Payroll Compliance Update: New Laws and Required Changes to Avoid Penalties in 2018 (part 1)

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Why This Matters

- About 900 federal wage-hour lawsuits in 1990
- About 1,900 suits in 2000
- About 6,700 suits in 2010
- About 8,900 suits in 2015
- About 8,300 suits in 2016 but value of settlements increased
- There are now more wage class/collective actions filed than discrimination class actions
  - And that's just in federal court . . .

Why This Matters

So . . . why the explosion of litigation?

- Archaic, counterintuitive laws
- Metastasizing liability
- Big penalties and mandatory fee-shifting
  - Back pay, liquidated damages, attorney's fees
  - Often inflated because no record of hours worked

Today's Goals

- Update on "Hot" issues in the wage and hour world
- Give a basic level of knowledge; these are things even a savvy HR leader might miss
- Learn the traps that are both counterintuitive and common (your company may be screwing up)

The "Primary Beneficiary" Test

- In determining whether an individual is an "intern" or an "employee," the courts look to several non-exhaustive factors:
  - the extent to which the intern and employer clearly understand that there is no expectation of compensation;
  - the extent to which the internship provides training similar to that given in an education environment, including clinical or other hands-on training;
  - the extent to which the internship is tied to the intern's formal education program through integrated coursework or credit;
  - the extent to which the internship accommodates the intern's academic calendar;
  - the extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning;
  - the extent to which the intern's work complements, rather than displaces, that of paid employees; and
  - the extent to which the intern and employer understand that there is no entitlement to employment following the internship.

**Wang v. Hearst Corp.*, 2017 U.S. App. LEXIS 24789 (2nd Cir. Dec. 8, 2017).

**Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2016).*

Automobile Dealer Exemption

- Currently awaiting Supreme Court decision.
- Issue: whether “service advisors” at dealerships are covered by what’s known as the “automobile dealer” exemption set forth in Section 213(b)(10)(A) of the FLSA.
- This exemption excludes from overtime any “salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles.”
  - Salesmen who sell cars are covered, as are the mechanics who service them.
- Are service advisors (those who sell services and act as the liaison between the customer and mechanic) “primarily engaged in” selling or servicing automobiles?

Second Circuit: FLSA Claims Are Subject To Arbitration

- Second Circuit has recently addressed various issues surrounding the arbitrability of FLSA claims.
  - One such issue is whether a class (collective) action waiver in an arbitration provision rendered the provision unenforceable as a matter of law. The Second Circuit replied with an affirmative, "no."
    - This issue is currently pending before the U.S. Supreme Court.
- With respect to individual FLSA claims however, employers in the Second Circuit who have implemented, or contemplate implementing, an arbitration provision for their employees can assume that, generally speaking, such a provision will be enforceable as to FLSA claims.

DOL: Overtime

- A Texas District Court issued a nationwide preliminary injunction enjoining the DOL from implementing and enforcing its final overtime rule.
- The rule, which was scheduled to take effect December 1, 2016, would have increased minimum salary levels required for an employee to achieve exempt status under the FLSA.
- On July 26, 2017, the DOL issued a request for information on the overtime rule, seeking public comment.
- On October 30, 2017, the DOL appealed the Texas District Court's summary judgment(?)
- On November 3, 2017, the DOL filed an unopposed motion to stay the appeal while it undertakes further rulemaking to determine what the salary level should be.

New Overtime Rule Coming: Next Steps

- The Obama-era rule tried to set the salary level for the white collar exemptions at $47,476.
- It is expected the new salary level will be in the low $30,000 range.
- In July 2017, after the DOL published a Request for Information regarding a new overtime rule asking for public comment, more than 140,000 comments were received.
- The next step is for the DOL to issue a proposed rule, and then then a final rule following a comment period.