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Beware the Perils of Varying State Wage-and-Hour Laws

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Special to the Legal

In the Federalist Papers, James Madison advocated for ratification of the Constitution, citing to the limited powers of the “general government,” and stating that “the states, in all unenumerated cases, are left in the enjoyment of their sovereign and independent jurisdiction.” So began the great federalism experiment of our Constitution.

Fast-forward more than 225 years and the reality of federalism in the patchwork of various wage-and-hour laws throughout the United States is breathtaking in its challenges for employers. This is especially so for multistate employers operating in several jurisdictions with varying wage-and-hour requirements.

While Congress enacted the Fair Labor Standards Act (FLSA) in 1938, most states (and even some localities) also have enacted a variety of wage-and-hour laws, many of which contain provisions that are more protective than the FLSA—these provisions often are far-reaching, relating, for example, to overtime eligibility and break requirements. In the last several years, employers throughout the country increasingly have had their pay practices challenged under state as well as federal law. These challenges



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have come in several different jurisdictions, and are not confined to those states that have a reputation for being employee-friendly such as California and New York.

For example, in 2010 in *Bayada Nurses v. Commonwealth*, 8 A.3d 866, 883 (Pa. 2010), the Supreme Court of Pennsylvania rejected a challenge to regulations promulgated by the Pennsylvania Department of Labor and Industry pursuant to its authority to issue regulations under the Pennsylvania Minimum Wage Act (PMWA), stating that “the FLSA does not supersede state law; Pennsylvania may enact and impose more generous overtime provisions than those contained under the FLSA which are more beneficial to employees.” The practical result of that case was that thousands of home care workers in Pennsylvania were entitled to overtime when the same workers in

approximately 35 other states were not (approximately 15 states had laws similar to the law in Pennsylvania). This is but one example of a difference between a state law and the FLSA that the plaintiffs wage-and-hour bar in Pennsylvania has seized upon in recent years to challenge the pay practices of Pennsylvania employers.

Other recent litigation in Pennsylvania includes several cases challenging the payment of health care workers under the FLSA's 8/80 method of calculating overtime. In those cases, the plaintiffs argued that the use of the FLSA's alternative method of calculating the wages of health care workers on the basis of a 14, rather than seven-day period, violated the PMWA. Many of those cases resulted in summary judgment being granted to the plaintiffs. The ultimate result of this litigation (in addition to costing Pennsylvania health care employers a pretty penny) was the amendment of the PMWA specifically to permit the 8/80 method for calculating overtime for health care employers.

Most recently, the plaintiffs bar in Pennsylvania has taken aim at the fluctuating workweek method of calculating wages under the FLSA, arguing that this method, which specifically is provided for by federal regulation, has no analogue under

Pennsylvania law. Two judges of the U.S. District Court for the Western District of Pennsylvania have agreed, holding that the fluctuating workweek method of calculating overtime is impermissible under Pennsylvania law.

This litigation may be the tip of the iceberg for Pennsylvania employers. Significant differences between the FLSA and the PMWA create fertile ground for inadvertent employer error, the end result being expensive wage-and-hour claims, which often are litigated in more plaintiff-friendly state court.

Similarly, several other states have laws divergent from the FLSA in numerous areas. Some state wage-and-hour statutes do not provide for the same exemptions from overtime as those found in the FLSA. For some jurisdictions, this is due to the failure to adopt revisions to their wage-and-hour laws or regulations mirroring the more employer-friendly U.S. Department of Labor regulations put in place in 2004. For example, several jurisdictions do not have exemptions for computer professionals similar to the exemption under the FLSA, including Indiana and Connecticut. In recognition of the challenges posed to employers by differing exemptions from overtime under federal and state law, in 2011, New Jersey's Department of Labor and Workforce Development adopted new regulations mirroring the FLSA's exemptions.

Other jurisdictions are moving further away from the FLSA, putting in place more protective requirements. By way of example, recently many states have enacted legislation related to the classification of workers as independent contractors, rather than as employees. If classified as employees, many of these workers would be entitled to overtime for all hours worked over 40 in a workweek. According to the National Conference of State

Legislatures, there have been some 50 pieces of worker misclassification legislation introduced (some of which have been enacted) in 24 states in 2013, including Connecticut, Delaware, Florida, Michigan and Texas. This means state-by-state distinctions surrounding worker misclassification, and a confusing and complex situation for employers. For example, in April, the District of Columbia enacted legislation providing for civil penalties where workers are found to have been misclassified and permitting worker lawsuits with remedies of up to treble damages for lost wages and benefits as well as restitution payments. Other possible remedies under the D.C. law are stop-work orders and public contract debarment. Under this law, employers must provide notice to workers of their status as independent contractors and the implications of such status.

Employers should analyze their current pay practices and policies with an eye toward compliance with state and local law as well as federal law.

Many jurisdictions have rules and regulations regarding paid meal breaks, an area not addressed or required under the FLSA, including Oregon, New Hampshire, Minnesota and Massachusetts. The states of Alaska, California, Colorado and Nevada all have laws regarding overtime pay that go beyond the FLSA by providing for pay for daily overtime, instead of just a 40-hour workweek.

More change may be on the way for state and local minimum-wage laws

as well. According to the Department of Labor, as of January, 18 states and Washington, D.C., had a minimum-wage level that was more than the current federal level of \$7.25 per hour. This means the employers of workers in states such as Washington, Ohio, Florida and Massachusetts must contend with a different set of state laws with regard to minimum wage. This November, voters in the city of SeaTac, Wash., home to Seattle-Tacoma International Airport, will decide whether to raise their minimum wage to \$15 an hour. And, according to a recent report from the Council of State Governments, "at least 10 states are debating raising their [minimum wage] rates."

Employers of all sizes should be aware of state- and locality-specific wage-and-hour laws and take steps to mitigate against the risk of litigation brought by employees challenging pay practices as violative of those laws. To reduce this risk, and to proactively address the rising tide of state law wage-and-hour litigation, employers should analyze their current pay practices and policies with an eye toward compliance with state and local law as well as federal law. Employers also should stay current with the dynamic pace of ever-changing state and local wage-and-hour laws, as they could prove to be a moving target in the coming months and years. Armed with the knowledge created by an analysis of current pay practices, employers can work to put in place compliant policies prior to facing expensive wage-and-hour litigation. •