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General Counsel Report

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Look for New Overtime Rules in 2019

As announced here, the U.S. Department of labor will issue a Notice of Proposed Rulemaking (NPRM) in early 2019 to determine the updated base salary level for exempt executive, administrative and professional employees. As a reminder, the proposal will replace the Obama administration's proposed minimum salary level of $47,476 and update the current minimum salary of $23,660.

At this point, the new rules are a year away. However, for most employers, the problems created by the white color exemptions are already here. Let me explain.

The standard rule under the FLSA is that all employees must be paid minimum wage and overtime. The FLSA and state wage and hour laws have carved out some exemptions from this general rule. One of these exemptions is for what are known as "white collar" employees. To be exempt under the white collar exemptions, employees must satisfy three criteria:

- First, they must be paid on a salary basis, and that salary must not be reduced based on the quality or quantity of the employee's work;
- Second, the employee must be paid at least a minimum salary level, which is currently $455 per week or $23,660 annually; and
- Third, the employee's primary job duties must involve the kind of work associated with exempt executive, administrative, or professional employees (the "duties test").

When employers are fined under a wage and hour audit or find themselves the subject of a wage and hour lawsuit, more often than not it is because they failed to pay their exempt employees their salary for any week in which the exempt employee performed work, or because their exempt employees were improperly classified as exempt to begin with. These risks are present now.

As we saw in 2016, over the coming year employees will be paying attention to this issue, and employers will be under greater scrutiny. Proactively auditing your exempt employees now to determine whether they are properly classified as exempt and ensuring you are paying them on a salary basis will leave you in a much better position to address the minimum salary levels when the DOL releases the NPRM. We can help.

No More Class Actions?

This past Monday, a divided United States Supreme Court dropped a bomb, holding that an employer can require its employees to agree to individual arbitration and waive their right to participate in class or collective action. The Court's 5-4 decision resolved three different cases (from the fifth, seventh, and ninth circuit courts) with similar facts. In each case, the employer and employee entered into a contract in which the employee agreed to individual arbitration as his/her sole recourse for resolving an employment dispute. However, in all three cases, the employees brought class action lawsuits against their employers.

The employees argued that the Federal Arbitration Act ("FAA"), which generally requires that courts enforce agreements to arbitrate, contains an exception. The exception, they argued, indicates that arbitration agreements are not to be enforced if the agreement violates federal law. Here, the employees asserted that the agreements violated the National Labor Relations Act ("NLRA"), which protects employees' rights to participate in concerted activity or Section 7 rights.

The Court disagreed with the employees and with the findings of circuit courts across the country. In its opinion, delivered by newly appointed Justice Gorsuch, the Court indicated that the laws do not conflict. Rather, he writes: "Far from conflicting, the Arbitration Act and the NLRA have long enjoyed separate spheres of influence and neither permits this Court to declare the parties' agreements unlawful." The FAA makes arbitration agreements enforceable. The NLRA affords employees a right to unionize and bargain collectively. The NLRA addresses workplace rights. It doesn't, the Court opined, speak to how legal disputes must be handled when they leave the workplace.

Should Employers Require Arbitration Agreements? Gorsuch begins his opinion with a similar question. He concludes that while "the law is clear," the policy is "debatable." There are numerous pros and cons to consider, including:

- Arbitration typically results in quicker resolution of claims;
- Arbitration fees can be costly and, in some states, must be paid solely by the employer;
- Arbitration outcomes can be more predictable because the matters are not determined by a jury;
- When prohibited from filing class actions, numerous individual employees may file numerous individual arbitrations, making defense costly and burdensome;
- Arbitration decisions can be difficult to appeal;
- Arbitration may feasibly be kept confidential.
- Should Employers Require Arbitration Agreements? Gorsuch begins his opinion with a similar question. He concludes that while "the law is clear," the policy is "debatable." There are numerous pros and cons to consider, including:

It's also important to understand that:

- Arbitration agreements may be unenforceable based on state law;
- The FAA does not apply to all employees;
- Employee relations downsides may outweigh benefits.

As is often the case, this ruling presents opportunities and pitfalls for employers. If you would like assistance in determining your organization's strategy, or in reviewing existing or new arbitration agreements, we can help.

Proceed with Caution When Deducting from Pay

At least once a week, I receive a question from a client asking whether a deduction can lawfully be made from an employee's paycheck. Especially for employers who operate in multiple states, navigating the federal and state wage and hour laws that govern deductions can be challenging and can limit an employer's ability to consistently implement and enforce paycheck deduction polices for employees nationwide. This week's WWYLD illustrates the complexity employers face.

Question: We have an employee resigning. We offer company accounts to employees that may be used to purchase products we sell. We offer this benefit to all employees and set up weekly payroll deductions. The terminating employee has a balance due of $60. Do we have an issue deducting this from her final paycheck? Also, we deduct for uniforms provided but lost or destroyed. Any issues with this?

Federal Law

Generally, under the Fair Labor Standards Act ("FLSA"), deductions from regular or final paychecks are permissible as long as the deductions do not cause the employee's pay to drop below minimum wage. Therefore, under Federal law, it is permissible to deduct the cost of the unreturned uniforms as long as the deduction does not bring the employee's pay below minimum wage.

There are certain deductions that can be made that take the wages below minimum wage owed. One such deduction is for repayment of loans and cash advances. The other is for contributions to funds established for the benefit of employees. Under federal law, you could deduct the $60, even if that brings the employee's pay below minimum wage, because that $60 is to repay a loan/advance.

State Law

But, before we determine whether we can permissibly deduct from this employee's paycheck, we must look to the law of the state in which the employee works. Many states have wage and hour laws that are far more restrictive on employers than the Federal FLSA.

For example, if this employee worked in:

Massachusetts: In Massachusetts, it's unlawful to charge an employee for her uniform. So, that cost could not be deducted from a MA-based employee's paycheck. Massachusetts also treats the deduction for the loan differently. Massachusetts courts have stated that a deduction "where there is proof of an undisputed loan" is permissible as long as it does not bring the employee's pay below minimum wage.

Iowa: Iowa law states that wages cannot be withheld unless required by law/court order or at the written authorization of the employee. Even with written authorization, an employer cannot withhold wages related to:

- Cash shortages in common money till (with certain limited exceptions)

- Losses due to breakage, damage, acceptance of bad checks, and default of customer credit unless the employee abused the discretion afforded to him/her by the employer or the loss is caused by the employee's willful and intentional disregard for the employer[1]s property
- Lost or stolen property unless the property is equipment specifically assigned to, and receipt acknowledged in writing by, the employee from whom the deduction is made

Under Iowa law, as long as the employer has a written agreement, it would be permissible to deduct the $60 for the loan/cash advance. While Iowa law generally prohibits deductions for lost/stolen property, if the uniform was specifically provided to this terminating employee, the deduction for lost uniforms would be also permissible if there is a written agreement.

Minnesota: In Minnesota, an employer needs to have specifically timed authorizations in order to take lawful deductions. For loans, the employee must have voluntarily agreed to the deductions *before* the loan was taken. But, for uniforms, the authorization must be *after* the loss and before the deduction.

Practical Tips

Don't operate in Massachusetts, Iowa, or Minnesota? These just serve as examples – nearly every state has its own wage and hour laws that dictate when and how employer may make deductions. So, navigating these questions is relevant to all employers. It's imperative that employers understand not only the parameters established by the FLSA, but also the state-specific laws that apply to their workforce. Policies and practices that work in one state may have to be modified to be lawful in another state. If you need assistance understanding the laws that impact your organization, need a review of your current pay practices, or need carefully drafted pay-related polices, we can help.