MAY 4, 2020 | WAGE & HOUR COMPLIANCE

Key Employment Considerations When Resuming or Increasing Business Operations

Many states are beginning to re-open their economies, and employers are resuming or increasing business operations in some fashion. As employers make this transition, there are several key employment considerations that employers should pay close attention to. Below is an overview of some of the topics employers should carefully analyze when reopening or increasing business operations.

1. **Exempt and Non-Exempt Employee Classification Issues**

As employers begin to ramp up business or begin plans to do so, employers should carefully evaluate whether exempt employees performing a majority of work on non-exempt tasks still meet the administrative exemption under the Fair Labor Standards Act ("FLSA"). For instance, many exempt employees, especially in the hospitality and service industry, are already or will be performing a majority of tasks that may not necessarily satisfy the FLSA's primary duties test at first glance.

As a general rule, an employee who spends at least 50% of his time performing exempt duties will satisfy the primary duties test. But, courts have advised that a company should not apply the 50% test on a day-to-day basis but rather on a more "holistic" basis. That may mean you have to look at periods even longer than a workweek to make the determination, and it will depend on the nature of your business.

Although the time an employee spends performing primary duties is a factor, it is not the sole factor for meeting the duties test. Time alone is not the sole test, and nothing in the FLSA requires that exempt employees spend more than 50% of their time performing exempt work. Other factors may include the relative importance of the employee's exempt duties compared with his nonexempt duties, his relative freedom from direct supervision, and the relationship between his salary and the wages paid to other employees for the type of nonexempt work he performs.

And, specific to the hospitality and service industry, the FLSA recognizes that "an employee of a retail or service establishment shall not be excluded from the definition of an employee employed in a bona fide executive or administrative capacity because of the number of hours in her work week which she devotes to activities not directly or closely related to the performance of executive or administrative activities." 29 U.S.C. § 213(a)(1).

The regulations specifically recognize that certain executives, particularly in retail establishments, will often perform exempt work concurrently with nonexempt work. "Assistant managers in a retail establishment who

perform exempt executive work such as supervising and directing the work of other employees . . . may have management as their primary duty even if the assistant managers spend more than 50 percent of their time performing nonexempt work . . . ." 29. C.F.R. § 541.700(c). *See Grace v. Family Dollar Stores, Inc. (In re Family Dollar FLSA Litig.)*, 637 F.3d 508 (4th Cir. 2011) ("It is misleading simply to add up the time that [Plaintiff] spent unloading trucks, stocking inventory, running cash registers, or sweeping floors and conclude thereby that she was merely a clerk and not a manager.")

For example, in *Grace*, the Fourth Circuit found that the plaintiff "was performing management duties whenever she was in the store, even though she also devoted most of her time [99%] to doing the mundane physical activities necessary for its successful operation." *Id.* at 517. *See also Jones v. Virginia Oil Co., Inc.*, 69 Fed. Appx. 633, 637 (4th Cir. 2003) (manager exempt where she spent 75 to 80 percent of her time carrying out non-exempt tasks); *Murray v. Stuckey's, Inc.*, 939 F.2d 614, 618-20 (8th Cir. 1991) (store managers met the primary duty test even though 65-95 percent of managers' time was spent on non-managerial duties).

On the other hand, if an exempt employee is *reassigned* entirely to a position that is traditionally classified as non-exempt during reopening and he or she no longer perform any duties sufficient to meet the administrative exemption, employers should consider reclassifying the employee as non-exempt. For example, if a restaurant manager is a reassigned to a server position, or if a factory supervisor is reassigned to a position on the line in a factory and performs no duties related to the management or general operations of the business, the employee will likely need to be reclassified as a non-exempt employee and be paid an hourly rate. To avoid potential wage claims, employers should carefully review each employee's job duties and re-evaluate employee job classifications, especially if any changes are being made to how the workplace is managed.

2. **Overtime Calculations for Employees Performing Jobs at Two Different Rates of Pay**

To sustain business operations and reduce costs, many employers have asked employees retained during reductions in force and furloughs to perform work in two separate positions with different rates of pay. While this is certainly permissible, employers have often struggled to determine what rate of pay the employee should be paid for overtime worked by that employee in a workweek.

The default rule under the FLSA requires payment of overtime at the rate of 1.5 times the weighted average of the two different rates – i.e. the blended rate. For example, if an employee in a manufacturing plant works 20 hours in a week performing janitorial services at a rate of $15 per hour and an additional 30 hours in the same week working on the assembly line at $20 per hour, the overtime blended rate would be $18 per hour. (Blended Rate = [20hrs x $15] + [30hrs x $20]/ 50hrs). Thus, the overtime rate would be $27 per hour. (OT rate = $18 x 1.5).

Employers must calculate this every single week for each employee who performs work at different rates and works more than 40 hours per week. The employee's paystub should reflect the hourly rate that the employee received working in each position. In other words, the blended rate should not be reflected as the employees' hourly rate for all hours worked. The hours worked in each task at the assigned rate should correlate, and the blended rate should only be used for calculating the overtime rate.

3. **Benefits Considerations for Existing and Furloughed Employees**

Employers are facing a surge of questions related to benefits in light of the pandemic, and benefits-related questions will certainly increase as businesses re-open and employee re-enter the workforce. Employees who have been working from home may have made changes to certain benefits, such as reducing contributions to flexible spending accounts ("FSAs") or commuter and parking benefits. Although employees may already be aware of these benefits, employers should nonetheless remind employees of the benefits available to them upon returning to work.

The Coronavirus Aid, Response, and Economic Security Act (the "CARES Act") allows health FSAs and health reimbursement arrangements to reimburse over-the-counter medicine and drugs and menstrual care products, effective retroactively to Jan. 1, 2020. Employers should update their plan documents and summary plan descriptions accordingly to describe these new rules and communicate them to employees.

Furthermore, if an employee became ineligible for benefits because they no longer qualified as a "full-time" employee based on reduced hours, employers will need to determine if and when those employees can re-enter the benefits plans. Health benefits, in particular, is a top priority for employees now more than ever. Employers should carefully review benefits plan provisions with respect to eligibility and elections and be transparent about those with employees.

Employers should also consider the Affordable Care Act's employer mandate's "break in service" rules. If an employee returns from a furlough after less than a 13-week absence during which the employee was not participating in the employer's health care plan, the employer must immediately reinstate the employee on the plan under the Affordable Care Act. If an employee returns to service after a period of 13 or more weeks without any credited service hours, an employer may consider that employee as a "new hire" for the purpose of the employer mandate upon their return.

4. **Telework Policies**

Since the EEOC has endorsed telework as an effective infection-control strategy and working from the kitchen table has become the new norm for a number of employees, employers need to establish clear expectations and responsibilities for employees who continue to work from home in some capacity. To the extent that an employer has not created or revisited their telework policy, now is the time to do so.

As states begin announcing plans to reopen the economy and get employees back to work, questions about telework and how to manage a remote workforce have risen exponentially. There is no doubt that employees will enforce stay-at-home policies for individuals that feel sick or become sick, but many employers may choose to require a subset of their workforce to work from home exclusively.

In drafting a robust telework policy, employers should take into consideration a number of factors, including the following:

- which positions are eligible for telework;
- the number of days an employee may telework, the duration of the telework agreement, and an employee's expected work hours;
- how employees should request to telework;
- circumstances under which employees may be permitted or required to telework on an as-needed basis;

- protocols for when employees may return to work following an illness;
- expectations and responsibilities while teleworking;
- how non-exempt employees will report hours worked and continue to abide by the employer's overtime policy (to the extent non-exempt employees are able and permitted to telework); and
- workspace expectations.

To the extent that employees use company-issued equipment and laptops, employers should also outline security expectations and how employees may acquire additional equipment to perform their duties. Employers should make clear that out-of-pocket expenses will not be reimbursed unless by prior approval of a manager.

These are just a few of the many issues that employers are facing as they begin making plans to increase business operations. Employers should carefully evaluate employees work duties and benefits upon return to work, and also reiterate workplace expectations and responsibilities to the extent those have changed. The last thing an employer wants to face is a lawsuit while trying to manage its business while recovering from the economic downturn.

For additional information on these issues and other return to work strategies, please tune into Conn Maciel Carey's webinar on "Return to Work Strategies: Employment and Workplace Safety Implications of COVID-19" on Thursday, May 7, 2020 at 1:00pm EST. Participants can register here.