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Retail Detail

Compliance Solutions For The Top Wage And Hour Issues Retailers Face

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The Department of Labor's Wage & Hour Division (WHD) and plaintiff's firms have intensified their focus on retail employers recently, and there is no indication that this will abate any time soon. In recent years, retailers repeatedly have found themselves facing the most expensive wage and hour settlements and judgments in WHD investigations and private litigation. Given this reality, we have set forth below a list of the top ten areas of exposure for retailers followed by some practical tips for addressing them. Because California is often a trend-setter in employment law, a few of the below topics focus on California law.

1. An Increasing Nationwide Focus on Franchises.

Retailers are being targeted through their franchise relationships. The WHD has an ongoing initiative to focus on so-called "fissured industries"--i.e., industries with alternative arrangements, such as franchises, subcontractors, independent contractors, and contingent workforces. To fulfill this initiative with respect to franchisors, the WHD is using tactics such as including a mixture of "brand-owned" and franchise locations in investigations and not limiting the investigation as it used to when no violations are found at that first locations visited. One of the goals of these investigations is to compare franchised and company-owned locations in search of evidence to justify imputing any franchise violations to the franchisor as joint employer. Such targeting of retailers' franchise relationships is expected to increase further as David Weil, who is credited with largely inventing the "fissured industry" initiative, is expected to be confirmed soon as the new head of the WHD. Plaintiffs' attorneys are also increasingly using joint employment arguments to attempt to bring franchisors into lawsuits over alleged wage and hour violations against franchisees' employees.

While franchised retailers cannot stop such lawsuits or investigations from occurring altogether, defending against these claims will be easier for franchisors if they maintain clear separation between themselves and the operations, employees, and marketing of their franchisees. Franchisors should also cover wage and hour compliance in their written agreements with franchisees.

2. President Obama's Directive.

Retailers will be targeted as a result of President Obama's recent directive to the WHD to propose revisions to update and simplify what are commonly referred to as the "white-collar" exemptions from the Fair Labor Standards Act's overtime pay and minimum wage requirements--the executive, administrative, professional, outside sales, and skilled computer employee exemptions. While President Obama has not suggested how the white-collar exemptions should be updated and simplified, we expect the WHD to respond to President Obama's request for changes by proposing revisions to both the duties that

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must be performed by an employee to qualify for a particular exemption and the salary requirements that must be met to render employees exempt.

The specifics of the changes that the WHD may propose are unknown at this time, but the retail industry is likely to be affected by at least two anticipated changes. First, we anticipate that the WHD will propose revisions that would make non-exempt the managers and assistant managers who are spending the vast majority of their time on manual labor tasks, such as sweeping the floors and stocking shelves. Second, with respect to the exemptions that most often apply to retail managers--the executive and administrative exemptions--we expect that the WHD will propose a drastic increase in the minimum salary required for exemption. The current minimum salary is $455 per week, and we expect that the proposed increase could approximately double this minimum.

When the WHD last revised the white-collar exemptions in 2004, the revisions were not given retroactive effect, and it took two years for the revisions to be proposed, considered, revised in response to public comments, and published. We anticipate that if any revisions are made in response to President Obama's directive that they likewise will not have retroactive effect and may take a long time for the WHD to finalize. Thus, retail employers would be best served by ensuring compliance with the existing white-collar regulations while we await the WHD's proposed changes and our opportunity to comment on them.

3. The Federal "Primary Duty" Test.

The current version of the WHD's executive exemption duties test requires that the "primary" (i.e., key, principal, or most important) duty of the employee be management of the store or a customarily recognized subdivision of the store. While a few states define "primary duty" differently, the primary duty requirement under federal law can be met without the employee spending the majority of his daily work hours on management as long as his management responsibilities – tasks such as interviewing, selecting, and training employees; setting and adjusting employees' work schedules; assigning work to and directing the work of employees; evaluating employees' performance; handling employee complaints and grievances; disciplining employees; and monitoring or implementing legal compliance measures – are the most important duties he performs.

The problem is proving that these managerial duties are the most important. If a judge or jury believes the assistant manager's or manager's primary duties are non-exempt, the retail employer will have a lot of misclassified managers on its hands to whom vast amounts of back overtime pay are likely owed. To guard against this outcome, there are many steps retail employers can take, some of which will depend on the specific work environment of a given employer. A few protective options available to most retail employers include the following:

- focus the manager's job description on the exempt tasks that should be performed,
- evaluate managers' performance and determine bonuses and promotions based on how well they perform the exempt duties, and
- provide training to the managers on their exempt responsibilities.

4. California's Quantitative Primary Duty Test.

As many retail employers have discovered through expensive and protracted class action litigation, California does not apply the federal "primary duty" test for the executive exemption (or any other white collar exemption). California, like a few other states, has adopted a quantitative approach[1]. Under this approach, the employee must spend ***more than half*** of his or her time performing exempt managerial functions to qualify for the executive exemption.

In many retail store locations (especially smaller locations), managers and assistant managers do not spend more than 50% of their time performing exempt managerial tasks. Where this is the case, retail employers should consider classifying California managers and assistant managers as non-exempt, even if its managers and assistant managers in most other states are properly classified as exempt.

[1] Colorado, Connecticut, and Wisconsin also limit the executive exemption to retail managers who spend a certain percentage of time in excess of 50% on exempt tasks, but, unlike California, these states apply their particular versions of the quantitative analysis in addition to, rather than in lieu of, the federal "primary duty" test.

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5. The "Two or More Employees" Requirement (No Double Counting).

In addition to having a primary duty of management, managers and assistant managers must "customarily and regularly" supervise the work of at least two or more full-time employees to qualify for the executive exemption. While most retail stores employ at least two hourly-paid associates, such as clerks, cashiers, or stockers, the key is that each manager must supervise at least two full-time employees and must work enough overlapping shifts with them to regularly supervise them.

To ensure compliance with these requirements, be sure not to count the same two hourly-paid associates as supervised by both the manager and assistant manager and keep an eye on the extent of shift overlaps. Also keep in mind that in a smaller store, having enough subordinates and enough overlapping shifts may not be possible. In such instances, it may make sense to classify the managers and/or assistant managers of those particular stores differently.

6. Increasing Salary Threshold For the Executive And Other White-Collar Exemptions.

Even if the duties requirements for the executive exemption are met, retailers may soon be required to increase their exempt managers' salaries to maintain the exemption. Under federal law, the minimum salary level for the executive and other white-collar exemptions currently is $455 per week, which equates to $23,660 per year. As discussed above, this minimum is expected to increase--perhaps more than double--when the WHD implements revisions to its regulations interpreting the white-collar exemptions.

Under some state laws, the minimum salary requirement is higher than current federal law.[2] For instance, California's minimum is currently $640 per week (amounting to $33,280 per year). Because it is tied to California's minimum wage rate, which is set to increase first on July 1, 2014, and then again on January 1, 2016, the minimum salary level for exemption will rise to $720 per week on July 1, 2014, and to $800 per week on January 1, 2016.

In addition to increasing the minimum salary level for the white-collar exemptions, the increases in California's minimum wage will permit fewer retail employees to qualify for California's inside salesperson overtime exemption unless their commission rates and base pay are increased. To qualify for California's inside salesperson exemption, the employee must earn more than 1.5 times the California minimum wage and must derive more than 50% of his or her earnings from commissions, measured on a workweek basis.[3] As of July 1, 2014, California inside salespersons will need to be paid at least $13.51 per hour and make more than that in commissions, and starting January 1, 2016, they will need to be paid at least $15.01 per hour and make more than that in commissions.

[2] In addition to California, the salary level is higher in Alaska and New York than under federal law. It is also arguably higher in Connecticut, which has different duties tests depending on the amount of weekly salary the employee receives. The salary level under Alaska law is tied to the minimum wage such that it increases as the state's minimum wage does. The salary level under New York law is scheduled to increase on December 31, 2014, and again on December 31, 2015.

[3] California employers must also qualify for an exemption under or an exception from the FLSA to avoid paying their California employees overtime compensation. In addition to the previously-referenced white-collar exemptions, there is a "retail or service establishment" exception under the FLSA--often referred to as the "7(i) exception" due to its inclusion in § 7(i) of the FLSA--that is similar to California's inside salesperson exemption. The federal "retail or service establishment" exception's requirements, however, are different in a few respects that can make it more difficult for some employers to satisfy than California's insides salesperson exemption.

7. California's Minimum Wage Increase Also Has Ripple Effects For Non-Exempt Employees.

As mentioned above, California recently passed legislation that raises California's minimum wage twice over 18 months, from $8.00 to $9.00 per hour on July 1, 2014, and then to $10.00 per hour on January 1, 2016. Because many entry-level retail employees are paid at or near the minimum wage, retail employers will likely need to increase the hourly amount, and, of course, the overtime pay rate, of its entry-level employees this year and again in 2016. Beyond increasing the hourly rates of entry-level retail employees, there are at least two other significant ripple effects of the increase in California's minimum wage.

First, retail employers will need to take steps to make certain that their itemized wage statements (which are required under

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California Labor Code section 226) accurately reflect the increased minimum wage when the changes take effect.

Second, retail employers should be sure to comply with California's "Wage Theft Prevention Act," which (among other things) requires employers to notify non-exempt employees in writing of any changes to their pay rate within seven calendar days from the time the change is made. Accordingly, employees impacted by the increase in the minimum wage must receive written notice by July 7, 2014, for the increase to $9.00, and by January 7, 2016, for the increase to $10.00. A separate written notice is not required if all changes are reflected on a timely itemized wage statement.

8. Bag Checks.

Issues with non-exempt employees are not limited to the effects of California's upcoming increases in its minimum wage. Nationally, non-exempt employees are suing over having to spend time waiting to have their bags checked for stolen product. In many retail environments, particularly in distribution or fulfillment centers, employees are required to submit to security screenings both before and after their shifts to ensure they are not carrying contraband or stolen product. In some lawsuits, employees have claimed that they may spend as many as 30 minutes daily on such activities. The employees argue that such time is primarily for the benefit of the employer and a necessary activity they must undergo to do their job. Therefore, they argue, the time spent waiting for and undergoing such screenings should be treated as compensable work time, and, if they have already worked 40 hours per week, should be paid at an overtime rate.

On March 3, 2014, the Supreme Court granted review of one of these cases – *Integrity Staffing Solutions, Inc. v. Busk*, which involves a contractor that provides warehouse workers for an Amazon fulfillment center. If the Supreme Court rules in favor of the employees, many retailers may face similar lawsuits for unpaid wages and, proactively, may have to change their timekeeping policies and perhaps even the placement of their time clocks.

9. Plaintiffs' Counsel Distort The Purpose Of Store Labor Budgets.

Plaintiffs' counsel increasingly are attempting to use store labor budgets to suggest that retail employers will ignore all legal requirements in the interest of the bottom line. There is absolutely nothing wrong with requiring a store to monitor its expenses and to ensure they do not outstrip revenue. In fact, doing so is essential. Nevertheless, plaintiffs' counsel like to use labor budgets to paint retailers in a bad light with courts and to suggest that there are unlawful, unwritten policies at play. The argument goes something like this: Because nothing is more important to the company than turning a profit, the company gives its stores tight budgets that do not contain nearly enough labor hours to permit necessary staffing levels in the stores. Further, any managers who cannot run their store without exceeding the labor budget will be demoted and/or fired while those who can stay within the budget will be rewarded with bonuses tied to the store's profitability and, perhaps, promoted more quickly. As a result, the managers are incentivized by the company to do two things: (1) send their subordinates home before they exceed the budgeted hours for the week and work many extra hours each week themselves, performing the non-exempt, manual tasks that their subordinates should be completing; and (2) ask their subordinates to clock out when they hit their scheduled hours for the week and to keep working off the clock.

To minimize the usefulness of the labor budget arguments for plaintiffs' counsel, there are several steps retail employers can take. While some such steps will depend on the specific circumstances of the employer, most employers could probably take some or all of the following five preventative steps:

- Give managers some flexibility with respect to the labor budget or at least make clear to them that, in appropriate circumstances, it may be necessary and appropriate to exceed the number of projected labor hours for the store.
- Train managers on best practices in creating labor budgets and employees' work schedules without dictating the budgets or schedules to the managers.
- Create a bonus formula and criteria for promotion that do not directly consider the manager's ability to stay within a labor budget.
- Communicate explicitly to managers that ensuring the store employees are properly paid for all hours worked is more

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important than staying within the labor budget and that they will be disciplined or fired if they permit their subordinates to work hours that are not recorded and paid.

- Use the recommendations in Topic 3 (The Federal "Primary Duty" Test) to reiterate to your managers that you expect them to manage the store staff rather than spending the bulk of their time performing the staff's duties for them.

10. Suitable Seating – The California Supreme Court Will Weigh In.

Labor budgets are just one example of a tool plaintiffs' counsel like to use, and they are always looking for new ways to target employers. For example, they have recently seized on a previously ignored provision in the California Wage Orders provides that "[a]ll employees shall be provided with suitable seats when the nature of their work reasonably permits the use of seats." This "suitable seating" requirement has gained traction over the last several years as a basis for class claims against California employers. Retail employers have been hit especially hard with these suits, based on allegations that they do not provide seats to cashiers.

Unfortunately, the law in this area is presently unclear because the Wage Orders do not define the term "reasonable" or provide examples of when the nature of work reasonably permits the use of seats. For this reason, the Ninth Circuit – which is wrestling with this unclear law in two separate cases, including one involving retail cashiers – has posed several questions to the California Supreme Court that should clarify the law and employers' obligations.

While employers await the California Supreme Court's clarification, we recommend that retail employers take the following steps:

- Evaluate every job that requires standing to see if the nature of the work reasonably permits the use of seats.
- If performing the job while sitting is not practicable, ensure all practices and policies support this determination. For instance, the job description should describe the importance of the standing requirement, including the rationale for it (e.g., the importance of customer perception).
- Structure jobs for which no seat is provided to ensure frequent movement. For example, when cashiers are not ringing up customers, they should be refocused on tasks requiring more movement, such as stocking shelves.
- If the job reasonably permits the use of seats but no seats have been provided yet, consult with legal counsel before making any major changes.

Conclusion

There is no magic pill for retail employers to avoid all federal or state agency investigations and private lawsuits under the federal and state wage and hour laws. That being said, by being mindful of the hottest points of potential exposure, such as the ten listed above, and by proactively managing wage and hour practices to reduce the points of potential exposure, retail employers can reduce the likelihood of an adverse finding or a costly settlement.

The tips and suggestions in this article are in no way meant either to guarantee that use of them creates a litigation risk-free environment or, alternatively, to suggest that any specific practice or policy maintained by an employer violates the law or is indefensible in litigation.

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