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Employing Insurance to Protect You From Wage & Hour Suits In Light of Updated Regulations

Posted on July 11, 2016

By Samantha R. Miller

In 2014, we reported that wage and hour lawsuits—claims in which employees and companies dispute the amount owed to an employee or class of employees for overtime work—had increased 432 percent over the last two decades.

Unfortunately for companies, the trend continues. According to Norton Rose Fulbright's 2015 benchmarking survey, labor and employment suits were among the top five categories of litigation that companies faced during 2015.[1]

Further, the Department of Labor ("DOL") may just have exacerbated this trend by instituting updates to employee overtime regulations. The DOL has recently updated the regulations (the "Final Rule") governing the exemption of certain employees, particularly "white collar" employees, from the overtime pay protections of the Fair Labor Standards Act ("FLSA").

Among other things, without "intervening action" by their employers, the Final Rule will extend the right to pay overtime to an estimated 4.2 million workers who are currently exempt from overtime pay requirements.[2] More specifically, companies with exempt "white collar" employees either will have to reclassify those employees as non-exempt (and thus face hefty payments for their overtime work) or increase their salaries from $23,660 annually to $47,476 annually to continue their exemption.[3] Similarly, the threshold salary for exempt "highly compensated" employees is increasing from $100,000 per year to $134,000 per year.[4]

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[1] *See* http://www.nortonrosefulbright.com/news/128691/norton-rose-fulbright-releases-2015-litigation-trends-annual-survey.
[2] *See* http://www.law360.com/articles/803098/how-auto-dealers-can-prep-for-dol-s-new-overtime-rules.
[3] *See id.*
[4] *See id.*

For businesses with white collar workers, this translates to total annualized cost increases of approximately $295 million per year over the first 10 years of the Final Rule.[5] Furthermore, employers who willfully violate the FLSA's minimum wage and overtime payment requirements may be subject to payment of back wages, liquidated damages, attorney's fees and costs, and civil fines, among other things.[6]

Of course, avoiding wage and hour claims through best employment practices is the most ideal strategy for employers. Businesses should seek assistance from employment counsel regarding such practices, as specific guidance on compliance with the Final Rule is beyond the scope of this blog post.

However, regardless of how good a business's practices are, some claims are inevitable, as recent history demonstrates, and an employer's insurance policies are a powerful tool in minimizing the financial impact of such claims. Therefore, in order to fully protect a business from the financial consequences of potential litigation, an employer should consider how its current insurance portfolio will respond to wage and hour claims.

Coverage for employment suits such as wage and hour claims typically is encompassed within so called employment practices liability ("EPL") coverage. For public companies, EPL coverage is most often found in stand-alone EPL policies. Private companies usually have an EPL section in their director and officer (D&O) liability policies.

Despite the presence of such EPL coverage, insurers regularly deny coverage for wage and hour claims, citing (1) an exclusion or public policy that purports to prohibit recovery for the costs of restitution (i.e., the return of wrongfully withheld wages), and/or (2) FLSA exclusions that typically bar coverage for "alleged violations of the [FLSA] . . . or any similar federal, state or local statute."

But courts have reached differing conclusions on these two issues based on nuanced distinctions in policy language, including the precise language of FLSA exclusions. *Compare Republic Franklin Ins. Co. v. Albemarle Cnty. Sch. Bd.*, 670 F.3d 563 (4th Cir. 2012) (finding that employer's obligation to pay attorney's fees or liquidated damages under FLSA would constitute covered losses from wrongful acts within the meaning of the policy and rejecting insurer's argument that liquidated damages are restitutionary in nature); *PHP Ins. Serv., Inc. v. Greenwich Ins. Co.*, No. 15-CV-00435-BLF, 2015 WL 4760485, at *1 (N.D. Cal. Aug. 12, 2015) (finding, *inter alia*, insurer had duty to defend underlying class action lawsuit involving labor violations and denying insurer's summary judgment motion as to insured's breach of contract and bad faith claims); *California Dairies Inc. v. RSUI Indem. Co.*, 617 F. Supp. 2d 1023, 1028 (E.D. Cal. 2009) (finding policy's FSLA exclusion applied to some, but not all, of the allegations against insured) *with New Hampshire Ball Bearings Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 2014 WL 935120 (C.D. Cal. Mar. 10, 2014) (court did not reject, but rather distinguished, *California Dairies* based on narrower language of FLSA exclusion in that case). Further, wage and hour suits typically include multiple claims brought under different legal and factual theories, including claims under state law. Exclusions may bar coverage for some, but

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[5] *See id.*

[6] *See* http://www.jdsupra.com/legalnews/dol-s-new-overtime-rule-what-employers-90703/.

not all, of these various claims. *See California Dairies Inc.*, 617 F. Supp. 2d 1023. Although this may seem to be only a partial victory, it is critical because in most jurisdictions, even if one claim in an underlying suit is potentially covered, the insurer must cover the costs of defending the entire suit. Given that litigation costs often can be as, or even more, substantial than ultimate settlements and judgments in wage and hour suits, this complete coverage for defense costs is highly valuable.

Moreover, today, companies may purchase specific wage and hour coverage endorsements to their policies. For example, sample language may cover "the Costs, Charges and Expenses of the Insureds which the Insureds have become legally obligated to pay by reason of a Wage and Hour Claim first made against the Insureds during the Policy Period . . . for a Wage and Hour Wrongful Act taking place prior to the end of the Policy Period." In addition, "Wage and Hour Wrongful Act" in such endorsements may be defined to include "any actual or alleged violation of: (a) the FLSA or any other similar federal, state, or local laws or regulations . . . ." However, such specific wage and hour policy provisions have inherent limitations; such endorsements vary and are not all created equal. For example, these types of provisions may be available only to larger companies such as those with more than 4,000 employees; or, the endorsements may cover only defense costs.

In sum, policyholders should not accept insurer denials at face value. Instead, employers should work with insurance professionals to ensure that all facts, circumstances, and nuances in policy language are reviewed and analyzed to maximize their insurance coverage, which can be a valuable corporate asset.