invalidated the regulations when only the payroll debit card provisions were at issue. Accordingly, the Board's invalidation decision was deemed void.

In July 2018, the employer whose challenge of the regulations prompted the IBA's decision appealed the lower court ruling to the state's intermediate court of appeals, which has yet to render a decision. Until then (or, more likely, until the state's highest court of appeals rules), the 2016 regulation changes remain in limbo.

North Carolina

EFCA Notice Posting Requirements

As of January 2018, all North Carolina employers were required to post notification of the Employee Fair Classification Act (EFCA). This Act created a separate division within the state's industrial commission to take reports from the public regarding independent contractor misclassification and to investigate reports of misclassification. Employers who have improperly misclassified workers may be held liable for back taxes, wages, benefits, and other penalties resulting from the misclassification.

Ohio

Pending Legislation on White Collar Exemptions

H.B. 605, pending in the Ohio House of Representatives, would raise the minimum salary threshold for the Executive, Administrative, and Professional (i.e., "white collar") exemptions to $913 per week, the same level as in the now-defunct Obama-era DOL rule. However, the legislation is sponsored by Democrats and is unlikely to be acted on by either the current or the incoming Republican-controlled General Assembly.

Oregon

Predictive Scheduling Law

Joining a handful of other states, in 2018 Oregon passed predictive scheduling protections. Under the Oregon Fair Work Week Act, employers in the hospitality, retail, and food services industries with more than 500 employees worldwide must provide employees a work schedule in writing at least seven days before the first day of the schedule. Additionally, employers must provide a rest period of at least 10 hours between shifts, unless an employee consents to work during the rest period, in which case the employer must pay the employee one-and-a-half times the employee's normal rate.

Maximum Working Hours for Some Workers

Additionally, Oregon passed a law that limits employers from requiring employees working in a mill, factory, or manufacturing establishment to work more than 55 hours per week. However, an employee may consent in writing to work up to 60 hours per week. Any work after 10 hours per day must be compensated at an overtime rate. Further, employers may not require employees employed in a mill, factory, or manufacturing establishment to begin a shift fewer than 10 hours after the end of the employee's previous shift.

Limitations on Paid Sick Leave

Finally, Oregon passed a law allowing employers of any size to limit, to 40 hours per year, the number of hours of paid sick time that employees may accrue.

Pennsylvania

Notable Court Decisions

In late-December 2017, the Superior Court of Pennsylvania ruled that the Pennsylvania Minimum Wage Act (PMWA), 43 P.S. § 333.101 *et seq.*, requires payment of a higher rate for each overtime hour worked than does the federal FLSA's fluctuating workweek (FWW) method. The court held that the PMWA requires *one-and-one-half times* the regular rate for each overtime hour, rather than the *half-time* rate allowed under the FLSA. The Pennsylvania Supreme Court has agreed to review the decision.

Puerto Rico

Regulation Updates

After significant changes to Puerto Rico wage and hour laws took effect in January 2017 – including calculation of daily overtime, vacation leave, new exemptions from payment of overtime and meal penalties, and flexible work schedules, among others – the Puerto Rico Department of Labor revised its interpretative regulations and repealed several outdated ones that were now inconsistent with current law. Regulation No. 9017 addresses topics such as changes in schedules, alternative work schedules, requests for changes in schedules, the mandatory meal period, recordkeeping requirements, and settlements in wage and hour cases. Regulation 9017 became effective on May 5, 2018.

Equal Pay Act

Puerto Rico also enacted its Equal Pay Act, which prohibits employers from inquiring into an applicant's past salary history unless the applicant volunteered such information or the employer already negotiated a salary with the applicant and set it forth in an offer letter, in which case an employer may inquire or confirm salary history. This law also forbids employers from prohibiting discussions about salaries among employees or applicants, with certain exceptions for managers or human resources personnel, and contains an anti-retaliation provision. Available remedies for victims of pay discrimination include back pay, compensatory damages, and an equal amount of actual damages as a penalty.

Rhode Island

New Sick Leave Requirements

Effective July 1, 2018, employers with at least 18 employees must provide at least one hour of paid sick leave for every 35 hours worked. Employers with fewer than 18 employees must provide sick time, but it may be unpaid.

Washington

Higher Salary Requirement for "White Collar" Exemptions Forthcoming?

The Department of Labor & Industries (L&I) intends to issue new rules establishing a higher minimum salary for the Executive, Administrative, and Professional (EAP or "white collar") exemptions for all industries in the state. Following meetings in April 2018 with representatives of labor and business organizations, the Department drafted, and then revised, new proposed rules, which it then subjected to a series of feedback sessions with "stakeholders" in November 2018 and public commentary through December. Under the current pre-draft proposal, the minimum salary threshold to qualify for the EAP exemptions would increase to between two and two-and-a-half times the state minimum wage for a 40-hour workweek, with an effective date of January 1, 2020. If enacted, the new salary threshold formula would yield results similar to that in the now-defunct regulation enacted by the U.S. Department of Labor under the Obama administration.

Equal Pay Law Updated

In March 2018, the governor signed into law amendments to Washington State's Equal Pay Act. Among the Act's revisions, employers may not prohibit an employee from disclosing or discussing his or her wages, or retaliate against an employee for discussing his or her wages, the wages of other employees, or for seeking justification from the employer for perceived differentials with regard to wages, promotions, or other employment opportunities.

Minimum Wage

The year 2018 saw Seattle become one of the first municipalities outside of California to reach the $15.00 per hour minimum wage threshold. Notably, it then became the first in the country to hit $16.00 per hour, when that rate went into effect on January 1, 2019, for employers with more than 500 employees.

Wisconsin

Outside Salesperson Exemption

Effective May 1, 2018, Wisconsin Act 340 (2017) was amended to conform its outside sales employee exemption to federal law. The exemption provides, in congruence with federal law, that to qualify for the outside sales exemption, an employee must be "customarily and regularly engaged away from" the employer's "place or places of business" when making sales. Previously, Wisconsin's outside sales exemption had tracked the requirements of federal law prior to its 2004 amendments, under which outside salespersons were required to spend at least 80% of their time away from the employer's premises.

Thank you for your interest in

Wage and Hour Developments 2018

A Year in Review

When a wage and hour violation affects many employees over an extended period of time, it can give rise to substantial liability, even if the employer acted in good faith.

Counseling clients about wage and hour issues, performing wage and hour compliance reviews, and defending related litigation and government agency investigations have been among our firm's core services for over 55 years. With offices spread across the country, we offer our clients a network of experienced wage and hour attorneys with extensive knowledge of state and federal wage and hour laws.

Jackson Lewis P.C. is a law firm with more than 900 attorneys nationwide serving clients across a wide range of practices and industries. Our client service philosophy is rooted in strong relationships built on a thorough understanding of each client's particular industry, business and culture.

Should you want to discuss how items contained in this report could impact your organization, please contact the Jackson Lewis attorney with whom you regularly work, or visit us at jacksonlewis.com to find out how we can partner with you.

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