JacksonLewis

WAGE & HOUR DEVELOPMENTS: A YEAR IN REVIEW

2019

INTRODUCTION

Federal and state laws regulating the payment of wages continue to develop at a rapid pace. States continue to increase their minimum wage, despite the federal minimum wage remaining stagnant at $7.25 per hour since 2009. Statewide, Washington now has the highest minimum wage in the country, at $13.50 per hour, although the District of Columbia bests it at $14.00 per hour. However, some counties and local jurisdictions have even higher rates, with Emeryville, California continuing to lead the pack at $16.30 per hour. The long-awaited federal overtime rule, raising the salary level for exempt white collar workers, also was finalized, increasing the minimum annual salary from $23,660 to $35,568. But several states have raised the bar there, too, requiring even higher salary levels. Currently, New York leads that group, requiring an annual salary as high as $58,500 (in New York City) to satisfy the white collar exemptions.

The federal Department of Labor has also been busy—finalizing rules addressing how to calculate the "regular rate of pay," a necessary prerequisite to determining the proper overtime rate; issuing a proposed regulation clarifying use of the fluctuating workweek method of pay; rescinding the so-called "80/20 Rule," a thorn in the side of hospitality employers; and revising the regulations defining who is a "joint employer."

So in case you missed it, here is a summary of some of the high (and low) lights of 2019.

SUPREME COURT CASES

Supreme Court Upholds *Auer* Agency-Deference Doctrine

Two Supreme Court cases are noteworthy this year, although neither directly address wage and hour issues. In *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) and *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), the Supreme Court addressed whether courts must continue to defer to agency interpretations of their own regulations—they do, but the circumstances in which such deference is required is now more limited. The decision, thus, reduces the ability of agencies, including the Department of Labor, to implement changes through informal guidance. In the second case, Lamps Plus, the Court continued its long line of cases upholding the enforceability of arbitration agreements under the Federal Arbitration Act, including class action waivers, often an issue in wage and hour litigation, holding class-based arbitrations cannot be implied, but expressly agreed to by the parties.

By the thinnest of margins, the U.S. Supreme Court declined to overrule the so-called *Auer* (or Seminole Rock) deference doctrine. *Kisor v. Wilkie*, 2019 U.S. 4397 (June 26, 2019).

Generally, under *Auer*, a court should defer to an agency's interpretation of its own ambiguous regulation, so long as that interpretation is reasonable, even if the court believes another reasonable reading of the regulation is the better reading. The doctrine was first established more than 20 years ago in *Auer* v. Robbins, 519 U.S. 452 (1997), although its roots can be traced back several decades earlier, to *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945).

The *Auer* doctrine has had a steady stream of critics who argue, among other things, that the doctrine violates separation of powers, as it permits an agency to implement a regulation, itself determine what the law means, and then demand that courts defer to its interpretation. Some also argue that the doctrine encourages agencies to issue vague regulations, and then use sub-regulatory guidance, not subject to the notice-and-comment requirements of the Administrative Procedure Act (APA), to expand upon those regulations.

The *Auer* doctrine has long been derided by those opposed to the growing size and role that federal agencies now play — the so-called administrative state.

With a swing vote from Chief Justice John Roberts, the *Auer* doctrine survives, albeit not unscathed and a shadow of its former self. The Court, in further defining the doctrine's application, has significantly limited it to the point where the Chief Justice noted in his separate concurrence that the "distance" between the plurality view (permitting deference in some circumstances) and that of Justice Neil Gorsuch, who would have overruled *Auer* in its entirety, is "not as great as would initially appear." Chief Justice Roberts did not join the plurality opinion, authored by Justice Elena Kagan and joined by Justices Stephen Breyer, Ruth Bader Ginsburg and Sonia Sotomayor. While the plurality upheld the *Auer* doctrine on its merits, Chief Justice Roberts instead refused to abandon the doctrine only because of stare decisis, resulting in what Justice Gorsuch described as a doctrine "maimed and enfeebled – in truth, zombified." Justice Gorsuch's opinion was joined in whole or in part by Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh. So, the *Auer* doctrine survives for now, albeit greatly weakened. One thing is guaranteed: Parties will be litigating whether the doctrine applies in a given case for years to come.

Class-Based Arbitration Requires Express Consent of Parties

Class action arbitration is such a departure from ordinary, bilateral arbitration of individual disputes that courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement, the U.S. Supreme Court ruled in a 5-4 decision. *Lamps Plus, Inc. v. Varela,* 139 S. Ct. 1407 (2019). Thus, the Supreme Court concluded, "Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."

Following the Court's decision, arbitration agreements must clearly and unmistakably state that the parties agree to resolve class and collective actions through arbitration. Without such a clear agreement, a party cannot be compelled to class arbitration.

OTHER NOTABLE FEDERAL CASES

Ninth Circuit Refuses to Expand California *De Minimis* Doctrine

In 2018, the California Supreme Court held that the *de minimis* doctrine as developed under federal law — allowing employers to forego paying tracking and paying employees for small amounts of work time — was inapplicable to claims under that state's labor laws, while noting that a more limited version of the doctrine might apply under some circumstances. *Troester v. Starbucks Corp.*, 5 Cal. 5th 829 (2018). When do those circumstances exist?

Not very often, the U.S. Court of Appeals for the Ninth Circuit held in a June 2019 ruling. *Rodriguez v. Nike Retail Servs.*, 2019 U.S. App. LEXIS 19475 (9th Cir. June 28, 2019). Rejecting the defendant-employers' arguments that a minute or less automatically constitutes a *de minimis* amount of time, and that an accumulation of such minutes still fails to constitute compensable time, the Court of Appeals concluded that such an interpretation of *Troester* not only would "read far too much into *Troester*'s passing mention of 'minutes,' but it would also clash with *Troester*'s reasoning, which emphasized the requirement under California labor laws that 'employee[s] must be paid for all hours worked or any work beyond eight hours a day.'"

The Ninth Circuit added, "We doubt that *Troester* would have been decided differently if the closing tasks at issue had taken only 59 seconds per day." "Instead," it continued, "we understand the rule in *Troester* as mandating compensation where employees are regularly required to work off the clock for more than 'minute' or 'brief' periods of time."

Thus, employers need not account for exceedingly brief periods of time (*i.e.*, "split-second absurdities") or short periods of time that are so "irregular that it is unreasonable to expect the time to be recorded." But, "[a]fter *Troester*, an employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the *de minimis* doctrine."

Therefore, in California the *de minimis* doctrine will rarely provide a defense to an employer's failure to compensate its employees for all time spent on work-related tasks, including pre- and post-shift inspections. Employers with operations in California need to ensure that their employee inspection, timekeeping, and other policies and procedures properly account for all such time.

Third Circuit Addresses Bonuses as "Remuneration" for Overtime Purposes, Applies Supreme Court's "Fair Reading" Mandate to FLSA as a Whole

When an employer permits its employees to participate in a bonus program offered by the employer's client, based on the work performed for that client, those bonuses do not always qualify as "remuneration for employment" that must be included in the employee's "regular rate" for purposes of calculating overtime pay due under the Fair Labor Standards Act (FLSA), the U.S. Court of Appeals for the Third Circuit Court held. *Secretary, U.S. Dep't of Labor v. Bristol Excavating, Inc.*, 2019 U.S. App. LEXIS 24767 (3d Cir. Aug. 20, 2019).

Generally, the overtime provisions of the FLSA require employers to pay employees one-and-a-half times their "regular rate" of pay for all hours in excess of 40 per workweek. 29 U.S.C. § 207. With limited exceptions, the regular rate includes "all remuneration for employment paid to, or on behalf of, the employee." However, what constitutes "remuneration for employment" is not defined in the FLSA.

The Third Circuit rejecting the Department of Labor's (DOL) contention that the FLSA's silence on what constitutes "remuneration for employment" means that *all* compensation, from whatever source, must be included. It instead concluded that "the silence of the Act is better understood as evidence that Congress took it for granted that it was only regulating the employer-employee relationship, not re-writing that relationship to impose the effects of decisions made by third parties."

In reaching its conclusion, the Third Circuit held that "looking to the parties' agreement protects the employer from having to pay for a third party's generous actions," and that it would be unfair to force employers to include promised bonuses from third parties as remuneration in the regular rate of pay unless and until the evidence demonstrates that those bonuses have become part of the pay calculation agreed to in some fashion by the employer and employee.

While the DOL argued that its approach was consistent with the "broad remedial purpose" of the FLSA, the Third Circuit shot back, noting that this argument ignores another statement in the Congressional findings underlying the FLSA: that protecting the well-being of workers is to be done "without substantially curtailing employment or earning power" and that imposing unexpected costs on employer does not work to the long-term benefit of employees."

The Third Circuit cited to *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018), in which the Supreme Court rejected a "narrow interpretation" of the FLSA exemptions in favor of "fair reading" standard. Significantly, it extended the Supreme Court's reasoning to the FLSA *as a whole*, noting that a "fair reading of the FLSA, neither narrow nor broad, is what is called for."

The Third Circuit has jurisdiction over the federal courts in Pennsylvania, New Jersey, and Delaware.

Second Circuit Sheers Cosmetology Student's Claims in Intern-or-Employee Case

Concluding that a student at a for-profit cosmetology academy was the "primary beneficiary" of the hours he spent training at the academy's salon, the U.S. Court of Appeals for the Second Circuit upheld the district court's determination that the student was an intern, and not an employee entitled to minimum wage or overtime under the FLSA or the New York Labor Law. *Velarde v. GW GJ, Inc.*, 2019 U.S. App. LEXIS 3536 (2d Cir. Feb. 5, 2019).

In upholding the district court's grant of judgment on the pleading to the defendants, the Second Circuit reviewed the "totality of the circumstances" of the plaintiff's training program against the multi-factor analysis it set in *Glatt v. Fox Searchlight Pictures, Inc.*, 811 F.3d 528 (2d Cir. 2016).

In its analysis, the Second Circuit noted that some of these factors were less applicable in the vocational training context than in other internship programs (for example, the absence of an expectation of future employment with the institution). Nevertheless, the Court readily concluded that the plaintiff was the primary beneficiary of the school's program, including the time spent at the salon honing his practical skills, given that, without such a program, the plaintiff would not satisfy the state's requirements to obtain his cosmetology license. The mere fact that the academy derived some benefit from the practical training (*i.e.*, any profits it received from the salon services provided to the public) did not necessarily mean the school was the *primary* beneficiary.

The Second Circuit has jurisdiction over the federal courts in New York, Connecticut, and Vermont.

DOL AGENCY DEVELOPMENTS

Overtime Exemption Regulations

In 2019, the DOL issued a Final Rule updating the minimum salary requirements for the "white collar" (executive, administrative, and professional) overtime exemptions. The new rule went into effect on January 1, 2020.

Under the Final Rule, the annual salary level for these exemptions will increase to $35,568, or $684 per week, a 50% increase from the current level of $23,660 ($455 per week). In addition, the annual minimum compensation for highly compensated employees (HCE) also will increase, from $100,000 to $107,432, well below the minimum HCE compensation set in both the Obama-era Rule and in the Notice of Proposed Rulemaking issued in March 2019.

Consistent with the Obama-era rule, employers will be permitted to use *nondiscretionary* compensation, including commissions, to satisfy up to 10% of the new standard salary level. Unlike the Obama-era rule, however, under the new Final Rule, nondiscretionary compensation may be paid annually rather than quarterly, providing employers with more flexibility in paying exempt employees nondiscretionary bonuses and commissions to satisfy the salary level requirement.

The new Final Rule also permits a catch-up payment at year's end, up to 10% of the standard salary level (*i.e.*, $3,556.80), if the employee has not earned sufficient nondiscretionary pay to satisfy the required salary. By contrast, for HCE, the standard salary level ($35,568) must be met without including any *nondiscretionary* pay, although such pay can be included in meeting the annual compensation requirement of $107,432.

The DOL has not made any changes to the duties test and has not provided for any automatic increases, although it anticipates updating the salary level every four years through notice-and-comment rulemaking.

Regular Rate Regulations

In December 2019, the DOL issued its Final Rule revising the regulations governing the calculation of the regular rate under the FLSA.

The FLSA generally requires employers to pay non-exempt employees overtime pay at one-and-one-half times their "regular rate" for all hours worked over 40 in a given workweek. The regular rate is defined, with a few exceptions, as all "remuneration for employment paid to, or on behalf of, the employee," divided by the total number of hours worked during that week.

Employers sometimes struggle, however, with properly determining the regular rate when providing various benefits and other forms of compensation to their employees in the modern workplace. The Final Rule, which became effective on January 15, 2020, seeks to clarify what forms of benefits and other compensation must, and need not, be included in the regular rate calculation.

While unlikely to eliminate all problems stemming from the oft-confounding regular rate determination, the revised regulations should provide some much-needed clarity and updated guidance to employers in their efforts to comply with the FLSA.

The revised regulations are quite lengthy. They:

- Clarify that payments for "paid time off" (PTO), when not worked, as well as payouts for unused PTO, need not be included in the regular rate, as this is pay for non-working time.
- Address an apparent contradiction in the current regulations on whether pay for "bona fide meal periods" is excludable from the regular rate. The DOL proposes to amend the regulations to remove the reference to "lunch periods" in 29 C.F.R. § 778.218(b) to "eliminate

any uncertainty about its relation to [Section] 778.320 concerning the excludability of payments for bona fide meal periods from the regular rate."

- Remove the word "solely" from the current regulations to clarify that an employee's reimbursable business expenses are excludable if they are incurred "in the furtherance of [the] employer's interests," even if they also might benefit the employee to some extent.
- Clarify what constitutes a "reasonable" expense within the meaning of 29 C.F.R. § 778.217(b) and excludable from the regular rate.
- Add a number of additional examples to the non-exhaustive list in the existing regulations of benefits excludable from the regular rate to include "conveniences furnished to the employee," such as on-site chiropractic treatment, massage therapy, physical therapy, and personal training services; gym, fitness, and recreational classes and memberships; modern "wellness programs" such as health screenings, vaccinations, smoking cessation support, and nutrition classes; discounts on employer-provided retail goods and services; and tuition benefits.
- Clarify that recent state and local laws, requiring "reporting pay" for employees who are unable to work their scheduled hours, because the employer subtracted hours from a regular shift before or after the employee reports to duty, will be treated as "show-up" pay under existing regulations. The DOL refers to proposed laws in Arizona, Connecticut, Illinois, Massachusetts, Maryland, New York, and Chicago.
- Eliminate the requirement that call-back payments be received only on an "infrequent" or "sporadic" basis for the exclusion to apply, although they cannot be "so regular that they are essentially prearranged." Similarly, the proposed regulations provide that predictability/scheduling pay (for failing to provide a certain minimum advance notice of the work schedule) and "clopening" pay (for failing to provide a certain minimum break between working a closing shift and the subsequent opening shift) — something recently enacted or proposed in several states — may be excluded from the regular rate of pay, so long as they too are not so regular that they are essentially prearranged.
- Seek to elaborate on the types of bonuses that are, and are not, "discretionary" and, therefore, excludable from the regular rate calculation.
- Add more examples of the types of modern benefit plans that may be excludable from the regular rate of pay.
- Remove language from the existing regulations to clarify when employers may exclude from the regular rate certain overtime premium payments made for hours of work on special days or in excess or outside of specified daily or weekly standard work periods.

Tip Pooling

In October 2019, the DOL issued a Notice of Proposed Rulemaking (NPRM), seeking to eliminate the "20% Rule" or "80/20 Rule," which first appeared in a DOL Field Operations Handbook (FOH) in 1988.

The 20% Rule, long a thorn in the side of hospitality employers and spawning substantial litigation, requires employers to pay tipped employees the full minimum wage, rather than the lower cash wage applicable to tipped employees, if the employees spend more than 20% of their time performing allegedly non-tipped duties. However, the DOL never defined what constituted tipped versus non-tipped duties.

The DOL abrogated the Rule in a November 2018 Opinion Letter and again in a February 2019 FOH amendment, but courts have since split on whether the DOL's latest guidance deserves deference. The proposed regulation seeks to elevate that guidance to the regulatory level and rescind the former regulation that was the genesis of the Rule.

The NPRM further seeks to implement changes made by the Consolidated Appropriations Act (CAA) of 2018 regarding tip pooling. The CAA prohibits employers, managers, or supervisors from keeping employees' tips, including from a tip pool, regardless of whether the employer takes a tip credit under the FLSA. It allows employers to mandate a tip pool that includes traditionally tipped (*e.g.*, servers and bartenders) and non-tipped (*e.g.*, cooks and dishwashers) positions if the employer does not pay the tipped employees using a tip credit (that is, the employee is paid the full minimum wage without any credit for tips). The proposed rule clarifies who is considered a "supervisor" or "manager" and, thereby, is excluded from receiving tips (regardless of whether a tip credit is taken).

Employers implementing policies regarding tipped employees also must consider state laws, which may provide different rules for tip credits or even disallow them altogether. The final rule likely will be released in 2020.

Joint Employer Standard

In April 2019, the DOL issued an NPRM to update its interpretation of the standard for establishing joint-employer liability under the FLSA.

Characterized as a "deregulatory proposal" by now-former Secretary of Labor Alexander Acosta, the proposed test for joint-employer liability would limit such liability to circumstances where the purported joint employer exercised direct or indirect control over an individual's terms and conditions of employment.

The NPRM proposes to replace the "not completely disassociated" test with one that focuses on "the potential joint employer's exercise of control over the terms and conditions of the employee's work" and, citing a longstanding U.S. Supreme Court decision, frames the primary question as whether the purported joint employer "exercises substantial control over the terms and conditions of the employee's work."

The DOL proposes a four-factor balancing test assessing whether the purported joint employer:

- Hires or fires the employee;
- Supervises and controls the employee's work schedules or conditions of employment;
- Determines the employee's rate and method of payment; and
- Maintains the employee's employment records.

Moreover, the DOL limits the test to "actions taken with respect to the employee's terms and conditions of employment, rather than the theoretical ability" to take such actions.

The new rule likely will be issued in 2020. If adopted by the courts, the proposed test should be welcome news for franchisors, staffing agencies, and other businesses that have faced uncertainty regarding their exposure to liability as joint employers under the FLSA.

Note: on January 12, 2020 the DOL issued its final rule, adopting the test set forth in the NPRM.

Fluctuating Workweek (FWW) Pay Method

Under DOL regulations, if certain conditions are met, an employer may pay an employee who works fluctuating hours a fixed salary for all hours worked, and then an additional half-time for all hours over 40, a number that decreases as the number of hours increases. Although DOL regulations expressly permit employers to use it, uncertainty regarding its requirements and the potential for litigation (particularly during the last 10 years) has limited employer use of the pay method.

In a NPRM issued in November 2019, the DOL intends to clarify that employers may provide additional pay, such as bonuses or premiums, to employees subject to the FWW method, even when the additional pay is tied to the number of hours worked, without jeopardizing the use of that pay method.

Since the current rule was issued in 2011, courts have reached inconsistent conclusions on whether such additional compensation is permitted under the FWW pay method. As a result, some courts have permitted so-called production bonuses, but not hours-based bonuses, under the FWW pay method, a distinction the DOL asserts in the NPRM it has never made.

In the NPRM, the DOL seeks to clarify that such bonuses, premiums, and other compensation, in fact, is permitted when using the FWW pay method, regardless of whether such compensation is hours- or performance-based. The final rule is expected in 2020. If the proposed rule is finalized, employers clearly will be able to further reward productive non-exempt, salaried employees eligible to receive such additional compensation. Thus, the rule not only should bring some clarity to the FWW method, but revive its use, which has waned in the years following the 2011 Rule.

Truck Drivers' Sleeping Berth Time Presumed Non-Compensable

In a welcome reversal of its prior guidance, on July 22, 2019, the DOL embraced the plain language of 29 C.F.R. § 785.41 and concluded that if a truck driver, or driver's assistant or helper, is completely relieved of duty and is provided with adequate sleeping facilities (including the truck's sleeping berth), the individual is not "working while riding" and, therefore, is not entitled to compensation for that time — regardless of how many hours a particular trip lasts or how much duty-free time is provided on that trip. DOL Wage & Hour Division Opinion Letter FLSA2019-10.

Admitting that its most recent prior guidance was "unnecessarily burdensome" on employers, the DOL withdrew five previous opinion letters and directly disagreed with recent judicial opinions that relied on the prior guidance, under which only up to eight hours of sleeping time could be excluded in a trip 24 hours or longer, and no sleeping time could be excluded for trips under 24 hours.

STATE UPDATES:

ALABAMA

Equal Pay Act

In June 2019, Alabama enacted the Clarke-Figures Equal Pay Act (CFEPA) to provide pay gender-based protections for employees. The CFEPA parallels the federal Equal Pay Act (EPA) in many respects, but, unlike the EPA, it also includes race as a protected classification. In addition, the CFEPA prohibits retaliation based on an applicant's failure or refusal to provide his or her wage history (although, requesting or receiving such salary information is not itself unlawful). The law applies to employers of all sizes. Recoverable damages under the CFEPA for a prevailing plaintiff are limited to the unlawful difference in wages, plus interest. Significantly, the CFEPA does not provide for recovery of other compensatory, liquidated, or punitive damages, or attorneys' fees, and requires an individual who prevails on separate claims under both the EPA and the CFEPA to return the lesser of the two recovered amounts. Finally, the CFEPA requires employers to adopt the recordkeeping requirements set forth in the FLSA's regulations, 29 C.F.R. Part 516.

CALIFORNIA

Independent Contractor Analysis Under the "ABC" Test

In 2019, the California legislature passed Assembly Bill 5, codifying and clarifying the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles County*, 4 Cal. 5th 903 (2018). In *Dynamex*, the Court adopted the "ABC" Test for determining whether an individual is an employee or independent contractor under the Industrial Welfare Commission (IWC) Wage Orders, abandoning, with limited exceptions, the multi-factor test established three decades ago in *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (1989). Under the ABC Test, to establish that an individual is, in fact, an independent contractor, an employer must prove that the person: (A) is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; (B) performs work that is outside the usual course of the hiring entity's business; and (C) is customarily engaged in an independently established trade, occupation, or business of the same nature as that involved in the work performed.

Reporting Time Pay Requirements Includes Telephonic Reporting

Historically, California's Wage Orders have required an employer to compensate its employees reporting time pay if the employees are required to report for work and, in fact, show up, but are then provided less than an established minimum number of hours of work or with no work at all. In *Ward v. Tilly's, Inc.*, 31 Cal. App. 5th 1167 (2019), the California Court of Appeal held that, in addition to reporting time pay for appearing at the workplace, employees may be entitled to reporting time pay if they are merely required to call in advance to confirm whether they are needed for a scheduled shift.

Expansion of Enforcement of Wage Penalties

Assembly Bill 673, passed in 2019, provides that, beginning January 1, 2020, workers may recover civil penalties through a private right of action for late payment of wages. The penalties are: (1) $100 for each failure to pay each employee for any initial violation; (2) $200 for each failure to pay each employee for each subsequent violation, or any willful or intentional violation; and (3) plus 25% of the amount unlawfully withheld. Assembly Bill 673 limits employees' recovery to statutory penalties or civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA), but not both, for the same violation.

Labor Commissioner's Authority Increased

Under Assembly Bill 688, effective January 1, 2020, the Labor Commissioner may issue a citation not only where an employer has failed to pay at least the minimum wage, but also where the employer has contractually promised to pay more than the minimum wage, but has failed to do so.

Unpaid Wages Not Recoverable under Private Attorneys General Act (PAGA)

Putting an end to employees' attempts to recover unpaid wages in PAGA-only actions under California Labor Code Section 558, the California Supreme Court ruled against allowing such claims. *ZB, N.A. v. Superior Court*, No. S246711 (Sept. 12, 2019). Because the unpaid wages provided for by Section 558 are not penalties and Section 558 does not contain a private right of action, plaintiffs may not recover their wages or any aggrieved employees' wages under Section 558 and PAGA. In so ruling, the court also resolved a split among the state's lower courts as to whether a PAGA claim, with a claim for unpaid wages under Section 558, could be compelled to arbitration.

Meal Period Premiums Do Not Trigger Derivative Liability for Penalties under Labor Code Section 203

In *Naranjo v. Spectrum Security Services, Inc.*, No. B256232 (Cal. Ct. App. Sept. 26, 2019), the California Court of Appeal ruled that actions to recover unpaid meal period premiums under Labor Code Section 226.7 do not automatically entitle employees to derivative claims for waiting time penalties or inaccurate wage statements.

Meal Period Premiums Payable at Employee's Base Rate

In *Ferra v. Loews Hollywood Hotel,* LLC, 40 Cal. App. 5th 1239 (Cal. Ct. App. 2019), the California Court of Appeal ruled that the correct rate for paying meal and rest period premiums is one hour of pay at the employee's base hourly rate, not the regular rate of pay used for calculating overtime wages.

COLORADO

Minimum Salary Increases for "White Collar" Exemptions

In November 2019, the Colorado Department of Labor and Employment (CDLE) issued a proposed rule, Colorado Overtime and Minimum Pay Standards (COMPS) 36, that will primarily expand coverage of the state's wage and hour laws to more employers and will increase the minimum salary requirement for the "white collar" (executive, administrative, and professional) exemptions on an annual basis over the next several years. Under the rule, which is expected to become final in January 2020, the minimum salary for these exemptions will increase to $42,500 beginning in July 2020. The minimum salary will increase $3,000 a year until it reaches $57,500 in 2026. Thereafter, the minimum salary will adjust annually by the Consumer Price Index currently used to annually adjust the state's minimum wage. The Colorado Department of Labor noted that the proposed salary increases were designed to eventually (as of 2025) parallel the levels adopted by the Obama administration, which later were declared unlawful by a federal district court and were rescinded by the current federal DOL.

Vacation Pay

In June 2019, the Colorado Court of Appeals held permissible an employer's policy disallowing payment of accrued but unused vacation pay if the employee was terminated or voluntarily quit without providing two weeks' notice. In direct response to the ruling, the CDLE, in proposed amendments to its Wage Protection Act Rules, stated, "Recent interpretations that unused vacation pay is forfeited upon employment separation is contrary to the text and legislative intent of the vacation pay statute." Under the CDLE's proposed revisions, the definition of "wage" or "compensation" would include "vacation pay earned in accordance with the terms of any agreement"; if an employer provides paid vacation, it must pay in accordance with the terms of any existing agreement or policy; and forfeiture of earned vacation is prohibited, with some permissible limitations. Those limitations include (1) whether there is any vacation pay at all; (2) the amount of vacation pay per year or other period; (3) whether vacation pay accrues all at once or accrues proportionally each week, month, or other period; and (4) whether there is an accrual cap of one year's worth (or more) of vacation pay.

Local Minimum Wage Rates Permitted

Repealing a 20-year-old prohibition, in May 2019, Governor Jared Polis signed legislation allowing local minimum wage ordinances, with certain restrictions. Under the new law, no more than 10% of Colorado's local jurisdictions may enact local minimum wage rates, any such rates cannot increase by more than 15% annually, and several adjoining communities may join to enact regional minimum wage rates. In addition, any jurisdiction enacting a local minimum wage rate must provide a tip credit for employees of any business "that prepares and offers for sale food or beverages for consumption either on or off the premises" equal to the tip credit provided in the state's constitution.

CONNECTICUT

In late 2019, the Connecticut Legislature passed House Bill No. 7501, "An Act Concerning the Workforce Training Needs in the State and Revisions to and Regulations of Gratuities Permitted or Applied as Part of the Minimum Fair Wage." The new law mandates that the state's minimum wage regulations incorporate the "80/20" or "20%" tip credit rule. Governor Lamont signed the bill on January 6, 2020, and it is now in effect.

The new law requires the state's Labor Commissioner to adopt new regulations regarding "employees who perform both service and nonservice duties and allowances for gratuities permitted or applied as part of the minimum fair wage," that is, traditionally tipped employees performing what commonly is referred to as "dual jobs." Significantly, the new law requires that those regulations incorporate the "80/20" or "20%" tip credit rule that was enforced by the U.S. Department of Labor under the FLSA until the DOL abandoned the rule in November 2018. The legislation also directs that the new regulations repeal current Section 31-62-E4 of the state's regulations. That section, as written, requires employers to segregate time spent on "service and non-service duties," but it fails to define or otherwise clarify what constitutes "service" and "non-service" duties.

Under the new law, the Labor Commissioner must post a notice of intent to adopt the new regulations no later than April 1, 2020. It also requires the Labor Commissioner to consult with representatives of the restaurant industry, restaurant employees, service employees, and "other interested stakeholders" before doing so. Following adoption of new tip credit regulations, the Commissioner must conduct random wage and hour audits of tipped workers in not less than 75 Connecticut restaurants and prepare a compliance report, to be issued within one year of the adoption of the new regulations and submitted to the joint standing committee of the General Assembly responsible for labor matters.

The new law also addresses the potential penalty damages a restaurant employee may recover if he or she proves a violation of the tip credit regulations. It also provides a "good faith" defense to the award of such damages. The law clarifies that a good faith belief "includes, but is not limited to, reasonable reliance on written guidance from the Labor Department."

Finally, on the rise of class actions involving the current tip credit regulations filed in state and federal court, the law provides that, effective from the bill's passage, an individual may not bring a class action premised on violations of the tip credit regulations, unless the individual satisfies the judicial rules of practice governing class action certification and can prove to the court that the proposed class members performed duties "that were not incidental to service duties ... *for more than a de minimis amount of time*" and were not properly compensated "for some portion of their nonservice duties."

HAWAII

Time Off for Voting No Longer Required

Due to Hawaii implementing all-mail balloting for elections, the Hawaii legislature repealed existing law that entitled employees to protected time off from work to vote.

ILLINOIS

Salary History Ban

Beginning on September 29, 2019, Illinois employers are barred from asking any applicant or interviewee about his or her salary or wage history. Employers also are prohibited from screening applicants based on salary or wage history and may not take past compensation into account when setting pay. The law does not prohibit employers from discussing an applicant's current expectations for compensation.

Predictable Scheduling Comes to Chicago

Beginning July 1, 2020, Chicago employers in several industries will face a host of new burdens and expenses in scheduling their employees. Employers in certain industries and that meet certain size thresholds will now have specific requirements for giving Chicago employees advance notice of their schedules, as well as any changes to their schedules. Employers will have to provide employees extra "predictability pay" when their schedules are changed on short notice, including changing dates and times of shifts, adding hours, cancelling shifts, or sending an employee home early on a shift. Employees will have the right to decline certain hours or shift changes that occur on short notice. These requirements will apply to hourly employees making at least $26 per hour and salaried employees making up to $50,000 a year.

New Expense Reimbursement Obligations

An amendment to the Illinois Wage Payment and Collection Act, effective January 1, 2019, requires Illinois employers to reimburse certain expenses and losses incurred by employees. It raises difficult questions as to whether Illinois employees must be reimbursed for items such as personal cell phones and home internet service.

$15 Minimum Wage Law

In February 2019, Illinois joined the list of states enacting a $15.00 per hour minimum wage law. Under the law, the hourly minimum wage increased to $9.25 on January 1, 2020, and will increase to $10.00 on July 1, 2020; to $11.00 on January 1, 2021; and an additional $1.00 per hour each January 1st thereafter, until reaching $15.00 on January 1, 2025. In addition to increasing the minimum wage, the law will increase the remedies available to employees who are paid less than minimum wage. Employees will be able to recover triple the amount of the underpayment; reasonable attorney's fees and costs; and an additional payment (effectively, interest) of 5 percent of the amount of the underpayment for each month it remains unpaid. In addition, employers will have to pay a statutory penalty of $1,500 to the Illinois Department of Labor Wage Theft Enforcement Fund and, on top of existing statutory penalties, the law will impose a penalty of $100 per each affected employee on an employer who fails to maintain proper payroll records. That penalty likewise will be paid to the Wage Theft Enforcement Fund.

INDIANA

Wage Deductions for Uniforms

In May 2019, the Indiana Legislature amended Indiana Code 22-2-6-2(b), which specifies the permissible reasons an employer may take a wage deduction from an employee. The revised language, which will apply retroactively to pending matters, makes clear that in addition to uniform purchases, employers may make wage deductions for the rental or use of uniforms or work-related clothing. Because the statute's language previously referred only to uniform purchases, plaintiff's attorneys had argued that employers who rented uniforms from a third party were taking improper deductions.

KENTUCKY

Extra Pay Under the Fluctuating Workweek Method

In *Sherwood v. Cook Out, Inc.*, (E.D. Ky. Aug. 22, 2019), the court found that incentive pay can be used in tandem with fluctuating work week (FWW) practices. The plaintiff, a manager for Cook Out, was paid a fixed salary under a fluctuating work week pay method, regularly was scheduled to work 50 hours a week, and was paid $8.00 per hour in "appreciation pay" for any hours worked in excess of 52.5 per week. The plaintiff claimed that these additional payments violated the "fixed salary" element of the fluctuating work week pay method. The court rejected his claim, noting that the plaintiff conflated additional overtime payments with salary variation and adding that the fixed salary requirement excludes consideration of overtime premiums, which is what the "appreciation payments" at issue were. As noted above, the DOL recently issued proposed changes to its FWW regulations, clarifying that such payments are in fact allowable under the FLSA.

MARYLAND

Equal Pay

In 2019, Maryland passed the Equal Pay Remedies and Enforcement Act, increasing the penalties for violations of Maryland's Equal Pay for Equal Work law. The new law authorizes the Commissioner of Labor and Industry or a court to require an employer that violates the Equal Pay for Equal Work law to pay civil penalties, on top of existing backpay remedies. A violating employer will be subject to a fine of up to $300. If the employer is found to have violated the law two or more times within a three-year period, it will be subject to an additional civil penalty equal to 10 percent of the amount of backpay damages owed.

Wage Statements

Maryland also passed the Wage Statements for Tipped Employees Act, directing the Maryland Commissioner of Labor and Industry to adopt a regulation that requires employers with tipped workers to provide a written or electronic wage statement for each pay period. The statement must shows the effective hourly tip rate as derived from the employer-paid cash wage plus all reported tips for tip-credit hours worked each workweek in the pay period.

Daily Rate Overtime Pay Method Approved

In Poe v. IESI MD Corp., 2019 Md. App. 1006 (Md. Ct. Spec. App. Nov. 20, 2019), the Maryland Court of Special Appeals (Maryland's intermediate appellate court) approved the application of the half-time overtime pay method for employees earning a daily rate under state law, 29 C.F.R. § 778.112. Because Maryland does not have a regulation that mirrors the federal regulation, the plaintiff argued that Maryland does not authorize use of the method in the FLSA regulation, which allows the employer to pay only the one-half overtime premium for hours worked in excess of 40 in a workweek, in addition to the daily rate. Because the Maryland Wage Hour Law (MWHL) is the state counterpart to the FLSA, the federal regulation is persuasive authority as to the correct interpretation of the MWHL.

MASSACHUSETTS

Tip Credits

As of January 1, 2019, employers who take a tip credit must calculate the difference between the service rate and earned tips at the completion of each shift worked by the employee to ensure the employee earned at least the full minimum wage for all hours worked when the service rate and earned tips are added together. The employer is required to add any amount due to the employee's next pay check.

Premium Pay

Also beginning on January 1, 2019, the premium pay rate for Sundays and certain holidays – extra pay applicable to certain businesses – was lowered from 1.5 times the regular rate to 1.4 times the regular rate. The premium rate will continue to be lowered by 0.1 annually until it is eliminated completely as of January 1, 2023. Thus, as of January 1, 2020, the premium rate for Sundays and holidays is 1.3 times the regular rate.

Inside Sales Employees Entitled to Overtime and Premium Pay

In *Sullivan v. Sleepy's LLC*, 2019 Mass. LEXIS 244 (Mass. May 8, 2019), the Massachusetts Supreme Judicial Court held that inside sales employees paid on a 100-percent commission basis are entitled to additional pay for overtime hours worked and for work on Sundays and certain holidays. The court held that commission payments, regardless of their amount, could not be credited toward overtime and premium pay for Sunday work. However, under Massachusetts law, commissions are excluded from calculation of the regular rate for purposes of calculating overtime. Therefore, these employees are entitled to separate and additional payments of one-and-one-half times the minimum wage for every hour the employee worked over 40 hours. For Sunday and holiday hours, the premium pay rate will change annually as described above until eliminated entirely in 2023.

The *Sleepy's* decision recognized that employers may have been relying on opinion letters that were potentially misleading. However, it did not specify whether its ruling applied retroactively. To date, the lower courts addressing the issue have held that the decision is retroactive. There is some chance that the legislature will revisit the issue. It has created a task force to review and provide recommendations on the current classification of inside sales employees paid solely by commissions, but it is unclear at this time what, if any, action the task force will take.

MINNESOTA

Wage Theft Act

As of August 1, 2019, Minnesota employers who commit "wage theft" may be found criminally liable. Under the Act, wage theft is defined broadly, to include any of the following if committed with "an intent to defraud":

- Failing to pay an employee all wages, salary, gratuities, earnings, or commissions at the employee's rate or rates of pay or at the rate or rates required by law, including any applicable statute, regulation, rule, ordinance, government resolution or policy, contract, or other legal authority, whichever rate of pay is greater;

- Directly or indirectly causing any employee to give a receipt for wages for a greater amount than that actually paid to the employee for services rendered;
- Directly or indirectly demanding or receiving from any employee any rebate or refund from the wages owed the employee under contract of employment with the employer; or
- Making or attempting to make it appear in any manner that the wages paid to any employee were greater than the amount actually paid to the employee.

The new law increases the authority of the Minnesota Department of Labor and Industry (MN DOLI) to conduct investigations of potential violations, including giving it the right to "interview in private non-management employees regarding the matter under investigation." The law includes $3.1 million in new funding over the next two years for MN DOLI's enforcement of the state's wage and hour laws.

Retaliation

Minnesota enacted a new law protecting employees from retaliation if they assert rights under the Minnesota Fair Labor Standards Act (Ch. 177) and the Minnesota Employment Code (Ch. 181). Further, "[i]n addition to any other remedies provided by law, an employer who violates this subdivision is liable for a civil penalty of not less than $700 nor more than $3,000 per violation."

Notice and Recordkeeping

As of July 1, 2019, Minnesota employers must comply with new notice and recordkeeping requirements.

First, employers must provide employees a written notice that includes the following:

1. The rate or rates of pay and basis thereof, including whether the employee is paid by the hour, shift, day, week, salary, piece, commission, or other method, and the specific application of any additional rates;
2. Allowances, if any, claimed pursuant to permitted meals and lodging;
3. Paid vacation, sick time, or other paid time-off accruals and terms of use;
4. The employee's employment status and whether the employee is exempt from minimum wage, overtime, and other provisions of chapter 177, and on what basis;
5. A list of deductions that may be made from the employee's pay;
6. The number of days in the pay period, the regularly scheduled pay day, and the pay day on which the employee will receive the first payment of wages earned;
7. The legal name of the employer and the operating name of the employer if different from the legal name;
8. The physical address of the employer's main office or principal place of business, and a mailing address if different; and
9. The telephone number of the employer.

The law further requires employers to keep a copy of the notice, signed by each employee acknowledging receipt of the notice. Employers also must provide employees written notice of any changes before the changes are effective.

Second, Minn. Stat. § 181.032(b), regarding employee earnings statements, was amended to require that employers include the following new information with the earnings statement provided to employees each pay period:

1. The hourly rate or rates of pay (if applicable) and basis thereof, including whether the employee is paid by hour, shift, day, week, salary, piece, commission, or other method;
2. Allowances, if any, claimed pursuant to permitted meals and lodging;
3. The physical address of the employer's main office or principal place of business, and a mailing address if different; and
4. The telephone number of the employer.

Third, Minnesota's general employer recordkeeping statute, Minn. Stat. § 177.30(a), was amended to require employers to maintain "a list of the personnel policies provided to the employee, including the date the policies were given to the employee and a brief description of the policies." All records required to be kept under Section 177.30(a) must be readily available for inspection by the commissioner upon demand. The records must be kept at the place where employees are working or kept in a manner that allows the employer to comply with this paragraph within 72 hours.

Timing of Wage Payments

Effective July 1, 2019, all wages (newly defined in the statute as "including salary, earnings, and gratuities") must be paid at least every 31 days. The law also requires employers to pay "all commissions earned by an employee at least once every three months." Minn. Stat. § 181.101. Significant to these wage payment changes is that employers may no longer rely upon the longstanding 15-day cap on a damage penalty for failure to pay wages following the employee's demand. Instead, there will be no limit to the penalty following a 10-day notice period. The law states, "This section provides a substantive right for employees to the payment of wages, including salary, earnings, and gratuities, as well as commissions, in addition to the right to be paid at certain times."

Minneapolis Minimum Wage Ordinance Upheld – For Now

In March 2019, the Court of Appeals of Minnesota (the state's intermediate appellate court) upheld a minimum wage ordinance enacted by the City of Minneapolis in 2017, providing for a higher minimum wage than that provided by state law. *Graco, Inc. v. City of Minneapolis*, 925 N.W. 2d 262 (Minn. Ct. App. 2019). In so holding, the court of appeals concluded that the Minnesota Fair Labor Standards Act (MFLSA) merely *prohibits* employers from paying less than the minimum wage established by the statute, rather than permitting them to pay the state minimum wage. The court of appeals further held, "MFLSA does not expressly prohibit a municipality from setting higher minimum wages, and it does not give the [state] commissioner *exclusive* authority to safeguard the state minimum-wage rates; it merely permits the commissioner to do so." Thus, despite the fact that the legislature had amended the MFLSA formula nine times since its enactment in 1973, and has set forth the procedures for establishing any future rate increases, the Court of Appeals was "not persuaded that this constitutes the all-encompassing regulations that Minnesota appellate courts have found to preempt local regulations."

The decision has been certified for review by the Minnesota Supreme Court.

Note: On January 20, 2020, the Minneapolis Supreme Court affirmed the decision of the Court of Appeals. Graco, Inc. v. City of Minneapolis, 2020 Minn. App. LEXIS 12 (Minn. Jan. 20, 2020). Thus, the Minneapolis minimum wage ordinance will remain in effect.

"Split Day" Pay Plans Prohibited Under State Law

In *In re Minnesota Living Assistance, Inc.*, 934 N.W. 2d 300 (Minn. 2019), the employer paid its employees using a "split-day" plan, meaning that an employee would be paid at a "regular" rate for the first 5.5 scheduled hours and at a premium rate of 1.5 times the regular rate for hours 5.5 through 16. The employer followed this pay plan even if an employee worked more than 48 hours, the overtime threshold under Minnesota state law. Following an order by the Commissioner of the Minnesota Department of Labor and Industry, the Minnesota Supreme Court held that the Minnesota Fair Labor Standards Act (MFLSA) prohibits such split-day plans. Further, the court held that even when an employer pays a premium rate for hours worked *before* 48 hours, the employer must use that premium rate when calculating the regular rate of pay for the payment of overtime over 48 hours in a workweek. The court reasoned the premium rate was not being paid for overtime hours, but for an employee's regularly scheduled hours.

NEBRASKA

Protections for Comparator Pay Inquiries by Employees

In April 2019, Governor Pete Ricketts signed LB217, adding a provision to the Nebraska Wage Payment and Collection Act that prohibits employers from retaliating against an employee because the employee "inquired, discussed or disclosed comparative compensation information for the purpose of determining whether the employer is compensating any employee in a manner that provide equal pay for equal work." Employees who have authorized access to wage information of other employees as a part of their job duties and who disclose such information in response to a charge or complaint or in furtherance of an investigation, proceeding, hearing, or other action, including an investigation conducted by the employer, are excepted from the law.

NEVADA

Under a bill signed into law in June 2019 by Governor Steve Sisolak, Nevada's minimum wage will increase to $12.00 per hour (or $11.00 for employees offered health insurance) by mid-2024. Beginning July 1, 2020, Nevada's current minimum wage rates of $8.25 (without health insurance) and $7.25 (with health insurance) will increase by $0.75 per hour to $9.00 and $8.00, respectively, and will increase annually at that same rate until reaching $12.00 (or $11.00) per hour on July 1, 2024. D.C.'s Economic Policy Institute estimates that about 300,000 Nevadans will be affected.

NEW JERSEY

Wage Theft Act

The Wage Theft Act (WTA) enhanced employer penalties under the state wage and hour laws and broadened liability for client-employers and labor contractors. The statute of limitations is six years for wage and hour claims. Employers are liable for liquidated damages in an amount up to 200% of the wages due an employee. If an employer fails to maintain records required under the law, there is a rebuttable presumption in favor of the employee. Moreover, there is a rebuttable presumption of retaliation if an employer takes an adverse action against an employee within 90 days of any conduct protected under the wage and hour laws. The Wage Collection Section of the New Jersey Department of Labor (NJDOL) has the authority to award claims of up to $50,000 (previously, $30,000) and may litigate retaliation claims. Employers are required to provide current and newly hired employees a notice of rights under the state wage and hour laws, which includes an explanation of how an employee may file claims. Although the NJDOL is responsible for preparing the notice, the NJDOL had not issued the notice as of the end of 2019.

Task Force Issues Report on Employee Misclassification Issues

In 2019, the New Jersey Task Force found misclassification to be "prevalent" in construction, janitorial services, home care, transportation, trucking and delivery services, and other labor-intensive low-wage sectors in which employers can gain a competitive advantage by driving down payroll costs. The Task Force made 10 recommendations to address the issue: (1) education and outreach; (2) strengthen public contracts; (3) coordinated enforcement; (4) interagency data sharing; (5) cooperation among states; (6) interagency cross-training; (7) criminal prosecution; (8) enforce workers' compensation laws; (9) use the DOL's Stop Work Powers; and (10) advocate for new legislation.

$15 Minimum Wage Act

In February 2019, New Jersey joined the ranks of states passing a $15.00 per hour minimum wage bill. Under the New Jersey law, the state's minimum wage rose to $10.00 per hour on July 1, 2019. It will rise to $11.00 per hour on January 1, 2020; and an additional $1.00 per hour on January 1st of each successive year until reaching $15.00 per hour in 2024. Each year thereafter, based on state constitutional provisions, the minimum wage may increase further depending on the national Consumer Price Index. The New Jersey law does carve out any exceptions, such as for seasonal employers and small employers (those with up to five employees), but most of those exceptions merely extend by a few years the schedule for implementing the $15.00 minimum.

NEW YORK

Minimum Wage and Exempt Salary Increases

While the minimum wage in New York City will remain at $15.00 per hour (for both small and large employers) in 2020, and is not currently subject to further increases, the minimum wage in other parts of the state will increase. The minimum wage for Long Island and Westchester increases from $12.00 to $13.00 per hour (with the maximum of $15.00 in 2022) and from $11.10 to $11.80 for the remainder of New York State (with the maximum of $12.50 in 2021).

The salary level for salaried exempt employees also increases for Long Island and Westchester, from $900 per week to $975 per week, and from $832 to $885 in the rest of the state. New York City remains at $1,125 per week.

Elimination of the Tip Credit

One of the biggest developments in New York on the wage and hour front occurred on the last day of the year. On December 31, 2019, the Commissioner of the New York State Department of Labor (NYSDOL) issued an Order providing that 2020 will be the last year employers who employ tipped employees outside the hospitality industry will be permitted to pay employees using a tip credit (i.e., pay such employees a rate below the minimum wage and take a "credit" for tips received by them to satisfy the state minimum wage requirements). Beginning in 2021, employers covered by the state's Miscellaneous Industries and Occupations Wage Order will be required to pay all employees the full minimum wage, without any credit for tips employees receive. Rather, tipped employees will be permitted to receive the full minimum wage directly from the employer and retain all tips. The tip credit will first be reduced by 50 percent on June 30, 2020, and then eliminated entirely on December 31, 2020. This change means that employees in car washes, nail salons, and parking garages, among other establishments, will be receiving a pay hike. Be on the lookout for increased prices (or greater automation) at your next car wash. The Order does not affect wages payable to tipped employees in restaurants and hotels, where employers may still – for now – pay employees a reduced cash wage and take a credit for tips received by employees. In New York City, for example, the current minimum wage is $15.00, but minimum cash wage payable to tipped employees is $10.00. Under federal law, the cash wage payable to tipped employees is $2.13 per hour.

Salary History Ban

Beginning January 6, 2020, employers in New York State may no longer request that job applicants provide wage or salary history or rely on prior salary history in determining whether to offer employment or determining the salary offered. Traditionally, if an interview was going well, it might end with the proverbial question, "What are you making now?" This allows the employer to gauge how much more it might take to attract the candidate. No longer. Finding that such inquiries contribute to a gender gap in pay, which compounds over time, New York has banned such inquiries. The law, however, permits applicants to voluntarily disclose their salary history information, if done so without prompting from the prospective employer. And, if an applicant voluntarily and without prompting discloses salary history information, the employer may factor in the information to determine the salary to offer that person. An employer also may still ask applicants for their salary expectations for the position. This statewide law is similar to earlier legislation passed in New York City and some other New York counties.

Lien Law for Wage Theft Vetoed

On the last day of the year, Governor Andrew Cuomo vetoed a bill that would have allowed a current or former employee (or the New York State Department of Labor), alleging "wage theft" by an employer, to place a lien on the employer's interest in real or personal property for the value of the wage claim plus liquidated damages. The bill was passed by the New York legislature earlier in 2019. For employers operating in New York, the reprieve may be brief. In his memorandum vetoing the bill, Governor Cuomo made clear that he intends to propose replacement legislation in 2020 to allow victims of wage theft to use "any and all assets, even personal assets, of the bad actor" to satisfy a judgment. The Governor noted that his administration has been aggressive when it comes to providing wage theft protections for vulnerable employees, but he was concerned that the due process issues inherent in the vetoed bill might lead a court to find it unconstitutional.

Labor Department No Longer Pursuing Call-In Pay or Predictive Scheduling Regulations

In 2019, the NYSDOL abandoned plans to enact regulations on "call-in pay," or predictive scheduling. The regulations would have required employers, among other things, to provide call-in pay (ranging from two-to-four hours at the minimum wage) if the employer did not provide non-exempt employees 14 days' advance notice of their work shift; canceled employee shifts without at least 14 days' advance notice; required employees to work "on-call"; or required non-exempt employees to report to work but then sent them home. The NYSDOL will leave employee scheduling to be determined by employees and employers, at least for now.

OHIO

Salary Inquiry Bans

The cities of Cincinnati and Toledo enacted regulations prohibiting current or prospective employers from asking about an individual's salary history. Cincinnati Ordinance 83 prohibits employers with at least 15 employees from asking applicants about their salary history or current earnings; screening applicants based on wages or benefits; relying on salary history in hiring decisions or in determining compensation; and refusing to hire or otherwise retaliate against an applicant who refuses to provide salary history. Ordinance 83 provides an exception for employers to engage in discussions with applicants about their expectations with respect to salary, benefits, and other compensation.

In addition to the salary inquiry ban, under Ordinance 83, an employer must provide the pay scale for the position offered upon reasonable request from an applicant who has received a conditional offer of employment. Ordinance 83 also excepts internal transfers or promotions; employee positions for which salary, benefits, and other compensation are subject to a collective bargaining agreement; and an applicant's voluntary and unprompted disclosure of salary history information.

Individuals alleging violations of the Ordinance 83 may bring a private suit, with potential remedies that include compensatory damages, attorneys' fees and costs, and other legal and equitable relief.

Toledo Ordinance 173–19 prohibits employers with at least 15 employees from asking applicants about their salary history or current earnings; screening applicants based on wages or benefits; relying on salary history in hiring decisions or in determining compensation; and refusing to hire or otherwise retaliate against an applicant who refuses to provide salary history. An employer will not be liable for an individual's voluntary, unprompted disclosure of salary information, but it may not use such information in determining whether to offer the applicant employment or in determining the applicant's compensation.

Ordinance 173–19 includes several exceptions. Employers may discuss compensation expectations with applicants. The Ordinance does not cover current employees who apply for an internal transfer or promotion with their current employer or former employees who are re-hired by the employer within five years of the applicant's separation date, provided the employer kept the former employee's salary history data.

In addition to the salary inquiry ban, under Ordinance 173–19, an employer must provide the applicable pay scale for the position offered upon request from an applicant who has received a conditional offer of employment. The Toledo Ordinance becomes effective on July 4, 2020.

OREGON

Oregon Equal Pay Act

The Oregon Equal Pay Act extends pay equity protections to a variety of protected classes, prohibits employers from requesting applicants' salary history, and expands existing remedies available to employees. The Act was passed in 2017, although many of its provisions, including the expansion of protected classes and posting requirements, went into effect on January 1, 2019.

The provision prohibiting employers from seeking salary history went into effect in 2017, although civil actions against employers who seek salary history are not permitted until January 2024.

Predictive Scheduling Notice Period Increased

Effective January 1, 2020, Oregon's predictive scheduling law requires covered employers to provide schedules with at least 14 calendar days' notice (up from seven calendar days). This increase, under Oregon SB 828, passed in 2017. Additionally, the private right of action portion of the predictive scheduling law went into effect on January 1, 2019, permitting employees to file an agency charge or civil lawsuit to address perceived violations.

Wage and Hour Court Decisions

The Oregon Court of Appeals decided two cases in 2019 with significant wage and hour implications for employers. In *Maza v. Waterford Operations, Ltd. Liab. Co.*, 300 Or. App. 471 (Or. Ct. App. 2019), the Court of Appeals interpreted OAR 839-020-0050 (requiring employers to provide "a meal period of not less than 30 minutes during which the employee is relieved of all duties") as establishing a mandatory 30-minute meal period, such that "if an employee is not relieved of all duties for the prescribed minimum 30-minute meal period, OAR 839-020-0050(2)(b) requires that the employer pay the employee's wages for [the entire 30-minute] period of time."

In Mathis v. St. Helens Auto Ctr., Inc., 447 P.3d 490 (Or. Ct. App. 2019), the Court of Appeals held that Oregon's offer of judgment rule (ORCP 54 E) can serve to cut off a prevailing party's attorney's fees in wage claims under ORS 652.200(2).

PENNSYLVANIA

Fluctuating Workweek Pay Method Unavailable

The Pennsylvania Supreme Court held that the Fluctuating Workweek (FWW) pay method calculating overtime, an acceptable practice under the FLSA, is unlawful under the Pennsylvania Minimum Wage Act. *Chevalier v. GNC*, 2019 Pa. LEXIS 6521 (Pa. Nov. 20, 2019).

Predictive Scheduling

Pennsylvania's Fair Workweek Employment Standards Ordinance will go into effect in April 2020. This predictive scheduling law requires employers in certain industries to provide employees advance notice of work schedules. It also requires employers in these industries to give employees predictability pay for specified schedule changes occurring without sufficient notice. The law also requires employers to provide a minimum number of hours off between shifts and priority when scheduling open shifts.

SOUTH CAROLINA

Wage Notice Requirements

The South Carolina Payment of Wages Act requires seven days' advance written notice of a change in employee wages. In this respect. The South Carolina Court of Appeals concluded that a text is sufficient to establish such written notice. *Gould v. Worldwide Apparel LLC*, 2019 S.C. App. Unpub. LEXIS 263 (Ct. App. S.C. July 17, 2019).

Ongoing Failure to Pay a Past Bonus Does Not Constitute "Continuing Violation"

In *Doyle v. Horry County*, 2019 S.C. App. Unpub. LEXIS 309 (Ct. App. S.C. Aug. 28, 2019), the South Carolina Court of Appeals rejected a plaintiff's contention that he had timely commenced an action predicated on the alleged wrongful termination of a bonus plan, because each year in which he failed to receive a bonus constituted a continuing violation. The court instead found that the employer had committed a *single* wrong with continuing *effects* and the statute of limitations ran from the first date on which the plaintiff knew or should have known of the wrong.

TENNESSEE

IRS Test Applied to Independent Contractor Analysis

Rejecting the strict test adopted by the California Supreme Court and an appellate court in its own state, the Tennessee legislature passed, and on May 10, 2019, Governor Bill Lee signed, a law adopting the 20-factor test used by the Internal Revenue Service when undertaking the employee-versus-independent contractor analysis. Under the new law (H.B. 539), which became effective January 1, 2020, those sections of the Tennessee Code setting forth the obligations of employers, and the rights of employees, under state law will apply only "if the individual performs services for an employer for wages and the services performed by the individual qualify as an employer-employee relationship with the employer based upon consideration of the [] twenty (20) factors as described in . . . Internal Revenue Service Revenue Ruling 87-41, 1987-1 C.B. 296."

VIRGINIA

New Pay Statement Requirements

Virginia Code § 40.1-29 was amended in 2019 to require employers to provide employees with a written statement, by paystub or online accounting, showing the name and address of the employer, the number of hours worked during the pay period, the rate of pay, the gross wages earned by the employee during the pay period, and the amount and purpose of any deductions. However, an employer engaged in agricultural employment, including agribusiness and forestry, is only required to provide a written statement of the gross wages earned by the employee during any pay period, the amount and purpose of any deductions upon request of the employee. The amendment went into effect on January 1, 2020.

The Virginia Department of Labor and Industry (DOLI) announced, "The law applies to all employees, even those who are not paid on an hourly basis, such as salaried and piece work employees." However, the DOLI added that it will not begin to enforce the requirement as to these employees until July 1, 2020, and that the enforcement policy will apply only to the hours-of-work requirement and not to any of the other provisions of Section 40.1-29.C.

Production of Personnel Records

Effective July 1, 2019, new Virginia Code § 8.01-413.1 requires all Virginia employers to provide copies of employment records to employees upon written request. Records reflecting dates of employment, wages or salary during employment, job description and job title, and any injuries sustained by the employee during employment must be provided within 30 days of receipt of a written request from a current or former employee or the employee's attorney. If the 30-day obligation cannot be met, then the employer must provide written notice of the delay and produce the records requested within 30 days of the notice. Failure to comply can result in a subpoena being issued for the records and possible damages, including expenses such as court costs and attorney's fees.

However, an employer will not be required to produce the personnel record if there is a written statement included in the employee's records by the employee's treating physician or clinical psychologist that, in his or her professional opinion, furnishing the records or allowing the employee to review the records would reasonably endanger the life or physical safety of the employee or another person, or that the records reference another person and access to the records would reasonably cause substantial harm to the referenced person. The latter provision does not include a healthcare provider. If an employee's records contain such statements and an employee requests the record, then the employer must produce the records within 30 days of the request to the employee's attorney or authorized insurer. The employer may not furnish the records to the employee.

Misclassification Task Force

In August 2018, Governor Ralph Northam signed an Executive Order establishing an interagency taskforce on worker misclassification and payroll fraud, which he reauthorized on August 8, 2019. On November 22, 2019, the taskforce released its report made 11 recommendations, including, in part, that penalties should be substantial enough to deter misclassification and apply even when an employer received advice, consultation, or counsel to engage in worker misclassification as a "business model." It also recommended that legislation be enacted to provide for a private cause of action against an employer for recovery of damages for misclassification and provide "whistleblower protection" for those who report suspected misclassification or other workplace fraud. Finally, it recommended that bidders be debarred for graduated periods of time, based upon repetition or severity of violations, from bidding on and receiving awards of contracts under the Virginia Public Procurement Act (VPPA) when the bidder is found to have violated requirement of proper worker classification.

WASHINGTON

Minimum Salary Increases for "White Collar" Exemptions

The Washington Department of Labor and Industries issued a new rule modifying the minimum salary level for the "white collar" (executive, professional, and administrative) exemptions. The change goes into effect in July 2020 and is tiered based on a 50-employee threshold. The salary level will be adjusted annually based on the Consumer Price Index for Urban Wage Earners and Clerical Workers.

The below chart shows the new salary level for 2020, as well as an estimate of how the salary level is expected to change over the next eight years. The actual figures will be published on September 1 of each year for the following year. See https://www.lni.wa.gov/forms-publications/F700-207-000.pdf

Date	Employers with 1-50 Employee	Employers with 51 or more Employees
July 1, 2020	$675/week ($35,100/year)	$675/week ($35,100/year)
January 1, 2021	$827/week ($43,004/year)	$965/week ($50,180/year)
January 1, 2022	$986/week ($51,272/year)	$986/week ($51,272/year)
January 1, 2023	$1,008/week ($52,146/year)	$1,152/week ($59,904/year)
January 1, 2024	$1,177/week ($61,204/year)	$1,177/week ($61,204/year)
January 1, 2025	$1,202/week ($62,504/year)	$1,353/week ($70,356/year)
January 1, 2026	$1,382/week ($71,864/year)	$1,382/week ($71,864/year)
January 1, 2027	$1,412/week ($73,424/year)	$1,569/week ($81,588/year)
January 1, 2028	$1,603/week ($83,356/year)	$1,603/week ($83,356/year)

Pursuant to the new regulations, Washington will be increasing the required hourly compensation for the computer professional exemption, as outlined below:

Date	Employers with 1-50 Employee	Employers with 51 or more Employees
July 1, 2020	$37.13/hour	$27.63/hour
January 1, 2021	3.5 X WA Min. Wage ($47.25 + CPI increase)	2.75 X WA Min. Wage ($37.13 + CPI increase)
January 1, 2022	3.5 X WA Min. Wage ($47.25 + CPI increase)	3.5 X WA Min. Wage ($47.25 + CPI increase)

Workweek Averaging Permitted, Separate Pay for "Non-Productive" Time Not Required, for Non-Agricultural, Piece Rate Employees

In 2018, the Washington Supreme Court held that employers who pay agricultural workers on a piece-rate basis must pay the employees a separate, hourly amount for "non-productive time" spent performing activities that are outside the scope of the piece-rate work, *e.g.*, loading equipment, washing trucks, and so on. In 2019, the Washington Supreme Court declined to extend that requirement to non-agricultural employees, holding that workweek averaging was permissible for such employees and that they did not have to be paid on a separate, hourly basis for non-productive time. *Sampson v. Knight Transp., Inc.*, 448 P.3d 9 (2019).

WEST VIRGINIA

Wage Payments from Prime Contractors

In 2019, the West Virginia legislature passed HB 2049, amending the West Virginia Wage Payment and Collection Act as it relates to a prime contractor's responsibility for wages and benefits. Under that statute, an employee of a subcontractor may seek repayment of wages and benefits from the prime contractor. The amendment addresses belated claims where the prime contractor, with no prior notice, is subject to suit long after a construction project ends due to the failure of a subcontractor to pay its employees. The law provides that, if an employee writes a letter to his employer about wage or benefit payments, the employer has seven days to respond and the issue can be resolved without the employer paying legal fees. If the employer fails to respond, the employee can still file a lawsuit and get his or her legal bills paid. The law also states that an employee must notify the prime contractor within 100 days of being notified by a statement or other means that wages or benefits were not paid. Once the prime contractor is notified, the employee has one year to file suit and must produce proof (*e.g.*, pay stubs, bank statements) to show missing wages and benefits.

Overtime Pay for Seasonal Employees

The West Virginia legislature amended the Wage Payment and Collection Act to change overtime pay requirements for seasonal employees at amusement parks. The amended definitions section of the statute exempts seasonal amusement park workers from receiving overtime pay, specifically, "season employee[s] of an amusement park … [who] work[] less than seven months in any one calendar year."

WISCONSIN

The Wisconsin Supreme Court has held that under state law, employers do not need to pay employees for routine commute time while driving company-provided vehicles from their homes directly to job sites. *Kieninger v. Crown Equipment Corp.*, 924 N.W.2d 172 (Wisc. 2019). Because the law clearly establishes that an employee's commute from home to work and back is not compensable, the court found that doing so in a company-provided vehicle, even carrying tools to perform the job, does not change that characterization. However, the court distinguished situations where an employee must first drive from home to an employer-designated meeting place to pick up tools prior to driving to the final work site. Where there is a mandatory two-leg journey, the second leg from the employer-mandated meeting place to the job site is compensable.

Thank you for your interest in the

2019 Wage & Hour Developments: A Year in Review.

Contact

Jeffrey W. Brecher

Principal
New York Metro
Long Island
(631) 247-4652
Jeffrey.Brecher@jacksonlewis.com