COLLAZO FLORENTINO & KEIL LLP Client Advisory

For Clients And Friends Of The Firm

January 11, 2011

Wage and Hour Compliance: The Government is Looking at You!

Over the last couple of years, the federal and state departments of labor have been aggressively targeting employers who misclassify employees as independent contractors/consultants or incorrectly classify employees as exempt. In addition, New York has modified existing legislation to require employers to comply with detailed wage and hour notice requirements and there are stiff penalties for employers who do not comply. All of this has led to a surge in wage and hour litigation, mostly involving class claims. The stakes are high as reports of multimillion dollar settlements frequently make the news. The importance of getting wage and hour issues "right" cannot be understated. This advisory will address the following recent developments and the steps that employers should take now to ensure compliance with wage and hour laws:

- Efforts of Federal and State DOL Task Forces to enforce wage and hour laws
    - We Can Help Campaign
    - Federal DOL collaboration with ABA-Approved Attorney Referral System
    - Planned proposed federal rule requiring written justifications for exempt status and independent contractor status
- New York legislation requiring strict notice requirements and enhancing penalties for wage and hour violations
- Case law narrowing the white collar exemptions

Background: Misclassification of Workers

The Fair Labor Standards Act ("FLSA") requires employers to pay overtime at one and one-half the regular rate for all time in excess of 40 hours per week except for employees in bona fide executive, administrative or professional positions, as well as certain computer, highly compensated and outside sales employees. For a position to qualify as exempt from overtime, an employer must demonstrate that the employee performs job duties that meet certain tests and is paid on a salary, or, in some cases, a fee basis. The determination of whether an employee's job duties are exempt is often a confusing task. Employers must bear

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in mind that job title and a high salary do not necessarily render an employee exempt from the requirements of overtime compensation.

The use of consultants has increased significantly over the last decade due, in large part, to the perceived economic advantages, *i.e.*, no requirement to pay employment taxes and insurance premiums for bona fide consultants. These economic inducements have served as a muse for employers to unwittingly classify some workers as consultants even though they may fall within the definition of "employee" under the tax and labor laws. The task of determining whether an individual may properly be classified as an independent contractor can be daunting and requires an analysis of many factors. To complicate matters, different laws require the analysis of different factors.

U.S. Department of Labor Initiatives

In addition to adding more investigators, the DOL has utilized other tools to deter employers from running afoul of wage and hour laws. For example, as part of its "We Can Help" campaign, it has partnered with unions, employee advocacy groups, and other federal and state agencies to indentify and investigate noncompliant employers on a nationwide basis. Moreover, the results of enforcement efforts have been made public to discourage other employers from violating the law. Healthcare employers must pay particular heed because some DOL officials have publicly noted that enforcement efforts will focus on the healthcare industry, though not to the exclusion of other industries.

The most noteworthy initiatives of the DOL, however, are its collaboration with the American Bar Association ("ABA") and its planned rulemaking. Despite the enhanced enforcement staff, the DOL acknowledged that thousands of minimum wage and overtime claims remain unresolved each year because of limited capacity. On November 19, 2010, Vice President Biden announced an unprecedented collaboration between the DOL and the ABA designed to assist workers in obtaining legal counsel for, among other things, FLSA claims. Effective December 13, 2010, the DOL will provide a toll-free number for a newly created ABA-Approved Attorney Referral System to complainants whose cases cannot be resolved by the DOL because of limited capacity. Additionally, if the DOL has conducted an investigation, the agency will provide complainants with information about its findings (including potential violations and back wages owed) which surely will be used by any private attorneys who may choose to represent the complainants in private litigation against their employers.

The DOL is also contemplating issuing regulations that would require employers to notify workers of their rights under FLSA; to provide workers with information regarding hours worked and wage computation; and to prepare and provide to workers written justifications whenever employers classify an employee as exempt or retain an independent contractor.

New York State Initiatives

New York also has intensified its vigilance in preventing abuse of wage and hour laws by passing legislation which amends various existing laws. We reported in an earlier advisory that the New York Labor Law had been amended in July 2009 to require employers to provide employees written notice of their rate of pay and their regular pay date at the time of hire. Additionally, if an employee is entitled to receive overtime, the employee must be provided written notice of his/her overtime rate of pay.

On December 13, 2010, Governor Patterson signed into law the Wage Theft Prevention Act ("Act") which takes effect on April 12, 2011. The Act further expands an employer's notification obligations for new hires and also requires annual notification to all incumbent employees of certain wage and hour information. Employers will be required to provide new hires, and all employees on or before February 1 of each subsequent year of employment, a notice containing, among other things, rates of pay, the regular pay day, and any allowances claimed as part of the minimum wage such as tip, meal or lodging allowances. The notification must be provided in writing, either in English or in the language identified by each employee as his/her primary language. Additionally, employers will be required to furnish each employee with a statement during every pay period that lists, among other things, the dates of work covered by that payment of wages; the rates of pay and whether the employee is paid by hour, shift, day, week, salary, piece, commission or other means; gross wages; deductions; any allowances claimed as part of the minimum wage; and net wages. For employees entitled to overtime payment, an employer also must provide in the statement the regular hourly rate of pay, the overtime rate of pay, and the number of overtime hours worked. An employee may request that an employer explain, *in writing*, how such wages were computed.

Recent Court Activity and Agency Opinions

The Second Circuit Court of Appeals recently held in three separate cases that financial underwriters, pharmaceutical marketing representatives and a regional sales director were all non-exempt employees who did not fall into the administrative or outside sales FLSA exemptions. In addition, the federal district courts have been reluctant to dismiss wage and hour cases without a full trial developing evidence on the workers' actual job duties. Moreover, the DOL has withdrawn numerous wage and hour opinion letters that were favorable to employers and has completely reversed a former opinion letter which had held that mortgage loan officers were exempt from overtime pay. Further, the DOL has decided that it will no longer issue administrative opinion letters, a long-time practice in which the DOL would respond to specific factual circumstances and opine on whether an exemption was appropriate. Instead, the DOL will issue administrative interpretations, applicable across the board, which may indicate a resistance by the DOL to opine that certain positions qualify as exempt from overtime.

Potential Stakes for Employers

The majority of wage and hour lawsuits are class rather than individual claims, whether brought by private litigants or the DOL. The costs to an employer can be staggering when considering the expense of a litigation defense, the time managers spend away from the workplace testifying at depositions or court proceedings, and the public relations fiasco that can ensue. These, of course, do not include the damages that could result if a negative verdict is rendered. While federal claims can result in two to three years of back pay damages (three years for willful violations) plus liquidated damages, in New York, a court will look back six years to determine potential wage and overtime liability, plus liquidated damages of up to 100%. In addition, a court may award attorneys' fees to a prevailing plaintiff and both the federal and New York state statutes allow for criminal penalties for willful violations. Moreover, in connection with the New York State Wage Theft Prevention Act previously discussed, a worker may recover, among other things, damages in the amount of $50 for each work week that an employer fails to provide the requisite pay notice (not to exceed $2,500 total) and $100 for each work week that an employer fails to provide a wage statement (not to exceed $2,500 total), plus costs and reasonable attorneys' fees. In addition, the New York Commissioner of Labor may order that an employee be rehired or reinstated for employer violations of New York's anti-retaliation provisions.

What Can An Employer Do?

With the spotlight placed on FLSA compliance efforts, more organizations will be subject to federal and state enforcement proceedings along with possible individual and class actions for wage and hour claims. To minimize liability from a DOL investigation or wage and hour lawsuit, employers are well advised to proactively review existing employee classifications and pay policies. A broad wage and hour audit can identify potential classification and other problems, and provide the basis for consideration as to whether and what steps are necessary to correct any existing problems. It is recommended that such a review be conducted by counsel retained to provide legal advice so that the audit results are protected by privilege. While the correction of misclassifications will not completely insulate an employer from potential claims, it certainly will demonstrate a good faith effort at compliance and cut off future damages.

If you have any questions about the contents of this advisory, please contact Tonianne Florentino, Farah Mollo, or Adam Harris at (212) 758-7600.