

“Jerry Maguire” - Wage and Hour Considerations

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Topics for Today

- Class and Collective Litigation
- What to Expect Soon
- White Collar Exemption/Overtime
- Increased DOL Investigations
- Misclassification
- Minors
- Bonuses, Incentives & Overtime
- Drafting Commission and Bonus Plans
- Deductions
- Remote Work
- Prevailing Wage Issues
- State Law Compliance

Legal Disclaimer

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Why are Federal Wage Claims Popular?

- Often lead to collective action lawsuits
- Liquidated damages
- Attorneys' fees
- State law claims
 - May lead to class claims
 - Treble damages (more in some states)
 - Longer SOL in some states

What About State Law Claims?

- Why would class action plaintiffs' lawyers pursue wage and hour class actions in state court rather than federal court?
- Hot issues
 - Meal and Rest Breaks
 - Unlawful and DeFacto Deductions
 - Recordkeeping and Wage Statement claims
 - Off-the-Clock claims

What is Expected from the US DOL Soon?

- Change in salary basis for white collar exemptions.
 - Currently \$684/week
 - Anticipated that the U.S. Department of Labor will propose an increase from the current minimum salary of \$684/week for white collar exempt employees
 - Expected to increase substantially
 - May build in automatic increases
- What about duties?



What is Expected from the US DOL Soon?

- Enforcement to focus on deductions that cut into minimum wage
- Continued enforcement for hours worked
- What do we need to think about now?

Increased Wage and Hour Investigations

- **More** investigators
- **More** Lawyers: DOL is hiring more lawyers for enforcement
- **More** investigations, more liquidated damages and more penalties



Misclassification Issues

- Employee or Independent Contractor?
- Various independent contractor tests
- DOL's Economic Realities Analysis
- ABC test
- Why does it matter?



Risks of Misclassification

- Minimum wage, overtime, and other unpaid wages
- Back taxes
- Unemployment audits
- Social Security contributions
- Unpaid benefits
- Employment law violations
- Workers' Compensation coverage
- Penalties and fines
- Litigation costs and attorney's fees
- Individual liability for corporate officers

Misclassification Issues



USDOL WHD and NLRB Have Joined Forces on this issue

- January 6, 2021: The NLRB and DOL announced that they entered a Memorandum of understanding which provides for and encourages interagency cooperation through “information sharing, joint investigations and enforcement activity, training, education, and outreach.”

Misclassification Issues

State Law Ramifications

- State wage and hour laws
- State agencies
- State-based independent contractor analysis
- Penalties and damages under state law

Hiring Minors to Address Workforce Shortages

Federal wage and hour restrictions

- Regulation of minors under the FLSA:
 - Minors under the age of 14
 - Minors aged 14-15
 - Minors aged 16-17



Hiring Minors to Address Workforce Shortages

State law restrictions

- Overlap between the FLSA and state law
- State law nuances to be mindful of
- Questions employers should be prepared to answer:
 - What age minor is the business willing to hire?
 - Do restrictions on the type of work inhibit the ability of minors to perform a job?
 - How will your business ensure compliance?
 - Who will be accountable for compliance?
 - Will your timekeeping system allow you to put automated safeguards in place to prevent minors from working during prohibited hours or more than allowed hours?

Hiring Minors to Address Workforce Shortages

What are some penalties for non-compliance?

Statute	Penalty	Penalty Amount
§ 579.1(a)(1)(i)(A)	General violation	\$14,050 per violation
§ 579.1(a)(1)(i)(A)B	Violation causing the death or serious injury of any employee under the age of 18	\$63,855 per violation (doubled where the violation is a repeated or willful violation)
§ 579.1(a)(2)(i)	Violation relating to wages	\$2,203 per violation
§ 579.1(a)(2)(ii)	Violation relating to retention of tips	\$1,234 per violation

Bonuses, Incentives and Overtime

Discretionary vs. Non-Discretionary Bonuses

- Not exactly what you may think

Non-Discretionary bonuses and regular rate

- Hiring incentives, and retention bonuses
 - **Golden Rule**: “Bonuses which are announced to employees to induce them to work more steadily or more rapidly or more efficiently or to remain with the firm are regarded as part of the regular rate of pay.”

Bonuses, Incentives and Overtime

- Calculating the regular rate for overtime purposes:
 - **Step 1:** Determine if a bonus must be included in the overtime pay calculation
 - **Step 2:** Define the time frame
 - **Step 3:** Calculate the straight-time compensation
 - **Step 4:** Calculate the new regular rate of pay
 - **Step 5:** Calculate the new overtime rate of pay
 - **Step 6:** Calculate total earnings

Bonuses, Incentives and Overtime

- Example of calculating the regular rate for overtime purposes:
 - Employee is paid base rate of \$10/hour
 - Employee works 50 hours in a week
 - Paid \$50 bonus for the week
 - To determine regular rate, divide bonus by hours worked ($\$50/50 \text{ hours} = \$1.00$) and add to base rate ($\$10 + \$1 = \$11$ regular rate)
 - Overtime is calculated based on regular rate
 - 10 hours of OT x $\$11 \times 1.5 = \$165$
 - But you have already paid the bonus, so you can deduct the \$10 of bonus paid for the 10 OT hours
 - Total OT: $\$165 - \$10 = \$155$
- Fisher Phillips White Paper available for calculating OT with bonuses and incentives

Bonuses, Incentives and Overtime

- Expect more litigation
 - Overtime miscalculations (collective actions)
 - “Promised” but unpaid bonuses
 - Ex/bonus payments after termination/resignations
 - Whether bonuses are required to be paid at the time of resignation or termination depends on terms of payout included in the bonus pay plan as well as state law.
 - Very important to include defined terms of payouts and forfeitures in a written bonus plan and consult with legal counsel

Pay Plans: Commissions and Bonuses

- Written agreement requirements
- Difference between commission and bonus
- Requirements for lawful claw backs and deductions



Pay Plans: Commissions and Bonuses

- Review commission plan agreement to ensure that the payment of commissions follow agreed-upon terms
- Define when a commission is “earned” and payable
- Consider state specific wage laws that may outline additional requirements for payment of commissions for terminated employees

Deductions

- Non-Exempt Employees
 - Deductions from non-exempt (hourly) employees not permitted if effectively reduces wages below minimum wage or cuts into overtime
 - Limited exceptions for taxes, benefits, insurance premiums, etc.
 - Many states have notice/consent requirements

Deductions

- Exempt Employees
 - Deductions from exempt employees not permitted if effectively reduces wages below minimum wage or cuts into overtime
 - Limited exceptions for taxes, benefits, insurance premiums, and:
 - Absence for one or more FULL days for personal reasons other than sickness
 - Absence for one or more FULL days due to sickness pursuant to a bona fide plan
 - To offset amounts for jury duty, witness fees or military pay
 - FMLA
 - First/last weeks of employment can be prorated
 - Many states have notice/consent requirements

Remote Work: Litigation Expected

Are you paying your remote employees fully and correctly?

- DOL guidance states that employers must exercise “reasonable diligence” to ensure that non-exempt employees are paid for all hours worked
- Reasonable diligence includes having:
 - Reasonable reporting procedures
 - Clear, written policies setting forth timekeeping requirements
- Employers must pay employees for all hours worked that the employer knows about:
 - Emails and apps
 - Hours worked *even without the employer’s permission*
 - Includes Obligation to pay for all hours worked (including Email and Apps)

Remote Work: Litigation Expected

Are you reimbursing your remote employees fully and correctly?

- Some states have laws that require employers to reimburse employees for business expenses:
 - Office supplies
 - Wi-Fi
 - Data plans
 - Cell phones Proper reimbursement for business expenses
- Even if no applicable state law, failure to reimburse could lead to allegations of federal minimum wage/OT violations for those paid at or near the minimum wage

Prevailing Wage Issues Spurred by Infrastructure Bill

What about federal contractors?

- Broad definition of federal contractors or subcontractors
- Davis-Bacon Act
- Service Contract Act
- State law prevailing wage laws



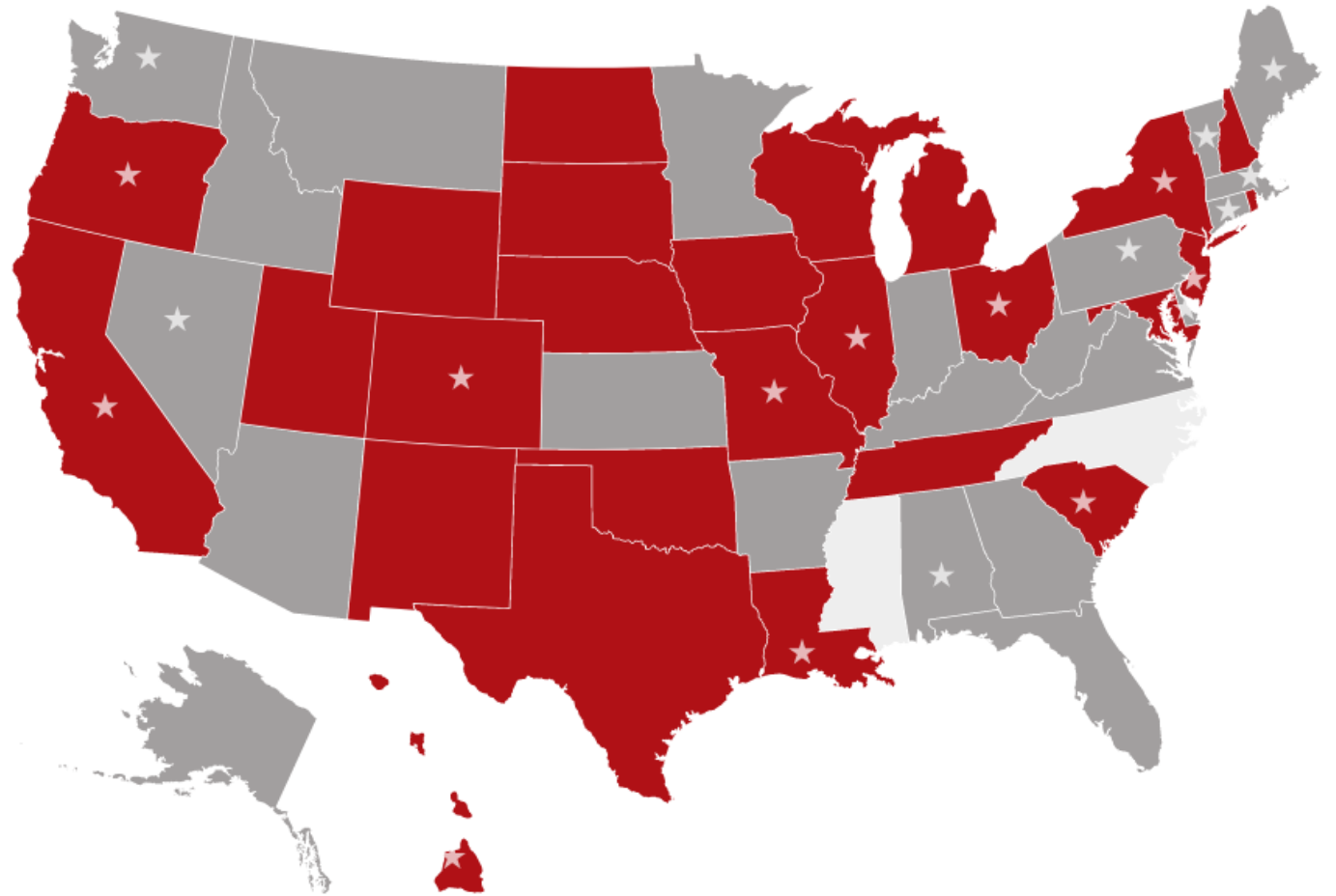
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- Fisherphillips.com
 - Wage and Hour page
 - Insights
- Wage Hour Wednesday Webinars
 - Podcasts
- Interactive State Maps
 - Wage & Hour
 - Pay Equity
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- And much more....

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- Fisher Phillips' Online **Wage & Hour Interactive Map** shows the various laws by simply clicking on each state.
- Located at www.fisherphillips.com/innovations-center/wage-and-hour-maps.html



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Questions?

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Thank You!

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