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ACT NOW ADVISORY

New York State Department of Labor Issues Several Opinion Letters Confirming Strict Interpretation of the Labor Law

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The New York State Department of Labor ("NYSDOL") has been busy! It has issued five opinion letters on several topics about which we have received numerous client inquiries. This Advisory summarizes the advice provided by the NYSDOL.

Fluctuating Workweek

- This opinion letter confirms that, except as described below with respect to employers in the hospitality industry, New York State employers may use the "fluctuating workweek" method of calculating salary and overtime pay for nonexempt employees. This is important because some states, such as California, have taken the position that this method of calculating pay and overtime is impermissible.

- A fluctuating workweek method of pay permits an employer to pay a nonexempt employee a salary for the straight time portion of all hours worked, so long as (i) the salary is "sufficiently large" to ensure that an employee's regular rate of pay will not fall below the minimum wage rate during any workweek, and (ii) the employer pays the employee an additional half-time payment for all hours worked over 40 in the workweek. For example, an employee who works a fluctuating workweek of 50 hours and is paid a salary of $500 has a "derived" regular rate that week of $10/hour. Employees paid by this method are entitled to overtime pay, at a rate of ½ their regular rate of pay (not 1½), for all hours worked beyond 40. In this case, the employee would be entitled to overtime pay of $50, calculated as follows: since the employee received the regular rate of $10/hour, the overtime rate would be half of $10/hour times the number of hours beyond 40. In other words, $5x10 = $50. Similarly, if the employee works 60 hours the following week, in addition to a weekly salary of $500, the employee would be entitled to $83.33 in overtime payments, for a total of $583.33, calculated as follows: $500/60 = $8.33/hour. Half of $8.33 is $4.17, and $4.17x20 = $83.33

- The opinion letter also instructs employers on how to calculate the regular rate of pay (and therefore, the appropriate overtime rate) if the employee is also paid commissions. An employer should include the total commissions received by the employee for the applicable week in the employee's rate of pay. For example, an employee who earns $100 in commissions during the 50-hour week described above is entitled to overtime pay calculated as follows: $500+$100 = $600; $600/50 = $12. The hourly rate is $12. Therefore, the overtime rate is $6 for each overtime hour worked, or $6x10 = $60.

- It should be noted here that Section 146-2.5 of the Minimum Wage Order for the Hospitality Industry (the "Order"), which was recently issued by the NYSDOL, provides that nonexempt employees "other than commissioned salespersons, shall be paid hourly rates of pay. Employers may not pay employees on a daily, weekly, salary, piece rate or other non-hourly rate basis." This may mean that employers in the hospitality industry (*e.g.*, restaurants, hotels and clubs) cannot utilize the fluctuating workweek method of pay. Based on the Order, as well as the opinions of certain NYS regulators, EpsteinBeckerGreen has requested an opinion from the NYSDOL validating the use of the fluctuating workweek in that industry.

Lunch Breaks – Sabbath Observers

- This opinion letter confirms that employees must be required to take at least a 30-minute lunch break each day, and the seemingly illogical rule prohibiting an employee from shortening this required 30-minute lunch period, for example, to leave early on Fridays to observe the Sabbath.

Posting of Notices

- This opinion letter confirms that an employer must post required New York State and federal posters at all of its work locations when employees are scattered over several work sites. One posting at a centralized work location is not sufficient, nor is a "poster indicating the location of a binder" that contains all of the applicable posters.

- The letter also refers to a prior opinion letter that prohibits posting via electronic notice to employees.

Wage Deductions

- This opinion letter confirms (again) the NYSDOL's stance that employers may not make deductions from the wages of their employees unless those deductions meet the specific conditions set forth in the Labor Law.

- In particular, it confirms that employers may not deduct from employees' wages to recoup "borrowed" (*i.e.*, used, but not yet accrued) PTO or vacation days, on termination of an employee's employment.

Liability of Corporate Officers for Violations of the Labor Law

- This opinion letter confirms that corporate officers may be liable for failure to pay wages, but only to the extent that they are acting as "employers," and not due merely to the fact that they are corporate officers. In determining whether a corporate officer is an "employer," the NYSDOL will consider the "economic realities" of the situation, such as whether the purported employer had the power to hire and fire employees, supervise or control employee work schedules, or determine the rate and method of payment of the employees.

What can an employer do?

"Best practices" based on these opinion letters include the following:

- An employer should not hesitate to use the fluctuating workweek method of pay in New York, but only if all requirements are met, and the employer administers it properly. Although the opinion letter does not address this point, some employers always use 40 hours as the denominator in order to determine the overtime rate (instead of the actual number of hours worked in the particular week). This method will generally result in a higher overtime rate, but it is usually less burdensome to administer.

- If an employer uses the fluctuating workweek method, it must clearly communicate to its employees how their compensation is calculated, and the weekly salary must be paid regardless of the number of hours worked – *i.e.*, even if fewer than 40 hours were worked in the week.

- Many employers find the administration of the fluctuating workweek somewhat complex. As such, before moving to this manner of compensation, employers are advised to confer with their labor counsel.

- Employers in the hospitality industry may wish to await the NYSDOL's opinion as to whether this method of payment is permitted in that industry.

- Employers should not permit employees to "work through lunch," even if the employee specifically asks permission to do so.

- Employers should ensure that all required federal and state employment-related notices are posted in all work locations, and not just in centralized work locations.

- Employers should not deduct used, but not yet accrued, PTO or vacation days from employees upon termination of employment (or, perhaps, should not permit employees to "borrow" such days in the first instance).

- Employers should be aware that individual corporate officers who act as an "employer," as that term is defined in the Labor Law, may be individually liable for the corporation's failure to pay wages and benefits to its employees.

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