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Overtime Pay Upheaval. Daily & Weekly Overtime & Top Wage & Hour Considerations

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BY SHAYDA ZAERPOOR LE OF BARRAN LIEBMAN ON APRIL 27, 2017

E-HEADLINES

Last December, the Oregon Bureau of Labor and Industries (BOLI) issued a revised guidance relating to the intersection of daily and weekly overtime. All hourly employees are entitled to overtime pay if they work more than 40 hours in a given workweek. Separately, state law also requires that workers who are employed in a mill, factory, or manufacturing establishment be paid daily overtime if they work more than 10 hours in a given day. For such employees, therefore, employers calculate both daily and weekly overtime and pay the greater of the two.

In response to a recent lawsuit filed by employees of Portland Specialty Baking, BOLI issued new guidance stating that such workers must be paid overtime calculated under both of those schemes, not merely the greater of the two. Employers scrambled to determine whether and how much more overtime pay would be required for their impacted employees, and whether it might make sense to restructure shifts and individual schedules to combat the effects.

On March 9, 2017, a Multnomah County Circuit Judge issued a decision in Mazahua Reyes v. Portland Specialty Baking, LLC and held that employees working in mills, factories, and manufacturing establishments are owed only the greater of daily or weekly overtime pay, not both, effectively overriding BOLI's updated guidance and returning things to the prior state of affairs.

For Oregon employers, this means wage and hour calculations go back to normal, but given the considerable upheaval over this issue, it is a good opportunity to consider some common difficulties that many employers face while trying to comply with wage and hour requirements.

Final paycheck violations: When faced with a departing employee, many employers will inadvertently commit a final paycheck violation. Pursuant to Oregon statute, if an employee resigns and provides less than 48 hours' notice (not including weekends or holidays), the final paycheck is due within five business days, or by the next regular payday, whichever comes first.

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However, if an employee is discharged by the business, his or her final paycheck is due no later than the end of the next business day, and if an employee resigns and provides at least 48 hours' notice, the final paycheck is due on the final day worked, or by the next business day if the last day worked falls on a weekend or holiday.

This means that employers cannot simply make a termination decision and then "deal with the paperwork" later. It also means that employers cannot necessarily wait until the next payday or scheduled direct deposit to cover the employee's wages, nor use multiple future pay dates to pay out a bonus or balance owed to the employee.

Employers must also be very cautious to carefully assess any additional balances that might be due, such as a payout for accrued and unused vacation time or commissions, and to ensure that any questions or discrepancies surrounding these items are either timely resolved (or decided in favor of the employee). Significantly, employers are faced with potential penalty wages for failure to pay within the required timelines, whether the failure was inadvertent or not.

Penalty wages are calculated at the employee's regular hourly rate, times eight hours a day, for each day the wages go unpaid (up to 30 days). Fines, interest, and attorney's fees can also be added, where applicable.

Unauthorized paycheck deductions: Employers are legally permitted to make deductions from employee paychecks for things such as the employee's selected benefit premiums, taxes, and garnishments. Otherwise, any other deductions, even if lawfully owed by the employee, must be authorized by the employee in writing, and must be recorded in the employer's records. This means that if an employee chooses to purchase items from the employer for his or her own benefit, specifically requests that the employer deduct the corresponding amounts owed from the next paycheck for his or her own convenience, and the employer fails to obtain a written authorization for the paycheck deduction, this will be considered an unauthorized deduction. Note that the employee authorization must be for the deduction specifically, not just for the purchase of the item.

In case of a violation, the employee is owed \$200 for the unauthorized deduction or actual damages, whichever is greater.

Further, even authorized deductions cannot take the employee's hourly wage below the applicable minimum wage, or the employer may face additional liability. Employers should also be careful that in the instance of a departing employee, an unauthorized paycheck deduction can also result in a final paycheck violation. Though the employer might have complied with the timelines detailed above in providing the final paycheck, if the balance owed was not paid in full because of an unauthorized paycheck deduction, the final paycheck will not be considered paid and the additional penalty wages may apply.

Misclassifications: Employers face the sometimes difficult task of determining whether a worker is an employee or an independent contractor, and whether an employee must be paid hourly or qualifies as exempt. Misclassifications have been an enforcement priority for both the Department of Labor and state administrative agencies.

In both of these categories, job titles and salaries are not determinative; the nature of the work performed and a substantive evaluation of the realities of the position are what will determine how the individual should be characterized.

Many employers choose to obtain an audit of the positions, formal job descriptions, and practical duties performed by their employees, and may choose to reassign duties between positions to better structure their workforce and more effectively utilize these classifications. Failure to appropriately evaluate these classifications not only results in amounts owed to the employee, but also to the Department of Revenue.

Employers should note that the decision in Portland Specialty Baking may very well be appealed, so the intersection of daily and weekly overtime may not yet be finalized. In the meantime, the Oregon legislature is also considering Senate Bill 984, which would codify the "greater of the two" calculation method. Keeping mindful of these categories and other wage and hour requirements, employers are faced with challenging (and often changing) requirements, and should consult legal counsel to evaluate the particulars and applicability to any given business enterprise.

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