Massachusetts Wage and Hour Laws: Legal Risks for Businesses in Transition

August 09, 2016

The laws governing payment of wages, overtime pay, and commissions have become a leading source of employee claims and employer liability. Mistakes in this area can be costly and penalties in Massachusetts include treble damages and individual liability against certain individual corporate officers. Buyers and sellers in corporate transactions must pay close attention to these risks where the transaction may result in termination of employees' employment.

Payment of Wages at Termination

The Massachusetts Payment of Wages Act (the "Wage Act") provides that any employee discharged from employment must be paid his or her wages in full — including any accrued but unused vacation pay — on the date of discharge. Many employers are unaware of this provision or choose to ignore it, as it may be difficult to generate an accurate final paycheck on the employee's last day of employment. Employers should make every effort to comply, and should not delay payment of a final paycheck for administrative reasons or until deductions for amounts possibly owed by the employee have been determined.

The requirement to pay accrued but unused vacation time may be particularly troublesome in the context of an asset deal. Although employees are technically terminated at closing by the seller, they often immediately transition to new employment with the buyer. The Wage Act's final payment rule would require payout of vacation time and, therefore, the employees to start with a zero vacation balance — a result that is often disfavored by employees. It is not uncommon for this problem to be addressed by allowing transferring employees to roll over (without any forfeiture of earned vacation time) their accrued vacation to the new employer, but must be done carefully to avoid potential wage claims and constructive receipt tax issues.

Commissions as Wages

The Wage Act applies to "the payment of commissions when the amount of such commissions, less allowable or authorized deductions, has been definitely determined and has become due and payable to such employee." In other words, unless commissions are both (i) definitely determined and (ii) due and payable under the terms of the commission agreement or plan, an employer does not have to pay such commissions on a weekly, bi-weekly, semi-monthly or monthly basis, or at the time of discharge.

Because commission arrangements often vary from employer to employer, when commissions are definitely determined and due and payable depends on the terms of the commission agreement or plan and the circumstances of the situation. A common problem with commission arrangements is a lack of clarity as to how commissions are to be calculated and when they are to be paid. Since commissions become "wages" under the Wage Act when the amount of such commissions "has been definitely determined and has become due and payable to such employee," employers should strive to avoid ambiguities.

Pay Deferrals May Violate the Wage Act

Postponing employee compensation also may violate the Wage Act, which provides that all

employees must be paid at least the minimum wage on a regular basis. Even if a portion of an employee's compensation is deferred (over and above the minimum wage), this can create an unexpected problem if the employee quits or is terminated, at which time the employee must be paid the entire balance of monies owed. Moreover, such practices can have significant negative tax implications (for example, if income is deferred until a later tax year) under Section 409A of the Internal Revenue Code.

Pay Period Misconceptions

Massachusetts law governs how frequently employees must be paid, yet many employers find that they have inadvertently violated these rules. Under Massachusetts law all employees must be paid at least weekly or biweekly (every two weeks) and within six days of the end of the pay period during which wages were earned. Employers who instead pay their employees only twice a month violate these rules in two ways: (1) by paying less frequently than biweekly, and (2) by failing to pay within six days of the end of the pay period. While exempt employees may be paid semi-monthly, or elect to be paid monthly, there is no exception to the biweekly payment rule for non-exempt employees.

Misclassification as Independent Contractors

No review of wage and hour issues facing employers would be complete without mention of the potential problems associated with use of independent contractors. Misclassification of employees as independent contractors can result in liability and penalties for failure to pay overtime, FICA and FUTA contributions, unemployment insurance payments, and workers compensation insurance premiums, as well as subject the employer to other civil and criminal liability, including mandatory treble damages under Massachusetts law.

Salary Payment Does Not Guarantee Exempt Status

A common misconception is that payment of a salary results in exemption from the overtime requirements of the FLSA. In order to be exempt from overtime payments, the employee must be paid on a salary basis and the employee's job responsibilities must also fall within one of the exempt categories, including the "white collar" executive, administrative and professional employee exemptions, and the computer and outside sales employee exemptions. Many salaried employees do not qualify for any exemption from overtime obligations, and relying solely upon whether an employee is paid a salary in categorizing him/her as exempt or non-exempt will almost certainly result in misclassifications.

Risks of Misclassification Under the FLSA and Massachusetts Law

Failure to properly classify an employee as exempt or non-exempt carries substantial risks. Employees who should have been classified as non-exempt will be owed overtime pay (plus interest) for all hours worked in excess of forty per week, going back up to three years. Furthermore, possible penalties for violation of the federal Fair Labor Standards Act ("FLSA") include liquidated damages (payment of twice what is owed), attorneys' fees, and litigation costs. Massachusetts law provides for mandatory treble damages. Employers are also prohibited from retaliating against employees for asserting claims under the FLSA or Massachusetts law.

Individual Liability

For Massachusetts employers, the Wage Act imposes liability not only upon the business itself but also upon the President and Treasurer of the employer and any "officers or agents having the management of such" employer.

For more information, please contact **Matthew Mitchell**.