Employment Law Alert: Employee Payroll Considerations in the Wake of the Silicon Valley Bank Collapse

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On March 10, 2023, the California Department of Financial Protection & Innovation declared Silicon Valley Bank ("SVB") insolvent, shuttered SVB operations, and appointed the Federal Deposit Insurance Corporation (the "FDIC") as receiver to liquidate SVB's assets.

Since the 10th, SVB customers have not had access to their deposit accounts.

On Sunday evening, March 12, 2023, the Federal Reserve Bank announced that SVB depositors will have **full access** to their deposits by Monday, March 13, 2023. This outcome certainly comes at the relief of SVB customers. However, certain risks remain. Specifically: With hundreds of thousands of SVB customers accessing accounts on Monday, delays in processing withdrawals are inevitable. This status raises an immediate concern: ***What happens if an employer misses a payroll date because of delays in accessing SVB deposit funds?***

The following Alert further clarifies the scope of this problem and outlines potential strategies to mitigate.

What We Know

In a Joint Statement issued Sunday evening, March 12, 2023, the Federal Reserve, the Treasury, and the FDIC announced here that:

> After receiving a recommendation from the boards of the FDIC and the Federal Reserve, and consulting with the President, Secretary Yellen approved actions enabling the FDIC to complete its resolution of Silicon Valley Bank, Santa Clara, California, in a manner that fully protects all depositors. **Depositors will have access to all of their money starting Monday, March 13.** No losses associated with the resolution of Silicon Valley Bank will be borne by the taxpayer.

This is certainly good news to the hundreds of thousands of SVB deposit holders. However, the sheer volume of businesses that will be seeking to withdraw funds from SVB on Monday, coupled with logistics around transferring withdrawn funds to new financial institutions, will surely cause actual access to SVB deposits to be delayed. These delays, in turn, stand to interfere with the regular payroll schedules of affected employers – particularly given that March 15 is a common payroll date.

What Should Employers Do About Payroll?

The failure to timely pay employee wages can result in severe penalties for employers.

For example, under the Massachusetts Wage Act, Massachusetts employers are subject to "treble damage" penalties for late payment of wages – *meaning that the aggrieved employee is entitled to three-times the amount of the late wages as recompense.* These treble damages are not a

corporate liability alone. The president and treasurer of the employer, and "any officers or agents having the management" over the employer, are individually liable for treble damages that arise from the late payment of wages. In addition, in a decision issued on April 4, 2022, in *Reuter v. City of Methuen*, the Massachusetts Supreme Judicial Court ("SJC") held that when an employer pays wages after the deadlines provided in the Massachusetts Wage Act, the employer and its officers are "strictly" liable for the resulting treble damages – *regardless of the reason for the delay, and even if the wages are paid only a day late.*

In other words, ***innocent mistake or inability to pay employee wages because of the actions of a third-party– such as a payroll provider or a bank – does not excuse liability.***

Given the strict and multiple liability exposure that results from late payment of wages, employers with liquidity access issues related to SVB should take immediate steps to mitigate wage liability exposure. Those steps might include the following:

- Creating a detailed balance sheet of payroll requirements and available funds – *the identification of short-term funds, cash burn-rates, and payroll shortfalls will be critical to understanding potential liability*.
- Working with new banking relationships to ensure that funds transferred from SVB can be redistributed as wages as soon as possible.
- To the extent available, exploring alternative sources of liquidity from current investor rolls or third-party lenders to cover short-term payroll obligations.
- If applicable, communicating with third-party payroll providers to determine if "bridge" financing is available to cover immediate payroll obligations.
- Communicating with insurers to understand liquidity options related to business disruption insurance, director's & officer's insurance, or employer's protection liability insurance ("EPLI").
- Temporarily reducing prospective employee wages to extend cash burn rates.
- Temporarily furloughing employees to stem the accrual of unpaid wage liability.

Setting employee expectations, through frank and clear communications, with respect to potential payroll disruptions.

Bottom Line

The Federal Government's announcement on Sunday evening – *guaranteeing that SVB deposit holders will have access to "all of their money"* – avoids a larger liquidity crisis for SVB's many customers. However, immediate operational risks, particularly around current payroll obligations, still remain for SVB deposit holders.

To that end, there is some current discussion around the creation of safe harbors from wage & hour law penalties for employers affected by SVB. That said, selected waivers of wage law penalties for SVB customers (who are primarily venture-backed businesses) raises constitutional complexities, and is probably not viable politically.

The bottom line is that employers should not expect a regulatory solution for short-term payroll shortfalls. Rather, employers should adopt the "self-help" strategies identified above *now* to limit late wage liability exposure.

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SVB has been a ubiquitous partner in the Boston start-up environment for several decades (even more so since its 2021 acquisition of Boston Private Bank). As a result of SVB's collapse, many Morse clients have already faced (and will continue to face) significant operational challenges, including payroll management obstacles.

The Morse Employment Law Team is available to help navigate these complex issues.

Please contact Matthew Mitchell or Rebecca Alperin should you have questions concerning this subject.