From Workplace to Work-From-Home: Telecommuting Compensation, Employment Tax and Other Puzzles in the Pandemic Era and Key Wage and Hour Developments

Labor and Employment Webinar Series
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Agenda

- Tax and business considerations
  - Withholding Tax Issues
  - Unemployment Insurance
  - Rules around business registration and operation
- Onboarding Remote Employees
  - Immigration compliance
  - Employment-related notices and postings
- Protecting the Business
  - Confidentiality, Security and Privacy
  - Restrictive Covenants for Remote Workers
- Effective Policies and Procedures
  - Remote working policies
  - Effective employee handbooks
  - Federal, state and local leave laws (including COVID laws)
  - Travel-related restrictions
- Wage and Hour Issues for Employers with Remote Employees
  - Off the clock work
  - State specific wage and hour rules
- Wage and Hour Developments and Litigation Trends – Remote workers and beyond
  - Increases to Minimum Wage and Exempt Salary Thresholds
  - Regular Rate of Pay Update
  - Unique state rules such as Call-In, Spread of Hours, and Split Shift Pay
  - Frequency of Pay Requirements
  - New FLSA Joint Employer Rule & Ensuing Litigation

Tax and Business Considerations: State Withholding Tax

Withholding Tax: Overview

- Generally, states require employers to withhold personal income taxes on behalf of their employees.
- Withholding amount is meant to reasonably approximate the amount of tax the individual would owe to a state or states on their compensation from the employer.
- Employer withholding requirements differ widely among the states.

Withholding Thresholds

- States generally adopt 1 of 3 types of thresholds:
  1. Number of Days In-State (*E.g.*, 60 days/year for AZ and HI; 15 days/year for CT; 14 days/year for NY)
  2. In-State Wages (*E.g.*, WI is $1,500/year; ID and SC are both $1,000/year)
  3. No Threshold (*E.g.*, CO, IN, MD, MI, NC)

- Some states adopt hybrid thresholds, *for example*:
  - Maine's threshold is 12 days/year ***and*** gross income of $3,000
  - Georgia's threshold is 23 days/quarter ***and*** the GA wages can't exceed 5% of total income

Withholding Tax: Tax Impact of Telecommuting

- Issues to Consider:
  - Nexus
  - Withholding
  - Convenience of the Employer Rules
  - Before Stay-at-home Orders and After

Withholding Tax: Nexus

- There must be a link, some "minimum connection between a state and the person, property or transaction" for a state to impose tax.
- Does the presence of a telecommuter create nexus for a company?
- In most states and in "normal" circumstances, the answer is yes!
- Most states say that the presence of 1-6 telecommuters in the state will create nexus for a company (*See Bloomberg Tax, 2019 Survey of State Tax Departments*).
- This could mean nexus for employment, income, sales and other taxes!

Nexus During COVID-19

- Will companies be “punished” by suddenly having to file returns in states because their employees are required to work from home in those states by government officials?
- A number of states have advised that during the COVID-19 stay-at-home orders, the presence of telecommmuters in the state will not create nexus.
  - Alabama, Iowa, Maryland, Mississippi, New Jersey, Pennsylvania, Rhode Island, South Carolina, and Washington, D.C. have issued official guidance saying that telecommuting alone will not create nexus.

Withholding Tax: Withholding During COVID-19

- How do companies handle withholding and employment taxes while their employees telecommute from other states in the absence of clear state guidance?
- Even if a state suspends its nexus provisions during the crisis, should a company start withholding in the employee's home state or continue to withhold in the employee's traditional work state?
- What obligations does an employer have to know where an employee is working during COVID?
- Consider reciprocal agreements among states.

Withholding Tax: Convenience of the Employer

- 6 states (NY, MA, CT, PA, DE, NE) have a “convenience rule”
- A 7th state (AR) appears to read a Convenience Rule into is regulations based on a pre-2020 legal opinion: https://www.ark.org/dfa-act896/index.php/api/document/download/20190514.pdf

Withholding Tax: Convenience of the Employer

- In general, if the employee works from home for their own convenience, broadly defined, the workdays at home will be treated as days worked at the assigned work location if that is one of these 6 states for nonresident income allocation and withholding purposes.
- Applies for nonresident income allocation and withholding purposes.
- Nuances:
  - MA's Convenience Rule was promulgated on a temporary basis at the onset of COVID (now being sued by NH in U.S. Supreme Court!)
  - CT's rule only applies if the other state is a "Convenience State."

Withholding Tax: Convenience of the Employer

- But what counts as necessity if an employer (assuming it provides non-essential services) can be fined for allowing its employees to come into work?
  - Seems to be a strong argument for necessity over convenience.
- Could a state (*e.g.* NY) argue that with an employee working from home for the necessity of public health (and not the specific necessity of the employer related to duties performed for the employer) that the convenience rule still applies?
  - This seems to be the approach of Massachusetts (via emergency reg.), as well as New York (*see* https://www.tax.ny.gov/pit/file/nonresident-faqs.htm#telecommuting) is taking.

Withholding Tax: During COVID-19 and After

- Telecommuting is likely to become even more prevalent after stay-at-home orders are lifted.
- Employers need to be careful about nexus and convenience rule issues when employees are no longer required to work from home.
- This may become even more complicated if orders are lifted and then reinstated, or locally reinstated, at points in the future.

Unemployment Tax Issues

Unemployment Tax Issues

Question: If an employee performs services in more than one state for a single employer, to which state should the employer report the employment for UI tax purposes?

Examples: Sally's employer is headquartered in Buffalo, NY.

1. Sally works 3 days per week from Buffalo and 2 days per week from Erie, PA.
2. Sally worked and lived full-time in Buffalo. On March 13, when the office was closed, she went to Columbus, Ohio to live with her parents and has been there ever since, working remotely .

Unemployment Tax Issues

Answer: It depends! All states use the same set of 4 tests.

Evaluate the following, in order. Stop when the answer points to a single state:

1. **Localization?** *Are the services performed outside the state incidental to those performed inside the state?*
2. **Base of Operations**? *Does the employee work from a base where she starts work, receives instructions, repairs equipment, performs tasks?*
3. **Place of Direction and Control**? *From where does the employer supervise the employee, give instructions and assignments, keep personnel and payroll records? Need not be headquarter location.*
4. **Employee's Residence** - *a last resort, so long as some services are performed in that state.*

Tax and Business Considerations: State Business-Related Requirements Implicated by Remote Workers

State Business Requirements

Having an employee(s) in a state may create obligations:

1. Qualify to do business
   - Register the company with the secretary of state
   - Can then operate in the state without incorporating in the state.
2. Register as an employer
   - Payroll company may assist with this;
   - E.g. NYS Form 100
3. Evaluate reciprocity of state-issued professional licenses;
   - Professional engineering
   - Ownership of medical practices

State Business Requirements

4. Confirm Workers' Compensation Coverage

- Policies usually based on state law
- Will cover work-related injuries occurring at home
- Policy should reflect all states where employees provide services
- NY generally requires all non-NY employers with employees working in NYS to obtain NY Workers' Compensation policy

5. Obtain Other Required Insurance

- Short-Term Disability
- Paid Family Leave

Onboarding Remote Employees

Onboarding Remote Employees

All the usual requirements still apply.

1. Online Applications
   - Common issues include ADA accessibility issues
2. Background checks
   - Consents must be obtained
   - Required FCRA disclosures given
3. Beware state-specific limitations in interview queries
   - Criminal history limitations and “ban-the-box” laws
   - Salary history inquiry bans

Onboarding Remote Employees

4. USCIS Form I-9

- Section 1 must be completed by the first day
- Section 2 must be completed within 3 days of hire
- Original identification and work authorization documents must be presented by the employee and reviewed by the employer

For remote workers

- Employer can designate and deputize a local agent to complete employer section of Form I-9 and inspect the documents
- Note that employer will be liable for agent's errors
- Make sure the agent understands the process and rules, completes the form properly

Onboarding Remote Employees

5. Required notices – vary by state

- Wage notices (e.g. NY Wage Theft Prevention Act)
- Notice of Rights under paid sick leave and other laws (NYC Earned Safe and Sick Time Act)
- California: Workers' Compensation, Disability and Paid Family Leave, Sexual Harassment Information, Notice of Pay Information, Protection for Victims of Domestic Violence
- Workplace posters, federal and state

Remote Workers and Protecting the Business

Protecting the Business

1. Information Security

- Carefully restrict access to sensitive information
- Policies should govern use
- Implement security protocols like PWs, VPN
- Provide secure devices
- Training

2. Unfair Competition

- State law governs restrictive covenants (non-solicit/non-compete)
- Enforceability varies widely across the country
- Some limitations on “choice of law” provisions
- Carefully consider whether employee’s location compromises existing contractual protections

Protecting the Business

3. Trade Secret Protection

- Definition of trade secret varies
- Various types of conduct is unlawful
- Some state laws address employee invention assignment in employment agreements, certain notice may be required or disclosures given
- Carefully consider whether employee's location compromises existing contractual protections

Remote Workers and Effective Policies and Procedures

Policies and Procedures – Telecommuting Policy

- Establish eligibility requirements and procedure for requesting.
  - Carve out for reasonable accommodations.
- Employee responsibilities and expectations, such as:
  - Work hours and break times;
  - Timekeeping;
  - Accessibility during work hours and communications with manager;
  - Safeguarding company equipment; and
  - Safeguarding company confidential information.
- Address responsibility for providing equipment, furniture, etc.
- Reminder that all other policies continue to apply.

Policies and Procedures – Employee Handbooks

- Anti-harassment and anti-discrimination policies – mandatory in some states and localities, recommended for others
- Mandatory leave policies
  - FMLA (nationwide if covered)
  - State and/or local paid and unpaid leave laws
- Vacation forfeiture and payout policies
- Payroll policies
- Meal and rest break policies

Policies and Procedures – Employee Handbooks

- Three general approaches for multi-state employers:
  - Specific handbooks for each state where the employer has employees;
  - Single handbook that complies with the laws of the most employee-protective state; and
  - “Handbook and addendum" approach.

Policies and Procedures – Leave Laws

- State FMLA analogs (some paid, some unpaid)
- Miscellaneous state leave laws, such as crime victim, jury and witness duty, blood and bone marrow donation, and emergency responder leave (some paid, some unpaid)
- State paid sick leave laws
- Local paid sick leave laws

Policies and Procedures – COVID-19 Specific Leave Laws

- Families First Coronavirus Response Act ("FFCRA")
- Applies to private employers with fewer than 500 employees and public employers of any size.
- Effective April 1, 2020 – December 31, 2020.
- Provides up to two weeks of paid sick leave where, among other reasons, the employee:
  - Is subject to a quarantine or isolation order due to COVID-19 concerns;
  - Has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  - Is experiencing symptoms of COVID-19 and seeking medical diagnosis; or
  - Is caring for an individual who is subject to a quarantine or isolation order or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- Provides up to 12 weeks of leave where the employee is caring for his or her son or daughter whose school or place of care is closed, or whose child care provider is unavailable, due to COVID-19.
  - Expansion of the FMLA, but paid at two-thirds cap, capped at $200 per day.

Policies and Procedures – COVID-19 Specific Leave Laws

- New York State COVID-19 Paid Sick Leave Law.
- Guarantees leave to employees who are subject to a mandatory or precautionary order of quarantine or isolation issued by New York State, the Department of Health, the local board of health, or any other authorized governmental entity due to COVID-19.
  - Private employers with 10 or fewer employees and net income of one million dollars or less in the previous tax year must provide **unpaid sick leave until the termination of the order.**
  - Private employers with 10 or fewer employees and net income over one million dollars in the previous tax year and private employers with between 11 and 99 employees, regardless of income, must provide **five (5) days of paid sick leave, followed by unpaid sick leave until the termination of the order.**
  - Private employers with 100 or more employees and public employers of any size must provide **14 days of paid sick leave**.

Policies and Procedures – Travel Restrictions

- Various states have adopted travel restrictions that can impact business travel.
- New York travel restrictions apply to individuals entering New York from or after travel to any other states.
  - Travelers from Connecticut, Massachusetts, New Jersey, Pennsylvania, or Vermont do not have to quarantine or undergo testing, but have to complete a Traveler Health Form.
  - Travelers from other states who were out-of-state for less than 24 hours must:
    - Complete the Traveler Health Form and take a COVID-19 test on the fourth day after arrival in New York; or
    - Quarantine for 14 days.
  - Travelers from other states who were out-of-state for 24+ hours must:
    - Take a COVID-19 test within 3 days before returning, quarantine and complete the Traveler Health Form upon return, take another COVID-19 test on the fourth day after arrival, and quarantine until both test results come back negative; or
    - Quarantine for 14 days.

Wage and Hour Issues for Employers with Remote Employees/ Developments and Trends

Off-the-Clock Work

- An employer must pay its employees for all work that it "suffers or permits."
  - Effectively, any work that an employer requires or allows an employee to perform must be treated as hours worked.
  - This is an exceptionally broad standard that the courts have found renders all work that an employer knew or should have known about compensable.
  - A directive from a supervisor is not necessary for work to be considered compensable hours worked.
- In contrast, an employer is generally not required to pay for work when the employer did not know, and had no reason to know, that the work was being performed.

US DOL Guidance for Remote Work

- Field Assistance Bulletin No. 2020-5 (Aug. 24, 2020)
  - Responds to the needs created by new telework or remote work arrangements.
  - Aimed at tracking hours for remote employees and obligation of employers to exercise reasonable diligence in tracking teleworking employees' hours of work.
  - Employer does not have to take impractical measures to determine hours worked versus hours reported.
  - Employer must pay for all hours worked that it knows or has reason to believe was performed.
  - Establish reasonable process for reporting uncompensated work time.
  - Do not implicitly or overtly discourage accurate reporting.

US DOL COVID Guidance for Remote Work

- DOL COVID-19 and the Fair Labor Standards Act Questions and Answers
  - Employers must pay employees their same hourly rate or salary if they work from home if the teleworking arrangement is a "reasonable accommodation for a qualified individual with a disability" or required by contract.
  - If not, the FLSA requires employers to pay employees only for the hours they actually work whether at home or at the employer's office, with caveats that employers must pay:
    - Nonexempt workers at least the minimum wage for all hours worked and at least time and one-half the regular rate of pay for hours worked in excess of 40 in a workweek; and
    - Salaried exempt employees their full salary in any week in which they perform any work subject to certain limited exceptions.
  - Employers may not require employees to pay or reimburse the employer for business expenses incurred while teleworking (for example, internet access, computer, additional phone line, or increased use of electricity) if:
    - Doing so reduces the employee's earnings below the minimum wage or required overtime compensation; or
    - Telework is being provided to a qualified individual with a disability as a reasonable accommodation under the ADA.

Wage and Hour Remote Issues

- There are also variations in many wage and hour rules across states such as:
  - Minimum wage https://www.dol.gov/agencies/whd/minimum-wage/state
  - Exemption and salary basis requirements
  - Potential misclassification of employees
  - Overtime pay
  - Meal and break periods https://www.dol.gov/agencies/whd/state/rest-periods and https://www.dol.gov/agencies/whd/state/meal-breaks
  - Frequency of wages https://www.dol.gov/agencies/whd/state/payday
  - Wage payout upon termination
  - Vacation as wages
  - Direct deposit
  - Deductions from wages
  - Wage Premiums such as call-in, spread of hours and split shifts
  - Payroll records/statements
  - Reimbursement of employee business expenses

Wage and Hour Developments and Litigation Trends – Remote Workers and Beyond

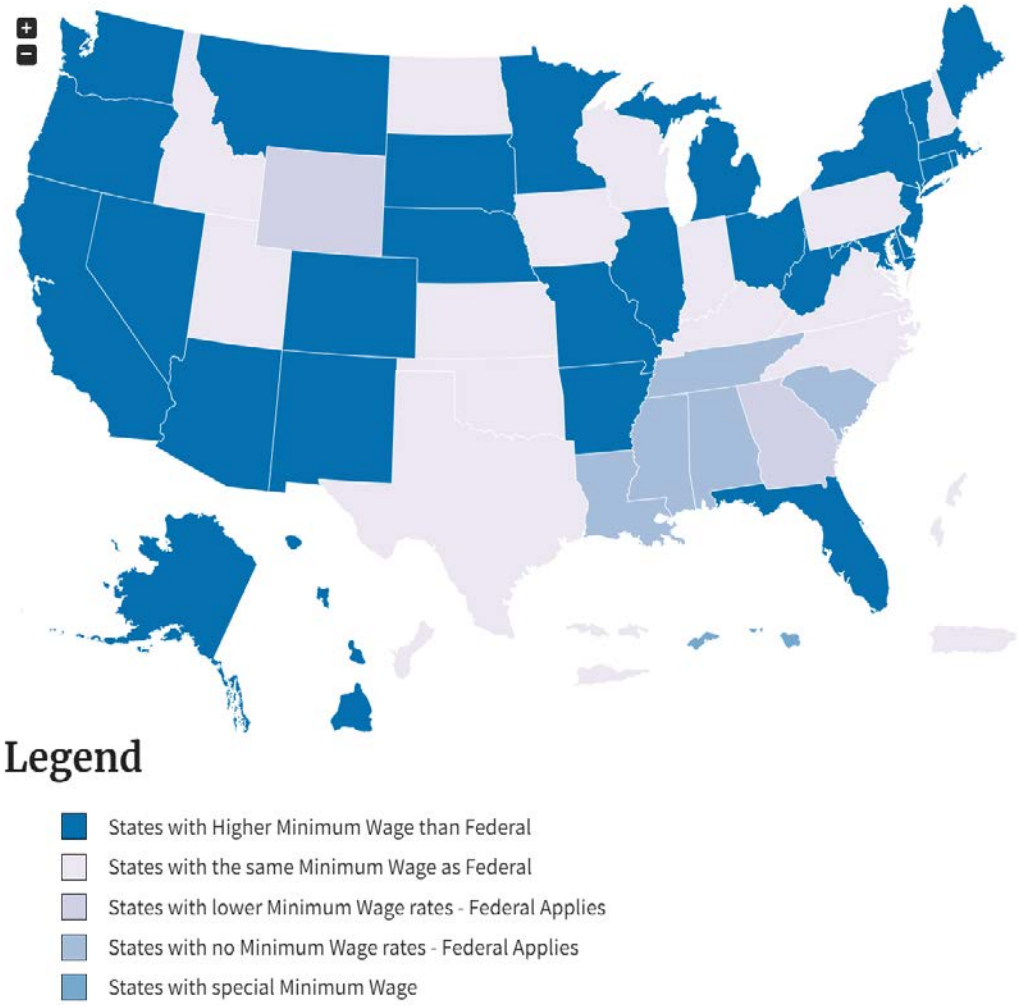
Wage and Hour Developments: Key Issues

- Increases to Minimum Wage and Exempt Salary Thresholds
- Regular Rate of Pay
- Call-In, Spread of Hours, and Split Shift Pay
- Frequency of Pay Requirements
- New FLSA Joint Employer Rule & Ensuing Litigation
- Other Issues for Multi-State Employers

Minimum Wage & Exempt Salary Threshold

Minimum Wage Increases

- Twenty five states will implement an increase to the minimum wage as of 2021.
- These increases may differ throughout the impacted states based on the locality of the employer, size of the employer, and/or depending on whether the employee is a tipped employee.



- Source: U.S. Department of Labor, State Minimum Wage Laws, October 1, 2020

New York Minimum Wage

- New York's minimum wage continues to increase

Location	Current	Scheduled Increases
NYC – 11 or more EEs	$15.00	N/A
NYC – 10 or less EEs	$15.00	N/A
Long Island & Westchester	$13.00	12/31/20: $14.00 12/31/21: $15.00
Remainder of NYS	$11.80	12/31/20: $12.50 Further increases as published by NYSDOL starting in 2021

New York Minimum Salary Requirements for Executive & Administrative Exemptions

- The minimum salary required for an employee to qualify for the New York executive and administrative exemptions also continues to increase:

Location	Current	Scheduled Increases
NYC –11 or more EEs	$1,125/week ($58,500/year)	N/A
NYC – 10 or less EEs	$1,125/week ($58,500/year)	N/A
Long Island & Westchester	$975/week ($50,700/year)	12/31/20: $1,050/week ($54,600/year) 12/31/21: $1,125 per week ($58,500/year)
Remainder of NYS	$885/week ($46,020/year)	12/31/20: $937.50/week ($48,750/year)

Regular Rate of Pay

Regular Rate of Pay

- Under the FLSA, non-exempt employees must be paid at least one and one-half times their "regular rate of pay" for all hours worked beyond 40 hours in a workweek.
- The regular rate is not simply the base hourly pay – rather, it includes "all remuneration for employment" except for those items explicitly excluded by the FLSA.
- Statutory exclusions:
  - Gifts made at holidays or other special occasions as a reward for service, which are not determined by or dependent on hours worked, production, or efficiency.
  - Pay for expenses incurred on the employer's behalf.
  - True premium pay for work on Saturdays, Sundays, and holidays, or hours worked in excess of eight in a day.
  - Discretionary bonuses.
  - Payments for occasional periods when no work is available due to vacation, holiday, or illness.
  - Pension and welfare contributions to a third party, and profit-sharing plan contributions.

Regular Rate of Pay

- USDOL revised the regular rate regulations, effective January 15, 2020.
- The regulations "confirmed" that the following types of employer-provided benefits may be excluded from the regular rate:
  - Wellness benefits such as gym memberships, fitness classes, and on-site specialist treatments;
  - Discounts on retail goods and services;
  - Payouts of unused leave (*e.g.,* sick leave);
  - Accident, unemployment, and legal services benefits;
  - Payments for hours not worked, including payment for bona fide meal periods and certain types of "call-back" pay;
  - Tuition reimbursement and repayment of student loans;
  - Travel reimbursements that do not exceed the maximums permitted under federal regulations; and
  - Business expense reimbursements, even if not "solely" for the benefit of the employer.

Regular Rate of Pay

- Common regular rate issues
  - Premiums for certain kinds of shifts (*e.g.*, holiday work)
  - Varying rates of pay for different work
  - Nondiscretionary bonuses
  - Miscellaneous cash payments
  - Certain benefits paid as cash or cash equivalents

Spreads, Splits, and Call-In Pay

New York: Spreads, Splits, and Call-In Pay

- Spreads: Employees are entitled to one (1) additional hour of pay at the minimum wage rate for any day in which the interval between the beginning and end of the employee's workday exceeds 10 hours.
  - The interval between the beginning and end of an employee's workday includes time off for meals and intervals off duty.
- Splits: Employees are entitled to one (1) additional hour of pay at the minimum wage rate for any day where the working hours are not consecutive.
  - Working hours are not considered consecutive where there is an intervening period of more than one (1) hour during the workday.
- Call-In Pay: An employee who, by request or permission, reports to work on any day shall be paid at least the lesser of:
  - Four (4) hours at the basic minimum wage rate; or
  - The number of hours in the employee's "regularly scheduled shift" at the basic minimum wage rate.

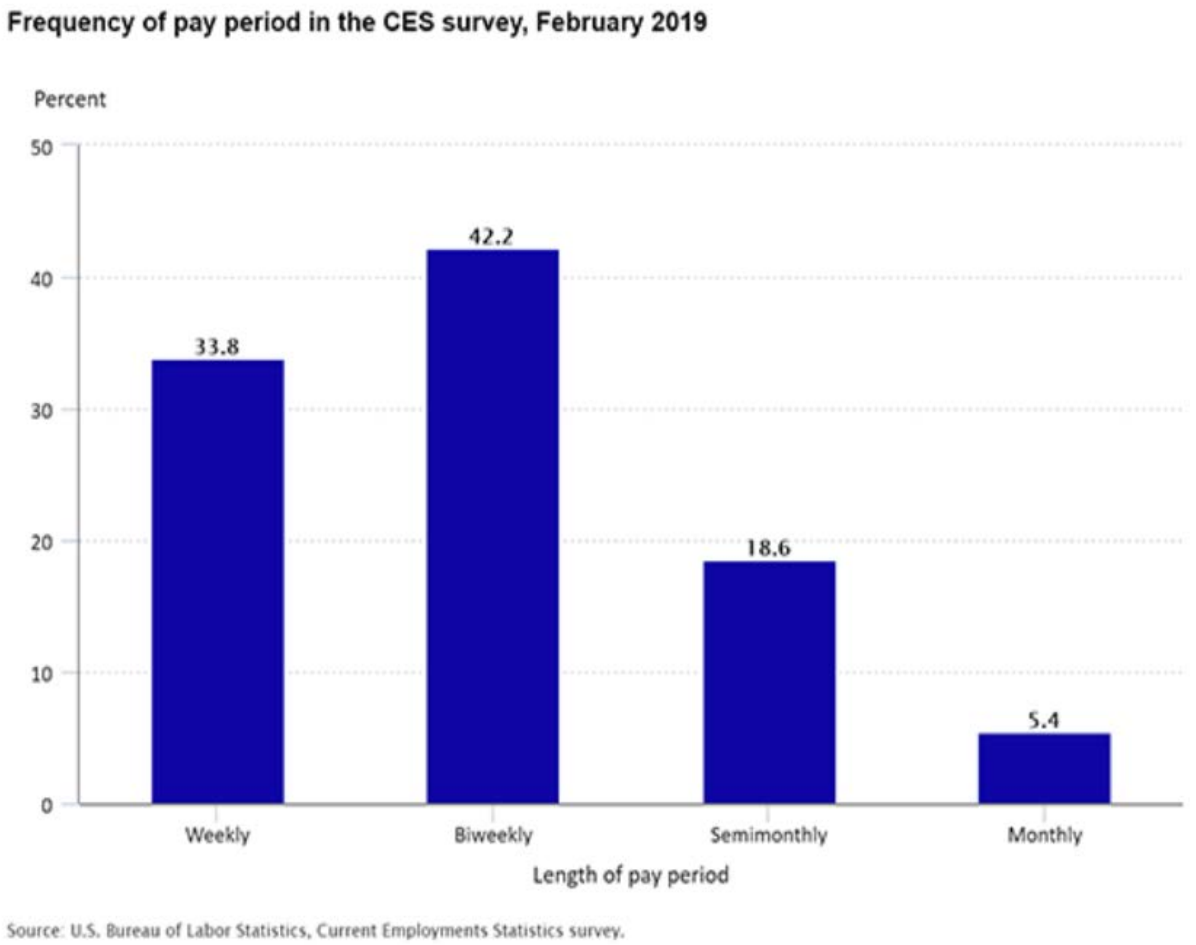
Limitations on Spreads, Splits, and Call-In Pay

- All that is required is that the total weekly wages paid be equal to or greater than the total due for all hours worked at the minimum wage and overtime rate, plus one additional hour at the minimum wage for each day in which a “spread” and/or “split” occurs.
  - An employer need only pay for one spread or split per day, even if both occur.
- For “call-in” pay, if the amount actually paid to the employee for the workweek exceeds the total of all hours worked at the minimum wage and overtime rates, plus any call-in pay owed, no additional payment for call-in pay is required for that workweek.

Frequency of Pay

Frequency of Pay

- Regulated by state law
- Varies across states and based on the type of work completed by employees
- USDOL offers a table that outlines pay frequency requirements by state
- States may also have different rules regarding payment upon termination



Frequency of Pay – New York

- Manual workers must be paid weekly and not later than 7 days after the end of the week in which the wages are earned.
  - Some very large employers that have applied and been approved by the NYS DOL as well as not-for-profit organizations can pay their manual workers semi-monthly.
- Clerical and other workers must be paid in accordance with the agreed terms of employment, but not less frequently than semi-monthly, on regular paydays designated in advance.
  - Bona fide executive, administrative, and professional employees who earn over $900 per week can be paid as frequently as employer likes.
- Payment upon termination: Not later than the regular pay day for the pay period during which the termination occurred.
  - Must be paid by mail if employee so requests.

Frequency of Pay – New York

- New York Labor Law Section 191
  - Generally, requires that employers pay “manual workers” no less frequently than on a weekly basis.
  - The NYSDOL has opined that “manual workers” include employees who spend “more than 25 percent of their working time performing physical labor.”
  - NYSDOL has interpreted "physical labor" broadly to include a wide range of physical activities.
  - However, “manual” employees of nonprofits “must be paid in accordance with their agreed terms of employment but not less frequently than semi-monthly.”

Frequency of Pay – New York

- *Vega v. CM & Assoc. Constr. Mgt., LLC*, 2019 NY Slip Op 06459 (1st Dept. Sept. 10, 2019)
  - Plaintiff alleged that she was a manual laborer and was paid on a biweekly basis in violation of NY Labor Law Section 191(1)(a).
  - Plaintiff was paid for all hours worked. Her only allegation was untimely payment – not underpayment or non-payment.
  - Despite receiving full payment for all wages due to her, Plaintiff sought to recover liquidated damages plus interest and reasonable attorney's fees based on the untimeliness of her wage payments.
  - The employer moved to dismiss the complaint, arguing that the statutory provision that provides for the relief sought (NY Labor Law Section 198(1-a)) applies only to nonpayment or partial payment of wages, but not late payment of wages.

Frequency of Pay – New York

- *Vega v. CM & Assoc. Constr. Mgt., LLC*
  - The lower court denied the employer's motion to dismiss and the employer appealed.
  - The Appellate Division upheld the lower court's holding, stating:
    - "[T[he term underpayment encompasses the instances where an employer violates the frequency [of pay] requirements… but pays all wages due before the commencement of an action."
    - "We reject defendant's implicit attempt to read into [S]ection 198(1-a) an ability to cure a violation and evade the statute by paying the wages that are due before the commencement of an action."
    - "The employer may assert an affirmative defense of payment if there are no wages for the employee to recover," but that does not "eviscerate" the employee's ability to recover the other statutory remedies of liquidated damages, attorney's fees, and interest.

Frequency of Pay – New York

- *Vega v. CM & Assoc. Constr. Mgt., LLC*
  - Liquidated damages under the Labor Law are generally equal to the amount of the underpayment (*i.e.,* double damages).
  - So, the plaintiff would be able to recover the full amount of the wages that were paid late.
- Fortunately, not all courts have agreed with *Vega.* However, the case serves as a cautionary tale regarding the importance of timely payments of wage.

Joint Employment

FLSA Joint Employment

- The Fair Labor Standards Act ("FLSA") requires covered employers to pay non-exempt employees at least the minimum wage for all hours worked and overtime for every hour worked in excess of 40 hours in a workweek.
- To be liable for paying minimum wage and overtime, a person or entity must be an "employer," which the FLSA defines to include "any person acting directly or indirectly in the interest of an employer in relation to an employee."
- The U.S. Department of Labor ("USDOL") has long recognized that an employee can have two or more employers who are jointly and severally liable for the wages due to the employee (*i.e.,* joint employers).

USDOL's New Joint Employer Rule

- On January 12, 2020, the USDOL announced a Final Rule to revise and update the FLSA joint employer regulations.
- The Final Rule took effect on March 16, 2020.
- The Final Rule continues to recognize the vertical and horizontal joint employment scenarios.

USDOL's New Joint Employer Rule Vertical Joint Employment

- For "vertical joint employment," the Final Rule provided that an entity (the "potential joint employer") is a joint employer of the other entity's employees only if the potential joint employer is acting directly or indirectly in the interest of the employer in relation to the employee.
- In determining whether this standard is met, the Final Rule rejected the "economic realities" test previously relied upon by the DOL which looked to whether the worker is economically dependent upon the putative employer
- Instead, the DOL adopted a four-part test that evaluates whether the potential joint employer:
  - Hires or fires the employee;
  - Supervises and controls the individual's work schedule or conditions of employment to a substantial degree;
  - Determines the worker's rate and method of payment; and
  - Maintains the employment records.
- The Final Rule also expressly stated that "[o]perating as a franchisor or entering into a brand and supply agreement, or using a similar business model does not make joint employer status more likely."

USDOL's New Joint Employer Rule Horizontal Joint Employment

- For "horizontal joint employment," the Final Rule provided that:
  - There would be no joint employment "if the employers are acting independently of each other and are disassociated with respect to the employment of the employee."
  - However, if the employers are sufficiently associated with respect to the employment of the employee, they are joint employers and must aggregate the hours worked for each for purposes of determining compliance with the [FLSA]."
- The employers will generally be sufficiently associated if:
  - There is an arrangement between them to share the employee's services;
  - One employer is acting directly or indirectly in the interest of the other employer in relation to the employee; or
  - They share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.

USDOL's New Joint Employer Rule Horizontal Joint Employment

- The determination of whether two or more entities "share control of the employee" depends on all of the facts and circumstances.
  - "Certain business relationships… which have little to do with the employment of specific workers—such as sharing a vendor or being franchisees of the same franchisor—are alone insufficient to establish that two employers are sufficiently associated to be joint employers."
- The Final Rule offers a number of examples of when two or more entities are horizontal joint employers:
  - Example. An individual works 30 hours per week as a cook at one restaurant, and 15 hours per week as a cook at a different restaurant affiliated with the same nationwide franchise. These restaurants are locally owned and managed by different franchisees that do not coordinate in any way with respect to the employee.
  - Application. Under these facts, the restaurant establishments are not joint employers of the cook because they are not associated in any meaningful way with respect to the cook's employment. The similarity of the cook's work at each restaurant, and the fact that both restaurants are part of the same nationwide franchise, are not relevant to the joint employer analysis, because those facts have no bearing on the question whether the restaurants are acting directly or indirectly in each other's interest in relation to the cook.

USDOL's New Joint Employer Rule Horizontal Joint Employment

- The Final Rule offers a number of examples of when two or more entities are horizontal joint employers:
  - *Example.* An individual works 30 hours per week as a cook at one restaurant, and 15 hours per week as a cook at a different restaurant owned by the same person. Each week, the restaurants coordinate and set the cook's schedule of hours at each location, and the cook works interchangeably at both restaurants. The restaurants decided together to pay the cook the same hourly rate.
  - *Application.* Under these facts, the restaurant establishments are joint employers of the cook because they share common ownership, coordinate the cook's schedule of hours at the restaurants, and jointly decide the cook's terms and conditions of employment, such as the pay rate. Because the restaurants are sufficiently associated with respect to the cook's employment, they must aggregate the cook's hours worked across the two restaurants for purposes of complying with the Act.

New York et al. v. Scalia et al.

- The Attorneys General of 17 states, including New York State and Washington D.C. filed a lawsuit to vacate and enjoin implementation of the Final Rule on the basis that it violated the Administrative Procedure Act (APA).
- On September 8, 2020, Judge Gregory Woods of the U.S. District Court for the Southern District of New York vacated major parts of the rule.
  - Specifically, the Court struck down the portion of the Final Rule dealing with “vertical joint employment.”
  - The ruling does not impact the Final Rule as to “horizontal joint employment.”

Joint Employer Rule – What Now?

- On Friday, November 6, 2020, the USDOL filed a notice of appeal with the U.S. Court of Appeals for the Second Circuit seeking to overturn Judge Woods' decision.
- For now, employers should be cautious regarding potential joint employment relationships, particularly where the "economic realities" test and/or reserved power to direct and control workers may be implicated.

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QUESTIONS?