KAUFMAN DOLOWICH LLP

KD Alert - The New York Workplace and COVID-19 - Getting Back To Business (Part III)

As New York businesses prepare to reopen and bring employees back to work, it is imperative that employers pay particular attention to a number of critical wage-and-hour issues.

Is My Employee Still Exempt?

While an employee prior to his or her separation before the pandemic may have been properly classified as exempt, a change in the employee's duties and/or compensation upon their return may change that classification.

As most employers recognize, employees properly designated as exempt are not eligible to receive overtime compensation; to wit, payment of time-and-a-half the regular rate of pay for all hours worked above 40 in a week. Rather, exempt employees are generally paid on a salary basis at or above the minimum salary threshold, regardless of the hours worked. To fall within an exemption, an employee must fit the applicable criteria for that exemption. The criteria differ based upon the specific exemption at issue. For example, the managerial exemption requires, among other things, that the employee's primary duty consists of the management of the enterprise, and the employee customarily and regularly directs the work of two or more other employees.

Upon returning to work, some managerial-level employees, who were previously designated as exempt, may suddenly find themselves performing more manual and less managerial tasks. Perhaps, because there will likely be fewer employees initially in the workplace means these "managers" are not supervising others. Thus, while the designation of that employee as exempt was previously proper, the continued designation upon their return to work may be wrong and prove costly. In other words, that employee who returns to work and may be called upon to work more than forty hours per week may now be owed overtime, and the employer may simply be unaware.

Even if the duties remain the same as before, but due to certain economic constraints, the employee is paid a salary that now falls below the mandatory minimum threshold, the employee previously designated as exempt might lose the exemption.

Employees who were previously classified as exempt under the outside sales exemption might also find themselves no longer exempt as a result of social distancing requirements. To qualify under the outside sales exemption, an employee must, among other things, be customarily and regularly engaged away from the employer's place of business. If, due to social distancing, the employee is no longer going out to meet prospective clients in person, but is instead interacting with them by phone or video conference, then – whether he is working from home or the office – that employee may no longer be exempt under the outside sales exemption.

Therefore, it is important that employers thoroughly review the duties and classifications of returning employees to determine whether the previous exemption still applies. The failure to do so at the onset of reopening may lead to liability for the employer.

Should Employee Time be Tracked?

As addressed above, employees previously classified as exempt may now be non-exempt. This means that the employer must track the employee's work hours to ensure that each hour worked is paid to the employee properly. This goes for all non-exempt employees who are working from home, as well. Some businesses may direct certain employees to telework for reasons pertaining to social distancing, while others may have employees who request to work from home while their children are unable to go to school or summer camp. Regardless of where the non-exempt employee performs work, the obligation for the employer to accurately track

the employee's time remains.

Does the Employee Need a New Wage Acknowledgment Form?

As employees who lost their jobs are re-hired, the employer must remember to provide the returning employee with a wage acknowledgment form that is required for all New York employees. The form, when prepared properly, sets forth critical information, such as the rate of pay for employees, any applicable allowances, and the overtime rate of pay. Even if an employee was not terminated, but simply had their rate of pay changed during the pandemic, the employer must make sure the form reflects the most updated information. An employer's failure to maintain these forms with accurate information could lead to significant monetary penalties for the employer.

Is the employer required to pay for COVID-Testing?

Another important wage-and-hour consideration as employees return to the workplace is whether to compensate employees for time spent being tested or screened for COVID-19. Even though the EEOC permits such testing, many employers who choose to conduct temperature screening and/or administer tests before the employee begins work, are unsure of whether time spent on these activities is to be deemed "on the clock." While some may argue that undergoing temperature screening or testing is akin to employees waiting in a security line or bag check line on the way in or out of the workplace — activities that are not compensable in many jurisdictions — there is no conclusive authority about this point to date. To err on the side of caution, until further guidance is issued, employers may wish to treat testing or temperature screening as compensable time if employees are being required to submit to it at work.

Best Practices

The law regarding wage and hour issues continues to undergo substantive changes as more and more employees return to work. If you are at all unsure of your workplace obligations, you may want to consult with experienced counsel who can guide you through the potential pitfalls when implementing these new laws.

The experienced Labor & Employment attorneys at Kaufman Dolowich & Voluck are available to assist. We will continue to keep you apprised of any further developments impacting the workplace, and are available to answer any questions and provide additional guidance to help you navigate the ever-changing landscape of the laws during the COVID-19 pandemic and its interplay with any other local, state or federal laws. For more information, please contact an experienced member of KD's Labor & Employment Law Practice Group.

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