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CLIENT ALERT

The Month in Wage & Hour – January 2020

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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

Department of Labor Regulation

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

As previously stated, the Department of Labor (DOL) has released its much-anticipated final rule on the often-litigated "joint employer" issue under the Fair Labor Standards Act and its statutory requirements relating to minimum wage and overtime obligations. This final rule represents the first significant revisions to DOL's regulations on this subject in more than 50 years. As expected, the final rule represents good news for employers, as it sets forth a standard that is more difficult for plaintiffs to meet. The final rule was published in the Federal Register and becomes effective March 16, 2020. The DOL's Fact Sheet is found here. The final rule, as published in the Federal Register, is found here.

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DOL Final Rule on Regular Rate Now in Effect

The Department of Labor's final rule regarding the calculation of the regular rate is now in effect, and employers should ensure they have considered its impact on employee perks.

As previously reported here, the rule now in effect provides employers further support that certain categories of benefits and compensation can be excluded from their calculations of the regular rate applicable to overtime payments. Such benefits range from discretionary bonuses to travel expenses to wellness benefits. They are all benefits that, by their very nature, are not tied to the employee's amount or quality of work performed.

For example, when it comes to excludable wellness benefits, the final rule sets forth a wide variety of examples of programs that can be excluded from regular rate calculations. These examples, however, do not purport to constitute an exhaustive list. The guiding principle is that the benefit be available to employees generally, without regard to participants' quantity or quality of work. In other words, in order to be excluded from the regular rate calculations, the wellness benefit cannot be hours-based or constitute an incentive to perform higher-quality work.

Now that the rule is in effect, employers should review the language of their programs and policies that provide benefits that they exclude from the regular rate calculations. This review should ensure that the benefits are in no way tied to the employees' job performance.

DOL Issues New Opinion Letters

The Department of Labor's Wage-Hour Division (WHD) issued two opinion letters this month, addressing (a) the calculation of the regular rate for a multiple-week bonus, and (b) the application of the salary basis test to per-project payments to certain

instructors. These are the latest FLSA opinion letters since the WHD resumed issuing such letters in January 2018. As our readers will recall, the Trump DOL revived the use of opinion letters in 2018 by issuing 17 letters that had been prepared during the George W. Bush administration but were rescinded by the Obama DOL. Since then, the WHD has issued nearly 30 more FLSA opinion letters on topics ranging from overtime obligations to the application of certain exemptions to the counting of hours worked. A full list of the WHD FLSA opinion letters of the Trump DOL is available here.

One of the new opinion letters offers useful guidance on how to calculate the regular rate (the hourly rate on the basis of which overtime must be calculated) for employees who earn a non-discretionary bonus that is earned over several weeks and does not apply to any particular week. The opinion letter explains that the employer's employees are eligible to earn a $3,000 bonus if they complete a 10-week training program, during which they work uneven amounts of overtime week to week. The opinion letter explains that, because the bonus cannot be tied to specific weeks of work, it should be divided equally between the 10 weeks of the period at issue (i.e., $300 per week should be added into the formula for the calculation of the regular rate). The full opinion letter can be accessed here.

The other new opinion letter addresses the compensation terms of certain educational consultants and whether they can qualify as "salary" payments under the FLSA's salary basis test, which is applicable to the administrative and professional exemptions. The opinion letter responded to a query by a company that employs educational consultants who work with schools nationwide on a project basis. Despite the unusual payment scheme at issue, and the fact that the amount of the consultants' pay would fluctuate throughout the year, the DOL concluded that the compensation terms at issue qualified as "salary" compensation. The full opinion letter can be accessed here.

Minimum Wage Increase for Some Federal Contractors

Beginning January 1, 2020, the applicable minimum wage rate for workers performing work on or in connection with federal contracts covered by Executive Order 13658, Establishing Minimum Wage for Contractors (the "Executive Order"), increased to $10.80 for hour. Additionally, the minimum cash wage which must be paid to tipped employees performing work on or in connection with covered contracts increased to $7.55 per hour.

The Executive Order, which was originally signed by President Obama in February, 2014, applies to the following types of contracts:

1. Procurement contracts for construction covered by the Davis Bacon Act.
2. Service contracts covered by the Service Contract Act.
3. Concessions contracts, including any concessions contract excluded from the SCA by the Department's regulations at 29 C.F.R. 4.133(b).
4. Contracts in connection with Federal property or lands and related to offering services for Federal employees, their dependents, or the general public.

The Executive Order's minimum wage generally applies to workers performing on or in connection with the above types of contracts if the wages of such workers are governed by the DBA, the SCA, or the FLSA.

The Executive Order allows the Department of Labor to adjust the minimum wage applied to covered contracts each year in accordance with the Consumer Price Index for Urban Wage Earners and Clerical Workers. Pursuant to 29 C.F.R. 10.29, contractors must notify all workers performing work on or in connection with a covered contract of the applicable minimum wage rate under the Executive Order. Contractors may satisfy the Order's notice requirement by displaying the DOL-issued poster reflecting the updated wage rates in a prominent or accessible place at the worksite.

State Law Developments

Here's a Tip: Plan for the Upcoming Elimination of the Tip Credit for Employees in New York State Outside the Hospitality Industry

The tip credit in the New York State Labor Law applicable to "Miscellaneous Industries" – most non-agricultural employers outside the restaurants, hotels and other businesses within the hospitality industry – will be eliminated effective December 31, 2020. At that time, the tip credit applicable to dozens of employee categories including car wash attendants, nail salon workers, tow truck drivers, dog groomers, wedding planners, tour guides, valet parking attendants, and hairdressers, will be eliminated. As Governor Cuomo announced on December 31, 2019, the tip credit for these workers will be phased out over 2020, which will "provide employees relief while also giving businesses time to adjust to these changes as to not inadvertently incur job loss." Under this implementation schedule, the difference between the minimum wage of $15 per hour in New York City, $13 per hour in Long Island and Westchester, and $11.80 per hour in the remainder of New York State, and the current tip wage will be cut in half, effective June 30, 2020. Effective December 31, 2020, the tip wage will be completely eliminated for workers in these effected industries. The tip credit applicable in the hospitality industry remains in effect.

This development is based on the Report and Recommendations to the Governor issued by the New York State Department of Labor on December 31, 2019. The Governor concluded that the "current system of tipping disproportionally impacts the lowest-paid workers" in New York State, specifically women, minorities and immigrants. According to the Governor, the employees at issue "receive less in tips and have widespread confusion about whether or not they are entitled to earn minimum wage or not," leading to "rampant wage theft in particular industries."

While affected businesses still have some time to adjust to the tip credit's elimination, businesses should begin planning for the changes to their payroll practices necessary to remain compliant with the law. Action items include issuing updated wage notices required to affected employees, adjusting earnings statements to reflect the changes to the tip credit aspect of employees' wages, notifying payroll processing companies of the changes to the employees' pay and amending any policy in effect concerning tip wages. Most importantly, affected employees should be notified in advance of these changes and that their ownership rights to their tip wages remain unaffected by them.

New York State Extends Wage & Hour Personal Liability to the Ten Members with the Largest Ownership Interest in Out-of-State LLCs

Under current law, the ten members of New York State limited liability companies with the largest percentage ownership interest are subject to joint and several personal liability for unpaid employee debts, wages, and salary for work performed in New York State. Effective February 10, 2020, an amendment to the New York State Limited Liability Company Law signed by Governor Cuomo on December 12, 2019 will extend personal liability for "all debts, wages or salaries due and owing" to the top ten members "of any foreign limited liability company, where the unpaid services were performed in" New York State. Percentage ownership is determined as of the commencement of the period in which the unpaid services were performed. According to the Governor, "[t]his measure closes a loophole that for too long allowed certain companies to hide behind their complicated corporate structure to avoid wage theft laws currently on the books."

As under the current statute, the former employees must provide written notice to the member that they intend to hold liable within 180 days after termination of such services. Any action to enforce such liability must be commenced within 90 days after return of an unsatisfied execution of judgment recovered against the limited liability company for such unpaid services. A member who has paid more than that member's *pro rata* share is entitled to contribution *pro rata* from other LLC members who are liable. The member may sue the other liable members, in a separate action, for recovery of amounts due from them jointly and severally.

Out of state limited liability companies that maintain employees in New York must evaluate their pay practices to ensure compliance with the law. The LLC's implementation and maintenance of accurate and precise recording of hours worked and compliant wage payment practices is the only viable method for protecting its members from potential liability.

There is no ABC in Uber: New Jersey Department of Labor Determined that Uber Misclassified Its Drivers as Contractors

In November 2019, New Jersey's Department of Labor (NJDOL) issued Uber Technologies Inc. an assessment of $675 million in unpaid unemployment and disability insurance contributions. This assessment accompanied NJDOL's determination that Uber misclassified its drivers as independent contractors. Unsurprisingly, Uber plans to challenge this determination.

Uber will invoke the current enforcement position of the United States Department of Labor (USDOL) and argue that it merely functions as a referral service or "virtual marketplace" for drivers and riders, and not an employer in the business of providing rides. Uber's view is supported by an Opinion Letter issued by USDOL on April 29, 2019, which takes the view that workers for a digital marketplace company that connects service providers to consumers are independent contractors and are not required to be paid minimum wage and overtime under the Fair Labor Standards Act (FLSA). Applying the FLSA's traditional economic realities test, the USDOL focused on factors such as:

- The workers' ability to select the manner and method of work.
- Their freedom to pursue work for other companies.
- The impermanence of the relationship between the company and the workers.
- Their provision of their own equipment or tools to perform work.

- The general lack of control by the company over the work performed.
- The lack of integration of the workers into the company's digital platform business.

Uber faces an uphill battle, as New Jersey applies a stricter "ABC" test to evaluate the employee or independent contractor status of workers such as Uber drivers. Under the ABC test, a driver is presumed an employee unless Uber demonstrates that:

- It exercises no control over the driver or the driver's performance of work.
- The services of the driver are either outside Uber's usual course of business or are performed outside of Uber's places of business.
- The driver is customarily engaged in an independently established trade, occupation, profession or business.

NJDOL's assessment against Uber is the latest (and the most significant) example of New Jersey government's aggressive enforcement efforts to crack down on alleged worker misclassification. In May 2018, New Jersey Governor Phil Murphy signed Executive Order No. 25, which established the Task Force on Employee Misclassification. On July 9, 2019, the Task Force issued a report containing its recommendations to combat misclassification. Such recommendations include, but are not limited to:

- Education and public outreach against misclassification.
- Imposition of the requirement that government contractors receiving state funds affirm compliance with laws regarding worker classification and payment of proper wages for all hours worked.
- Coordination of enforcement efforts and data sharing among various state agencies to combat misclassification.
- Cooperation with other states to combat misclassification and wage underpayments.
- Criminal referral of egregious violations to the New Jersey Attorney General.

The report further proposes numerous pieces of legislation aimed to increase compliance with wage and hour laws. Since then, Governor Murphy signed into law Senate Bill 2557, which permits the NJDOL to issue stop work orders against any employer who violates the state's prevailing wage laws. On August 6, 2019, Governor Murphy signed the New Jersey Wage Theft Act into law, putting into effect several of the key recommendations of the Task Force, specifically criminalizing violations of wage and hour laws and increasing fines and penalties under existing state law for underpayment of wages. In November 2019, New Jersey State Legislature introduced Senate Bill S4204 (Assembly Bill A5936). If this proposed legislation is adopted, workers could be classified as independent contractors only if it can be proven, by employers, that the workers at issue meet the ABC test.

New Jersey is not alone in its aggressive approach against worker misclassification. In its neighboring New York State and City, anti-misclassification laws such as the Construction Industry Fair Play Act, the Commercial Goods Transportation Industry Fair Play Act and the Freelance Isn't Free Act are aggressively enforced. In 2016, New York Governor Andrew Cuomo issued an Executive Order and expanded the existing Joint Task Force on Employee Misclassification into a Joint Enforcement Task Force on Worker Exploitation and Employee Misclassification. In California, Assembly Bill 5 ("AB 5"), which was to take effect January 1, 2020 (but is currently subject to a temporary restraining order issued on December 31, 2019 by the U.S. District Judge Roger T. Benitez of the Southern District of California), essentially codified the ABC test applied by the California Supreme Court in *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, 4 Cal. 5th 903 (2018), and expanded its application to California unemployment insurance and workers' compensation proceedings. Pursuant to AB 5, employee status is presumed unless the Company can prove that its relationship with the worker at issue meets the ABC test.

Any companies in New Jersey that are considering the engagement of independent contractors should carefully assess and document the circumstances justifying the independent contractor classification and understand that misclassification may impose significant exposure to liability. Companies should recognize the difficulty of meeting the ABC test and when in doubt, they are encouraged to err on the side of employee classification.

Litigation Summary

Court Concludes that FLSA Settlement Reached Through an Offer of Judgment Do Not Require Judicial Approval

The Second Circuit has endorsed an important exception to the general rule that the settlement of FLSA claims requires the approval of either the Department of Labor or a federal court. *Yu v. Hasaki Restaurant, Inc.,* a 2-1 panel majority held that judicial approval is not required when parties settle an FLSA claim through an offer of judgment made and accepted under Federal Rule of Civil Procedure 68. *Yu* was an FLSA overtime claim filed by a sushi chef in New York. After the complaint was filed, the restaurant sent a Rule 68 Offer of Judgment for $20,000 plus attorneys' fees. Yu accepted the offer within the time limit contemplated by Rule 68, and the parties filed a notice of settlement with the court. But before the Clerk could enter judgment, the district judge ordered the parties to submit the settlement agreement to the court for a fairness review and judicial approval, relying on Second Circuit case law. Both parties sought interlocutory review of that decision. The appellate court accepted review, stating that the case presented the narrow question of whether FLSA claims fall within the narrow class of claims that cannot be settled under Rule 68 without approval by the court (or DOL).The majority concluded FLSA claims were not exempt from Rule 68, observing that there is no clear expression in the FLSA of congressional intent to exempt the statute from the operation of Rule 68 and that the plain text of Rule 68 required the court to enter the judgment. The majority distinguished "stipulated judgments" entered under Rule 68 from various types of "private settlements" that require judicial approval when the parties seek to resolve the litigation through a stipulated dismissal with prejudice under Federal Rule of Civil Procedure 41(a)(1)(A).

U.S. Circuit Judge Guido Calabresi dissented, "emphatically" disagreeing with his colleagues, arguing they misread the law. While the FLSA contains "no robotic words" explicitly requiring that courts review all deals for fairness, the law as a whole "prohibits the kind of unsupervised private settlement agreements" contemplated by Rule 68. A petition for rehearing *en banc* has been filed in the case, in which advocacy groups argue that judicial approval of settlements achieved through Rule 68 should be required in order to protect workers from getting a raw deal.

Absent reversal by the full court, the practical implication of *Yu* is that parties within the Second Circuit can use Rule 68 offers of judgment to settle FLSA claims without having to go through the process of court review and incurring the cost, delay and public disclosures that are often required by the judicial approval process.

California Developments

Federal Court Enjoins Implementation of AB 5 in the Trucking Industry

We've been tracking litigation challenging two new laws enacted by the California legislature. On Thursday, January 16, a federal judge issued a preliminary injunction in the litigation challenging implementation of AB 5 with respect to the motor carrier industry. AB 5 broadly bans usage of independent contractors by employers with California operations. In *California Trucking Association v. Becerra et al., Judge Robert Benetiz* granted plaintiff's motion for a preliminary injunction against enforcement of AB 5 against motor carriers and owner-operators in California, thus extending the temporary restraining order he issued on December 31, 2019. The court largely agreed with the federal law preemption arguments made by plaintiff, who claimed that the "ABC test" for determining independent contractor status cannot be squared with pervasive federal level regulation of the trucking industry.

Federal Courts Block Implementation of Two New California Statutes to Kick Off the New Year

As previously stated, two separate federal court judges issued temporary restraining orders barring implementation of controversial statutes passed last year by the California Legislature.

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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, Glenn Grant, Christine Hawes and Jillian Ambrose will be speaking on February 20 on recent traditional labor law issues that impact non-union employers.

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