Wage and Hour Enforcement Update

In October 2014, the U.S. Department of Labor’s (DOL) Wage and Hour Division (WHD) released its enforcement statistics for fiscal years 2009 through 2013. The released statistics confirm an increase in wage and hour activity with increases in both the amount of recovered back wages and hours spent on enforcement. These heightened enforcement efforts have coincided with federal wage and hour lawsuits reaching a record high in the 2013-2014 year. More than 8,000 Fair Labor Standard Act (FLSA) cases were filed between April 1, 2013 and March 31, 2014, marking a nearly 5 percent jump from the prior year. The number of FLSA suits annually filed has been steadily increasing since 2000, with a 438 percent increase in that time. These enforcement and trend statistics remind employers to use care and best practices to ensure compliance with state and federal wage and hour laws. This briefing discusses the current trends in WHD enforcement efforts and provides employers with some best practice suggestions for avoiding and/or minimizing the impact of DOL audits and wage and hour lawsuits.

Enforcement Trends

The October 2014 statistics from the WHD show an increase in both the amount of recovered back wages and hours spent on enforcement. Notably:

- **Back Wages Recovered:** WHD’s FY 2013 total recovery of approximately $250 million is an increase from the approximately $173 million recovered in FY 2009 and the approximately $166 million recovered in FY 2005.
  - In FY 2013, overtime back wages recovered, in FLSA matters, totaled approximately $130 million, compared with approximately $119 million in fiscal year 2009; back wages recovered for minimum wage violations in FY 2013 totaled approximately $38.5 million, compared with the approximately $13.9 million collected in FY 2009.
  - Enforcement Hours: With the addition of some 275 to 300 new investigators, the hours spent by WHD on enforcement totaled 1.339 million in FY 2013, compared with approximately 880,000 hours in FY 2009, and 970,000 hours in FY 2005.

**Independent Contractor Misclassification**

The DOL continues to concentrate its efforts on the misclassification of workers as independent contractors under the FLSA. In 2011, the Government Accountability Office concluded that it was possible that nearly 60 percent of employers misclassify employees, and that same year the DOL and Internal Revenue Service signed a memorandum of understanding agreeing to coordinate efforts to combat and to prevent employee misclassification. In October 2014, the WHD began a blog series entitled “A Wage and Hour Division for the 21st Century Workplace.” The series discusses the WHD’s refocused efforts and interest in efficiency in an era where workplaces no longer consist of “a traditional brick and mortar company owned and operated by a single employer.” The WHD recognizes, in this series, that more employers are using independent contractors to staff their workplaces and notes that efforts are needed to ensure proper classification for such workers.

Further, the DOL has signed agreements with several states to coordinate and communicate more efficiently in hopes of improving outreach and enforcement in the area of independent contractor misclassification. In November 2014, New Hampshire became the 17th state to sign such an agreement after the state’s Department of Employment Security reported that it found misclassifications in nearly a quarter of its audits. In October 2014, the DOL renewed a 2011 memorandum of understanding with the Illinois Department of Labor, agreeing, among other things, to meet annually to discuss areas of mutual interest, to inform each other of possible violations,
and to coordinate enforcement. Thus, employers should expect enforcement efforts focused on misclassification to continue to increase.

**Fair Pay Overtime Initiative**

The DOL also continues to pursue its Fair Pay Overtime Initiative, which is focused on ensuring that non-exempt employees receive proper overtime compensation. In fiscal year 2013, 77 percent of recovered back pay awards were from overtime claims. This amounted to more than $130 million for more than 170,000 employees. Additionally, in March 2014, President Obama issued a presidential memorandum, “*Updating and Modernizing Overtime Regulations*,” focusing the WHD on regulatory updates to the FLSA overtime regulations and asserting that the “white collar” exemptions are outdated and need to be revamped. The WHD has engaged in a number of stakeholder “listening” sessions in an effort to move forward with the President’s directive. This move may mean a transition from the flexible “primary duties test” to a more rigid quantitative percentage system to determine whether an employee is exempt from overtime benefits, as well as an increase to the minimum weekly salary required under some of the white collar exemptions. A draft form of the revised white collar overtime exemption is now expected in February 2015. See our August 2014 client briefing, *President Obama Issues Fair Pay and Safe Workplaces Executive Order*.

**Federal Contractors**

In October 2014, WHD published a Final Rule establishing standards and procedures to implement Executive Order 13658, entitled “*Establishing a Minimum Wage for Contractors*,” which increases the minimum wage to $10.10 per hour for federal contractors performing on contracts agreed to on or after January 1, 2015. The new minimum wage will apply to workers who are entitled to the minimum wage under the FLSA, service employees covered by the McNamara-O’Hara Service Contract Act, and laborers and mechanics covered by the Davis-Bacon Act. The Final Rule also requires tipped employees working under government contracts to be paid at least $4.90 an hour. See our October 2014 briefing, *Key Provisions of Final Regulations on Contractor Minimum Wage*.

Also of note for federal contractors, the DOL and the WHD will play a major role in preparing regulations and guidance to implement Executive Order 13673, Fair Pay and Safe Workplaces. The Executive Order calls for the DOL to impose arbitration limitations for claims arising out of Title VII of the Civil Rights Act of 1964 and other sexual harassment tort claims. The order also calls for more transparency in pay information and disclosure of labor law violations. Like Executive Order 13658, the demands in Executive Order 13673 will apply only to certain federal contractors. See our August 2014 briefing, *President Obama Issues Fair Pay and Safe Workplaces Executive Order*.

**Five Best Practices for Wage and Hour Compliance**

1. Maintain proper records and post appropriate notices in accordance with the FLSA. The FLSA requires that employers maintain records of hours worked by non-exempt employees and provide non-exempt employees with notice of their rights under the FLSA. Maintaining records for all employees can help avoid excess costs in the event an employee classification is challenged by providing objective evidence of hours worked for the fact finder and can also help avoid liability for other violations of the FLSA.

2. Be consistent in language and actions. For example, in all agreements and communications with independent contractors refrain from using the term “employee.” Always refer to the contractors as “contractors” and be sure that independent contractors are not treated identically to other workers in the workplace. Whenever possible, allow contractors to set their own hours, to work for other employers, to engage their own employees, and to maintain control over the means of their work. Provide independent contractors with written vendor agreements that expressly create an employer-independent contractor relationship. These agreements should differ substantially from employee agreements and should discuss the limited amount of control that the employer will have over the contractor and the control the contractor shall retain.
3. Train personnel and management to understand the different nuances in the labor laws. Management, especially, should be trained to understand overtime regulations and to avoid micro-managing independent contractors.

4. Conduct audits. An employer should do its best to classify all employees appropriately and to reassess those classifications periodically. Employers should also periodically check to ensure non-exempt employees are being paid at the appropriate rates for time worked. These audits will also help employers avoid heightened penalties for willful violations of the FLSA, as they will evidence the employer’s intent to classify its workers properly.

5. Consult with your employment attorneys routinely. As the laws in this area are changing frequently and the political landscape is changing, it is important to consult with labor and employment attorneys if you have any concerns. Your attorneys will be aware of updates in the law and can assist you in changing policies or adjusting compensation systems to comply with the updated laws.

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