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CLIENT ALERT

The Month in Wage & Hour – December 2019

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In this issue:

This news bulletin is provided by the Labor & Employment Group of Crowell & Moring. If you have questions or need assistance on labor and employment law matters, please contact Tom Gies or any member of the Labor & Employment Group.

Top Wage & Hour Developments

State Laws

State and Local Increases to Minimum Wage Go Into Effect in on January 1

State and local governments around the country continue to institute increases to the minimum wage. Many of these increases go into effect in the New Year. Employers should take note of the changes listed below and check for any other adjustments affecting their workforce, particularly in smaller localities which may not be captured here. Note that the federal minimum wage remains at $7.25 for 2020.

State	Minimum Wage Change
Alaska	Rises to $12.00 ($9.00 for tipped employees) as a result of a 2016 ballot initiative
Arizona	Rises to $10.00, as a result of a 2018 ballot initiative; tipped wage remains unchanged at $2.63 • **Flagstaff** - $13.00
Arkansas	Rises to $10.00, as a result of a 2018 ballot initiative; tipped wage remains unchanged at $2.63
California	$13.00 for large employers (26+ employees); $12.00 for small employers • **Cupertino** - $15.35 • **Daly City** - $13.75 • **El Cerrito** $15.37 • **Los Altos** - $15.40 • **Menlo Park** - $15.00 • **Mountain View** - $16.05 • **Oakland** - $14.14 • **Palo Alto** - $15.40 • **Petaluma** - $15.00 for large employers (26+ employees); $14.00 for small employers • **Redwood City** - $15.38 • **San Diego** - $13.00 • **San Jose** - $15.25 • **San Mateo** - $15.38 • **Santa Clara** - $15.40 • **Sonoma** - $13.50 for large employers (26+ employees); $12.50 for small employers • **South San Francisco** - $15.00 • **Sunnyvale** - $16.05 • Other increases going into effect in the summer of 2020

Colorado	$12.00; $8.98 for tipped workers
District of Columbia	$15.00, beginning **July 1, 2020**[11]
Florida	$8.56; $5.54 for tipped workers
Illinois	$9.25; $5.55 for tipped workers
Maine	$12.00; $6.00 for tipped workers
Maryland	$11.00; no increase for tipped workers • **Montgomery County** - $14.00. For small employers (fewer than 51 employees) - $13.25
Massachusetts	$12.75; $4.95 for tipped workers
Michigan	$9.65; $3.67 for tipped workers
Minnesota	$10.00 for large employers (>$500,000 in gross receipts); $8.15 for small employers
Missouri	$9.45; $4.73 for tipped workers • **Kansas City** - $13.00
Montana	$8.65; $4.00 for small employers (businesses with gross annual sales of $110,000 or less)
New Jersey	$11.00 for most employers; $10.30 for seasonal and small employers (>6 workers); $10.30 for agricultural employers; $3.13 for tipped workers
New Mexico	$9.00; $2.35 for tipped workers
New York	$11.80 • **New York City** - $15 for small employers (<11

	employees). NYC minimum wage is currently $15.00 for large employers (>11 employees), and remains unchanged in 2020. • **Nassau**, **Suffolk**, and **Westchester** counties - $13.00
Ohio	$8.70 for large employers (>$319,000 in gross receipts); $7.25 (the federal rate) for small employers; $4.35 for tipped workers
Oregon	**Portland** - $13.25
South Dakota	$9.30; $4.65 for tipped workers
Vermont	$10.96; $5.48 for tipped workers
Washington	$13.50 • **Seattle** - $16.39 for large employers (>500 employees); less for smaller employers, depending on payment of medical benefits

As noted in last month's The Month in Wage and Hour, a new Department of Labor will raise the minimum salary for exempt workers to $35,568 on January 1, 2020. The following states and localities are making similar changes:

- In New York State, the minimum salary that administrative and executive employees must make to remain exempt from overtime will increase to $885/week ($46,020 annually). In Nassau, Suffolk, and Westchester Counties, the minimum salary that these employees must receive to remain exempt from overtime will increase to $975/week ($50,700 annually). And in New York City, these employees must make $1,125/week ($58,500 annually) to remain exempt, as of January 1, 2020.
- In California, in order to qualify for a white collar overtime exemption, employees must earn two times the state minimum wage for "full time employment" – meaning that on January 1, 2020, employees of small employers (25 or fewer employees) must earn $960/week ($49,920 annually) and employees of large employers (26 or more employees) must earn $1,40/week ($54,080 annually). Further, effective January 1, 2020, exempt computer professionals must earn $46.55 per hour, or $8,080.71 per month, or $96,968.33 per year.
- Alaska also requires employees to earn two times the state minimum wage to meet the minimum salary threshold test for white collar exemptions. Effective January 1, 2020, the minimum salary threshold will increase to $815.20/week ($42,390.40 annually).

- Pennsylvania was poised to make a similar change, but the state Department of Labor and Industry formally withdrew its proposal in late November.

Department of Labor

Final Rule on Changes to the "Regular Rate" Definition Issued by DOL

On December 12, 2019, DOL published its final rule making the first changes in 50 years in the definition of the FLSA's "regular rate." The regular rate, instead of an hourly employee's base hourly rate, must be used in calculating the rate used for payment of all overtime wages earned by employees covered by the FLSA.

In last month's issue, we summarized the principal categories of changes we expected to be made in the final rule. The final rule permits employers to exclude from the regular rate calculation the following categories of compensation:

- The cost of providing certain parking benefits, wellness programs, onsite specialist treatment, gym access and fitness classes, employee discounts on retail goods and services, certain tuition benefits (whether paid to an employee, an education provider, or a student-loan program), and adoption assistance.
- Payments for unused paid leave, including paid sick leave or paid time off.
- Payments of certain penalties required under state and local scheduling laws.
- Reimbursed expenses including cellphone plans, credentialing exam fees, organization membership dues, and travel, even if not incurred "solely" for the employer's benefit; and clarifies that reimbursements that do not exceed the maximum travel reimbursement under the Federal Travel Regulation System or the optional IRS substantiation amounts for travel expenses are per se "reasonable payments."
- Certain sign-on bonuses and certain longevity bonuses.
- The cost of office coffee and snacks to employees as gifts.
- Discretionary bonuses, by clarifying that the label given a bonus does not determine whether it is discretionary and providing additional examples.
- Contributions to benefit plans for accident, unemployment, legal services, or other events that could cause future financial hardship or expense.

The final rule will be effective on January 15, 2020.

Joint Employer Regulations Still Pending

The unsettled and thus often-litigated "joint employer" issue remains in flux as we head into the New Year. The business community continues to wait for further action from the U.S. Department of Labor (DOL) on its revised regulations on this subject – the first in more than 50 years. The proposed regulations provide for a standard that would be more difficult for

plaintiffs to meet and, for many employers, suggest new arguments against the imposition of joint and several liability for wage-hour obligations.

The new DOL regulations' "notice and comment" period ended months ago; they generated massive interest and tens of thousands of comments. Publication of the new regulations is widely expected in the next few months, with little if any change from the text the agency initially proposed.

Readers will recall that the DOL's pending regulations introduce a four-factor balancing test as well as guidance that certain business arrangements do not, just by their very nature, establish joint employer relationships. First, DOL is poised to introduce a balancing test that examines whether the putative joint employer (1) has the power to hire and fire the employee, (2) supervises or controls the employee's work schedule or conditions of employment, (3) determines the employee's wage rate and method of payment; and (4) maintains the employee's records of employment. It would not be necessary for all four factors to exist for a joint employer relationship to exist. However, a company could reserve the right to control the employee's working conditions, but that right of control would not suffice for a joint employer finding if the company did not actually exercise that control.

Second, the pending regulations are expected to specify that the following factors do not, in and of themselves, influence the joint employer analysis: (a) the existence of a franchisee-franchisor relationship, even if the franchisor provides its franchisees a sample employee handbook; (b) one company allowing another company to perform business on its property, (c) one company requiring its business partners to comply with minimum wage laws and to maintain compliant policies regarding sexual harassment prevention and workplace safety; (d) one company allowing another company's employees to participate in its apprenticeship program; and (e) one company offering employees of another the right to participate in its health and retirement plans.

The DOL's new balancing test, and its guidance about factors that should not enter the joint employer analysis, are eagerly anticipated among businesses most often challenged as joint employers under the FLSA, including franchisors in all industries. The new DOL regulations seem likely to be good news for the business community by introducing greater predictability and more employer-friendly outcomes into this volatile area of the law.

Litigation Summary

Appellate Court Rejects Arbitration Agreement That Is Unenforceable Under the FLSA

In *Hudson v. P.I.P.*, the Eleventh Circuit affirmed a lower court ruling denying an employer's motion to compel arbitration of an FLSA collective action alleging failure to pay statutorily required overtime pay to plaintiffs. The fees and costs provision in the employer's arbitration agreement provided that "each party to any arbitration *will* pay its own fees and expense, including attorneys' fees and will share other fees of arbitration." The district court held that this term is unenforceable under the FLSA's provision authorizing prevailing plaintiffs to recover attorneys' fees and costs, reasoning that the language did not leave the arbitrator with the discretion to award fees and costs to a prevailing FLSA plaintiff. The Eleventh Circuit agreed, finding that the clause prevented plaintiffs from vindicating their statutory rights under the FLSA in arbitration. The court remanded the case to the district court for a determination of whether the offending language could be severed under governing Florida law, rejecting

the district court's conclusion that the absence of a severability clause in the arbitration agreement meant that the language could not be severed. *Hudson* is a reminder to employers that, notwithstanding the trend favoring dispute resolution in arbitration, courts continue to scrutinize ambiguous arbitration agreements that effectively preclude plaintiffs from obtaining the full range of remedies available in court under the FLSA.

Pre-Shift Computer Log-in Activities Held de Minimis

In an interesting application of the FLSA *de minimis* rule, the court in *Peterson v. Nelnet Diversified Solutions* granted a call center operator's motion for summary judgment in an FLSA pre-shift "off the clock" collective action. The dispute focused on the time required for employees to get "call ready," including time required for the employees to activate their computers by swiping an access badge and entering user name and password credentials necessary to launch a Citrix session (known as computer "boot up" time) and the additional time required for Citrix to provide employees access to the company's electronic timeclock system (Citrix-Active time).

The case was initially certified as a "stage one" FLSA collective action and attracted almost 350 opt-in plaintiffs at three of the company's locations. Discovery and expert witness reports established that the amount of time required to complete the tasks at issue varied by location, and that the combined total averaged less than 3 minutes per day for each employee.

The opinion reviewed recent case law discussing whether certain types of "preliminary" activity constitute compensable work under the Portal-to-Portal Act amendments to the FLSA. The court rejected plaintiff's argument that interpretive guidance provided by the DOL regarding the treatment of pre-shift activities (expressed in a "Fact Sheet" published in 2008) was entitled to deference under principles first announced in *Skidmore v. Swift & Co.*, 323 U.S. 124 (1944). The court concluded that the tasks at issue were "integral and indispensable" and thus compensable within the meaning of the FLSA.

The court then applied a multi-factor articulation of the FLSA *de minimis* test that focuses on "the balance between the burden of remedying the situation in relation to the amount of lost wages…." The court credited expert testimony offered by the employer that its current computer systems did not link information from the badge-swiping time stamps with its timekeeping system such that keeping track of these pre-shift activities would require the employer to implement a substantively different timekeeping system that would represent a serious administrative burden. The court concluded that this burden, weighed against the parties' stipulation that the lost wages for the class period amounted to roughly $30,000, warranted the conclusion that the activities were *de minimis* and that the employer was thus entitled to summary judgment.

California Developments

$102 Million Judgment Against Wal-Mart for Wage Statement Violations On Appeal In Ninth Circuit

Wal-Mart has appealed a nine figure judgment that sets a daunting precedent for California employers. In *Magadia v. Wal-Mart Assocs., Inc.* San Francisco federal district court Judge Lucy Koh awarded plaintiffs $102 million after finding that Wal-Mart failed to provide accurate itemized wage statements in violation of California Labor Code section 226. The award was comprised of

$48 million in Labor Code statutory penalties and $54 million in civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA). The lion's share of the penalties stemmed from Judge Koh's decision related to a line item in the Wal-Mart wage statements titled "OVERTIME/INCT" that did not include the hours worked or the rates of pay. The line item represented additional overtime pay Wal-Mart retroactively made to employees who received both a quarterly incentive bonus and also worked overtime in the relevant quarter. Judge Koh found that even though this line item was a bonus award, and did not reflect additional hours worked, it violated Labor Code Section 226(a)(9)'s requirement that wage statements contain "all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee."

The court came to this conclusion despite recognizing that at least one California state appellate court had reached the opposite conclusion about whether Section 226(a)(9) applies to bonus payments in an unpublished part of its decision in *Fabio Canales v. Wells Fargo Bank, N.A.*, 23 Cal.App.5th 1262, 234 Cal.Rptr.3d 816 (2018). Judge Koh's opinion recognized that plaintiffs' interpretation of the applicable Labor Code provision made it difficult for employers to accurately account for quarterly bonuses in completing wage statements. The court also conceded that this result might discourage employers from offering bonus awards. These, and other statutory and policy arguments, have been made by *amicus* briefs filed by business groups in the appeal. The steep penalties awarded in this case, and the practical compliance problems presented by the decision will make this one of the most closely-watched wage hour cases in the coming year.

McDonald's Agrees to Settle California Wage and Hour Action for $26 Million

After nearly seven years of litigation, McDonald's and a class of approximately 38,000 hourly paid employees at its corporate–run stores in California have agreed to the terms of a $26 million settlement of various state law wage and hour claims in *Sanchez v. McDonald's Restaurants of California Inc.*, No. BC499888 (Cal. Super. Ct., L.A. Cty.). Superior Court Judge Ann I. Jones had granted partial summary judgment to plaintiffs, holding that McDonald's failed to properly pay daily overtime to employees working an overnight shift followed within twenty-four hours by a day shift by assigning all hours worked to the day that the overnight shift commenced. Such overtime, the court held, "should be based on the amount of work completed by an employee during any single twenty-four hour workday period, regardless of whether the employee works continuously through the day divide." As a result, according to the Court, McDonald's "does not calculate overtime based on . . . a workday" in accordance with the California Labor Code.

A hearing on the McDonalds' unopposed motion for preliminary approval of the settlement is scheduled to be conducted on February 11, 2020. The settlement is a reminder of the importance of carefully monitoring the evolving and often arcane standards regarding California's overtime pay and related wage and hour requirements.

Crowell & Moring Speaks

Please join us for the next edition of **Third Thursday – Crowell & Moring's Labor and Employment Update**, a webinar series dedicated to helping our clients stay on top of developing law and emerging compliance issues. Tom Gies, Christine Hawes and Katie Erno will be speaking on December 19 on recent changes in the law, and trends to watch for in 2020.

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[1] We specifically reference this mid-year increase in the District because of the location of many of our clients. Other states may anticipate a mid-year increase but not be listed here.

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