State Regulations Update

State Wage-and-Hour Law – A Hidden Minefield for Employers

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The hottest employment litigation topic for the last few years has been wage-and-hour litigation. There has been an avalanche of class and collective actions asserting that employers have failed to comply with laws setting restrictions on hours and placing requirements for overtime-premium pay and other compensation. The number of such claims has more than tripled in the last decade. Indeed, they rose over 60 percent in 2006 alone. Many of these actions have been brought on behalf of large numbers of employees, some in excess of 100,000, and have therefore involved claims for substantial amounts of money. Verdicts and settlements of $100 million dollars have occurred in some cases. In fact, there were four private settlements of wage/hour class actions in one recent year that each exceeded $50 million, and these were compromise settlements!

A few of those, and you are talking about real money! Indeed, a major retailer has announced that it will pay between $352 million and $640 million to settle pending wage/hour lawsuits against it.

As management casts a wary eye at this phenomenon, the emphasis is frequently on federal law – the Fair Labor Standards Act (FLSA). However, state wage-and-hour laws are often overlooked and can be just as important. State laws are usually similar to the federal law, but this does not mean that they are always the same and can be ignored. If a state wage-and-hour law is more generous to the employee than federal law, the state law usually must also be followed. Many clever plaintiffs’ lawyers have, therefore, brought major litigation under the state laws.
STATE LAW VS. FEDERAL LAW

What is the advantage to plaintiffs, and thus the danger to employers, of state law over federal law? How can the state wage/hour laws cause problems that the federal FLSA does not? The answers lie in both the procedures that may be followed in litigating state claims and in the coverage and provisions of the state laws.

Wage/hour litigation is so dangerous because of the numbers involved. Even though the amounts that may be claimed by employees can be small when a particular workweek is considered, the amount grows when the money at issue is multiplied by the number of pay periods in several years. The amount at issue can be staggering when multiplied by many employees, and that is exactly what plaintiffs try to do. They attempt to bring actions on behalf of and to recover for many employees over several years, thus multiplying the amount at issue.

It is this “class” or “collective” aspect of wage/hour litigation that makes it such a threat to employers. And it is the way that employees may be represented in these cases that presents one of the important features of some state law litigation. Under Section 16(b) of the federal FLSA, employees may bring a collective action, not only for themselves, but also for others similarly situated. Under this procedural device, the court can, under some circumstances, authorize notice to a class of potential claimants that invites them to join the collective action. The recipients typically get a form they can submit to the court indicating their consent to being represented in the case. If the court permits a broad notice to many potential claimants, typically present and former employees during a set period of time, then a number of individuals have the opportunity to join the litigation. If they do so, they are potentially eligible to participate in a recovery, but individuals who do not affirmatively join an FLSA collective action may not share in any funds recovered in the action. Although the defendant can make various arguments that a
particular lawsuit is inappropriate for collective treatment and that the other employees are not similarly situated, courts frequently will go forward with the collective action if the proper showing is made.

This scenario can be a nightmare for the employer, but the nightmare can be even worse under state law. In a number of states, these claims can be pursued in a “class” action. Although a class action has some features similar to a collective action, the seemingly esoteric differences can be quite important. As noted, in a collective action, the class of potential claimants has to affirmatively indicate a desire to participate. Many do, and this is why these cases are so scary. However, many individuals who receive notice of a collective action do not request to participate. Rather, they react like many of us react when we receive mail promising us something for nothing. They throw it away. Other individuals may feel that they are not entitled to the money being claimed and therefore do not make a claim. In any event, far less than a hundred percent of the typical class opts into a collective action. A 20-percent return, for example, is not unusual.

While 20 percent of hundreds or thousands of claimants is not especially good for the defendant, it could be worse. Under many state laws, it is worse. In many states, including California and New Jersey, violations of the state wage/hour laws can be pursued in a traditional class action. Under this procedure, the group of individuals for whom recovery can be obtained is not limited to those who affirmatively indicate that they want to participate. If the class is certified by a court, it can include everyone who receives notice who does not “opt out” and thus ask to be excluded from the class. As a result, the number of individuals who potentially may recover in a proceeding under state law may be several times greater than the number under the federal opt-in procedure. This can mean big money.
The size of these classes can be staggering. A class of 145,000 people was certified in California. In another case, a health-care organization in California agreed to settle with a class of 136,000 present and former employees. A class does not need to be nearly this large for the litigation to involve millions of dollars.

State law can provide plaintiffs with bigger recoveries in other ways. For example, the statute of limitations is also very important to the exposure of a business in wage/hour litigation. Since wage and overtime practices are often of long standing when they are finally challenged in court, how far back the court will look to determine what wages are at issue is very important. A long statute of limitations can multiply the risk to the employer. The federal FLSA has a two-year statute of limitations with a third year tacked on if the violation is considered willful. However, some states have longer statutes of limitations. For example, the applicable statute of limitations in New York is six years. This means that looking at a state statute rather than just the federal statute can be very important. Indeed, in one recent New York wage/hour case, the period at issue covered the 12 years before the date the appeal was decided.

Damages can also vary. Under the federal FLSA, employees may obtain as liquidated damages an amount equal to the amount of unpaid minimum wages or overtime compensation, effectively doubling their recovery. Under the law of Massachusetts, the remedy can be even harsher on employers – treble damages. This represents quite an incentive to bring a state-law claim.

State wage-and-hour laws are also very important because they can provide broader coverage. When an employer does not pay employees for overtime, it is typically because it considers the employees to fall under an exemption to the overtime requirements. There are a number of these exemptions under federal law, and state law frequently has similar exemptions.
However, not all federal exemptions are reflected in state law. For example, many employers rely on the so-called motor-carrier exemption, which is basically designed to avoid double regulation. Under federal and many state laws, some employees are exempt from overtime requirements if the U.S. Secretary of Transportation has the power to establish qualifications and maximum hours of service for them. Regulation of the employees’ hours is left to the Transportation Secretary. Many employees who drive vehicles of a certain size in their work can therefore be exempt from the coverage of overtime rules other than those established by the Secretary of Transportation. However, not all jurisdictions follow this approach. For example, the District of Columbia seems to recognize no motor carrier exemption. New Jersey limits it to the trucking industry, thus excluding many employees in other industries who might otherwise be covered. Connecticut applies the exemption to a narrower group of employees than federal law does.

The “outside sales exemption” is another area where federal and state law may differ. In order to qualify for this important exemption under California law, an employee must be engaged in sales activities for over 50 percent of his or her working time. The federal standard is different and not so demanding. The exempt work must constitute the primary duties of the employee, but this does not necessarily mean that 50 percent of the employee’s time must be devoted to it under federal law.

Where overtime is mandated, the payment requirements can vary dramatically between federal and state law. Federal law and many state laws permit an overtime calculation under many circumstances known as the “fixed wage for fluctuating workweek” calculation. Employers need to take appropriate steps to use this approach. But where utilized and appropriate, this method of calculation can greatly reduce the overtime liability of an employer.
— often by about two-thirds. However, California does not recognize this method as satisfying
its overtime-premium requirement. The result is that, in many situations, a pay system involving
much greater overtime premium payments is required under California law than under federal
law.

The nature of the overtime obligation can also vary under state law. The FLSA generally
requires that employees be paid overtime compensation for hours worked in excess of 40 hours
per week. Although the federal statute is commonly misunderstood, it does not require overtime
after eight hours in a particular day. Only if the weekly total is above 40 hours does federal law
require overtime premium pay. However, state laws can differ. California, for example, requires
that an overtime premium of time and a half be paid for the hours in excess of eight in a
particular day. Moreover, work over 12 hours per day must be compensated with double time.
Further, premium pay is also due for work performed on the seventh consecutive day of work on
a workweek. In states with these types of variations, the entire overtime-premium calculation is
different from the federal calculation in many circumstances. In such cases, it is the more
stringent state overtime rules that control.

**State Class Action and Federal Collective Actions Combined**

Rather than deciding whether state or federal law is better for their cases, some plaintiffs
have tried to get the best of both worlds. Since more than one cause of action can be pled in
many lawsuits, some plaintiffs have attempted to bring lawsuits under both the FLSA and the
applicable state laws. They have sought certification as both an opt-in FLSA collective action
and as a traditional class action that asserts violations of state law. However, some employers
have been successful in defeating this strategy. Many courts in these cases have recognized the
impracticality of combining both state and federal procedural devices in one case and have
concluded that having an opt-out class action in the same case as an opt-in collective action undermines the principles of the federal approach, which requires an active expression of interest by the individuals affected. These courts have refused to certify both procedures simultaneously.

On the other hand, some courts have permitted a mixing of federal and state claims. A recent Iowa case has gone forward with both types of claims. Indeed, the involvement of state laws can lead to incredible complexity. One recent settlement with a technology company involved claims filed in several courts under the laws of seven states, in addition to federal claims. It resulted in the creation of multiple subclasses, and the distribution of a settlement fund of millions of dollars.

**STATES LEAD THE WAY ON MEAL AND REST BREAKS**

Although many state laws parallel federal wage-and-hour law to a considerable degree, there are some areas where state law leads the way. Many states have statutes or regulations, not duplicated by federal law, that require certain meal and rest periods for employees. Connecticut, Massachusetts, Nebraska, Maine, Nevada, North Dakota, and Tennessee are some of the states that require that an employer provide a meal or rest break of at least 30 minutes during the course of a workday. Depending on the state, work shifts of five to eight hours typically trigger the requirement for a meal break. If the employee is given at least 30 minutes, the meal period may be unpaid in most states.

New York requires even longer meal periods for some jobs. Frequently, those employees working in a factory are entitled to a sixty-minute meal period if their shifts are greater than six hours and start between 1:00 p.m. and 6:00 a.m. On the other hand, shorter meal periods are required in certain other jobs. Mercantile employees only have the right to 30 minutes.
Although the requirement for meal and rest periods is widespread in state law, the epicenter of controversy for this requirement is California. That state requires a 30-minute meal break if the employee works more than five hours. California law also provides for a second meal break if the employee works longer than ten hours. Although this requirement is longstanding, it became a major issue for employers when California, like such states as Connecticut and Illinois, imposed what in reality is a financial “penalty” for failure to properly provide the required meal period. The California “penalty” (although the California courts call it a wage for technical reasons) is that employees are entitled to an hour of pay for each day that they are improperly denied the half-hour meal break.

With the adoption of this rule, another fruitful source of litigation was created. Plaintiffs have filed lawsuits claiming that businesses have systematically failed to provide the full break required by law. When these claims are spread out over several years, seemingly small numbers become larger. When they are multiplied by classes of hundreds or thousands of employees, they can become massive. In one case, a retailer was hit with a verdict of $185 million for allegedly failing to follow the state law on meal and rest breaks.

California is not alone, however. A New Jersey case involves meal claims on behalf of 72,000 class members.

The complexity of complying with such state laws is again demonstrated by California. Does an employer that tells its employees to take the 30-minute meal break satisfy its obligations, or must the employer follow up and make sure that the employees are actually taking the breaks? If the employee is a driver and is on the road unaccompanied by a supervisor, what is the company’s obligation? Some of these questions are now headed to the California Supreme
Court for resolution. The fact that they have not yet been conclusively resolved demonstrates some of the difficulties for employers in dealing with state laws.

THE CAUSES OF EMPLOYER EXPOSURE

If wage/hour lawsuits are so dangerous for employers, how do the employers get into these situations? The answer is a combination of employer inattentiveness and the opportunism of some plaintiffs’ lawyers.

Many employers get into trouble because they make unwarranted assumptions about the law and because they do not follow up to make sure that practice follows theory. A surprising number of employers believe that if they pay employees a salary, this means that the employees are exempt, salaried employees. Although the recent wave of expensive class actions has begun to educate such employers in a painful way, simple lack of knowledge is behind much of the problem. Only now are many employers focusing on the fact that they must comply with the stated legal tests to rely on an exemption, even if they do pay a salary.

The same type of mistake is made by businesses that have assumed that individuals are independent contractors if they have an agreement that says so. The test for whether an individual is an independent contractor is complex, and depends on much more than the formalities of the relationship or what the documents say. The courts apply the principle that if it looks like a duck and quacks like a duck, it may be a duck. As a result, businesses are often held to be employing “employees,” even though they call them “independent contractors.”

Such claims can present significant risks to employers. One court certified 19 separate classes covering as many as 24,000 individuals in a case against a major delivery company that was accused of misclassifying drivers as independent contractors.
Even if employers understand the law, they frequently trip up on its enforcement. The devil is in the details. It is not unusual for employers to believe that employees are exempt because their job descriptions match up with the requirements of a state-law exemption. However, if the facts on the ground do not match up with the job description, there could be a legal violation. It is the actual duties of the employee, not the wording of the job description, that controls whether there is a wage/hour violation.

Another ingredient of these situations is that it is so attractive for plaintiffs’ lawyers to bring wage/hour class actions. The classes can be large. Therefore, the recoveries can be large. Another feature of wage/hour cases that make them attractive to plaintiffs’ lawyers is that it is generally not necessary to prove that the employer intended to violate the law – although such a showing can frequently increase the size of the recovery. Further, in many circumstances, the employer bears the burden of proof on certain critical issues. Thus, although many employers have been oblivious to the danger, numerous plaintiffs’ lawyers have been very interested in this type of litigation.

EMPLOYER MISTAKES

What are the errors that lead to wage/hour litigation? There are in fact several types of mistakes that can bring on such misfortune. Each should be cause for concern for prudent employers.

One of the principal mistakes that employers make, and thus one of the principal claims that plaintiffs assert, is “misclassification.” In these cases, plaintiffs contend that they were improperly classified as either exempt employees or as independent contractors. This is an especially lucrative area for plaintiffs’ lawyers because a single finding of misclassification can often lead to the conclusion that many class members are entitled to relief. For example, a retail
establishment might have a number of stores that are staffed by assistant managers classified as exempt. If it is determined that the job duties statewide of the assistant manager do not qualify for exemption under the state’s wage-and-hour law, then it is likely that a whole class of present and former assistant managers over a period of years will have viable claims.

In one recent case, the court permitted a class action against a delivery company that was alleged to have misclassified several thousand employees as managers. Mortgage loan consultants, technical writers, and stock brokers are other types of employees who have recently brought major class actions based on state-law misclassification claims.

Misclassification has become a matter of increasing concern for the state and federal agencies that enforce these laws. The governor of New York has established a Joint Enforcement Task Force on Employee Misclassification to review this issue. New Jersey has followed suit with a similar worker-misclassification initiative. Further, the Internal Revenue Service has entered into agreements with 29 state agencies to share information pertinent to the misclassification of independent contractors.

A different type of common wage/hour lawsuit involves “working off the clock.” In this type of case, the focus is generally not on whether the employees are properly classified. Further, such litigation often does not involve announced or acknowledged company policies. Rather, the theory of these cases is that employee hours were not properly recorded. This often involves claims that the employees were required to work through lunch or breaks, or to work before they had clocked in or after they had clocked out. At least in theory, such cases should be harder to bring as class actions because they involve individual factual situations. Even the most ruthless or naïve employer is unlikely to publish a company memorandum saying that employees should be worked off the clock. And in fact, the New York courts recently rejected an argument for
class certification in an off-the-clock case involving thousands of employees because individual issues predominated. Nevertheless, plaintiffs have made considerable headway in many cases by arguing that there was an unacknowledged policy or practice of working employees off the clock, and that it can be proved by evidence of individual abuses. They present testimony of individual employees that their supervisors directed them to work off the clock, and the court is asked to generalize from these individual cases to find a pattern.

Despite the fact that off-the-clock cases are less likely to be based on an acknowledged, general policy, they can lead to major litigation. For example, a recent Minnesota class action, based primarily on an off-the-clock theory, produced a $50 million settlement. A current New Jersey class action involves off-the-clock-claims of over 70,000 present and former employees.

An important variation on the working-off-the-clock theory is the contention that certain activities required by the job are “work” but that the employer has not been paying the employees for time spent engaging in those activities. The issue of what is working time can come up in several contexts. “Donning and doffing” – putting on and taking off work gear – is a good example. In the *IPB, Inc. v. Alvarez*\(^1\) case, the U.S. Supreme Court held that such time is compensable if it is “integral and indispensable” to the employee’s work. It found in that case that donning and doffing necessary work gear fell in that category. Although this decision was under federal law, many states are expected to follow it. If an employer does not pay employees for such integral and indispensable activity, it may be found to be working its employees off the clock.

Travel time can be another contentious issue. A Pennsylvania company recently paid a $2-million settlement to a class of home-care workers to resolve claims that they were entitled to compensation for travel between the homes of clients.
Time spent working from home represents a major issue in this era of flexible work schedules and employees working out of their residences. Employers must make sure to capture this time and fully compensate for it.

Disputes also arise over the compensability of time spent in training programs. Although not all types of training programs involve compensable working time, many do. Training programs required by the employer and training in regular duties or to increase efficiency are treated as work for which the participants must be compensated. Employers frequently assume otherwise and pay the price.

The computer age presents other work-time challenges. Some employers use the computer to assist them in recording time and will assume that certain employees who work heavily with a computer begin work at the time that the computer is turned on and stop when it is turned off. Employers must be careful that other activities that are also compensable do not take place before or after the computer use if they take this approach, and they must capture any work time not recorded by the computer log-in information. Records must be accurate, not merely convenient.

WHAT HAPPENS IN A STATE-LAW CLASS ACTION?

State-law class actions are similar in some ways to other types of class actions. In those states that have class actions rather than collective actions, the first phase of the wage/hour purported class action after the initial pleadings and conferences involves class discovery. One of the first issues addressed will be the preservation of, and ultimately the production of, arguably relevant information that is electronically stored. This subject can often present a minefield of issues and problems by itself. Also, plaintiffs’ counsel will usually depose company officials about company policies and practices at issue. Company policies and related documents will be
gathered in an attempt to establish that members of the purported class are similarly situated. The employer will typically depose the individual plaintiffs and potentially other witnesses. Sometimes these depositions are solely for the purpose of class discovery. On other occasions, the parties may agree or the court may decide that they will be for all purposes. But a substantial focus, if not the sole focus, is on whether class-certification criteria are met. At the end of this process, the plaintiffs will file a motion for class certification. Depending on the facts, the employer may oppose the motion altogether or argue for a smaller or different class than the one that plaintiffs propose. In some cases, subclasses or multiple classes may be proposed.

There are several arguments that employer defendants can use to oppose or seek to limit class certification. Typically, state procedure requires that there be questions of law or fact that are common to the class members. Frequently, the plaintiffs will claim that there is a general company policy or practice that applies to all of the class members that raises these common questions. Employers often argue that this “commonality” requirement is not met.

To some degree, most states require that the dispute be “manageable” as a class action. Defendants in wage/hour cases frequently argue that individual factual questions predominate, requiring litigation of individual issues that will make the case unmanageable and make individual actions the better means of resolving the issues. For example, a recent California decision found that a case involving 25,000 store workers was not manageable as a class action. On the other hand, a class of 145,000 present and former store workers at a different employer was allowed in California.

Another important battleground regarding class certification is the issue of “typicality.” The employer will argue that the individual circumstances of the plaintiff, as they relate to the claims, are different from those of the class the plaintiff seeks to represent or that their legal
theories differ. If this argument is successful, it can defeat class certification. In December 2008, the New York Supreme Court Appellate Division rejected a proposed 200,000-person class in a working-off-the-clock and falsification-of-records case, in part because the claims of the individual plaintiffs differed from those of many proposed “class” members.

To maintain a class action, the proposed class representatives must be able to represent the class adequately. Defendants will sometimes argue that the plaintiff or his or her counsel is inadequate. Although it may seem odd that defendants are arguing that their opponents will not do a good job in suing them, courts take this issue seriously and will not permit a class action to go forward without an adequate class representative.

A lot can ride on the class-certification determination. The court’s ruling on this issue will decide the magnitude of the case. The result can range from a complete denial of class certification, meaning that only the individual plaintiffs remain involved, to the certification of a large class with the potential for major financial exposure. For example, a class estimated at 100,000 members was certified in a recent wage/hour case in Minnesota. The certification of such a class has a major impact on the case. At a minimum, it presents the likelihood of very burdensome and expensive discovery. Further, permitting the class claims to go forward multiplies the risk to the defendant, which in turn affects the settlement dynamic.

If a class is certified, the next step is class notice. As discussed above, in a traditional class action, this notice informs the recipients of their rights in the case, and gives them an opportunity to opt out of the class. If they do not do so in compliance with the rules established by the court’s order and the notice, then they remain in the class and are represented in the lawsuit. Although some class members may actively participate and even testify, many class
members have no further personal involvement in the case until it is resolved. Nevertheless, their claims are being litigated.

Of course, to the extent that a collective action procedure is followed, as under federal law, the standards are different, and the procedure is different. Ultimately, the collective procedure leads to class notice inviting individuals to opt into the class, but requiring that they take this affirmative step if they are to participate.

Following class certification and the notice period in the typical class action, the parties litigate the merits of the case. This usually involves discovery on any remaining issues, often including liability and damages. Defendants commonly file summary-judgment motions, attempting to resolve some or all of the issues as a matter of law without the necessity of a trial. In contrast with the practice of plaintiffs in the typical employment case, the class representative lawyers may also file summary judgment motions in some instances. For example, last year a court in New York granted summary judgment in favor of a class of grocery store managers who were asserting overtime claims. If summary judgment motions do not resolve the case, then it goes to trial. Depending on the circumstances, including the size of the class and the issues involved, the trial may be bifurcated, with certain issues tried before others. Often, the liability and damage issues are dealt with in separate phases of the trial. Then, of course, there can be an appeal.

Obviously, in many cases there is enormous pressure on all parties to settle the litigation before going all the way through the litigation process. Some cases are resolved early, some are resolved on the eve of trial, and some are settled in between, but most class actions are ultimately settled. However, although there are many procedures such as mediation to attempt to bring about a settlement, it occurs only if the parties agree.
This description of what an employer endures in defending a wage/hour class action is just the study-notes version. It can be a grueling and a very expensive ordeal even if the case is resolved before trial.

**ENFORCEMENT BY STATE AGENCIES**

Class actions brought by private individuals and their lawyers are not the only way that state wage/hour laws can be enforced. Many states permit disgruntled present and former employees to file charges with the state agencies responsible for wage/hour enforcement. If the state agency determines that there is a legal violation, it may commence proceedings on behalf of affected individuals. In some states, this involves litigating before the state agency itself, rather than contesting the matter in a regular trial court.

There are at least four potential disadvantages for employers in litigating with a state agency. First, the agency may have different resources from a private litigant. Although it may not want to devote all of its energies to a particular case, such agencies often are not sensitive to attorneys’ fees, as they pay none, or to the overall cost of the litigation. The state’s lawyers are typically on salary, and that makes a difference.

Second, the agency may be less willing to compromise than private litigants. Normally, an agency does not litigate these matters unless it has concluded that the law has been violated, and it may feel that it should, or may be required by law to, settle for no less than “full relief.”

Third, some state agencies may be permitted to represent large numbers of employees without having to meet the prerequisites for bringing a class action. This takes away major defenses for employers.

Fourth, the typical state agency may have more settlement leverage than private plaintiffs. For example, they will sometimes be litigating before their own administrative law
division. Further, some employers may be concerned that they will have to deal with the agency in the future regarding other issues. This may cause a business to worry about appearing unreasonable to an important enforcement agency.

On the other hand, there can be an advantage to litigating against a state’s enforcement agency rather than against private plaintiffs—if the employer has to litigate at all. State agencies enforce the wage/hour laws in many cases over a long period of time. They have precedents as to how issues are to be analyzed and rules interpreted that may not be affected by the particular case. Unlike private attorneys, they are not usually affected by the possible recovery of contingent fees. Thus, a state agency may agree with the employer on some legal issues when private plaintiffs would not.

Sometimes it is necessary for an employer to litigate against both public agencies and private plaintiffs at the same time. Although double recovery for the same claim theoretically should not occur in these cases, they frequently involve the undesirable complexity and expense of having two opponents.

WHAT IS TO BE DONE?

What should employers do in light of this patchwork quilt of state wage-and-hour regulations? How can a multistate employer with widespread operations deal with this situation quickly and easily? Unfortunately, there is no magic formula. Rather, employers need to look carefully at the state wage-and-hour laws in every state where they have employees. They need to do so without assuming that the law is the same everywhere or that the state’s wage-and-hour laws match up exactly with the federal FLSA. And, of course, they should not make the assumption that everyone to whom they pay a salary is exempt from overtime provisions.
This type of specific, state-by-state review is not anyone’s idea of an enjoyable undertaking. It does not generate revenue or customer satisfaction. However, if a million dollars saved is a million dollars earned, such a proactive approach can pay major dividends. Mistakes in this area can cost millions, and avoiding multimillion-dollar problems is well worth the effort.

Once the basics of state law have been determined, and overall policies and procedures have been adjusted to comply with them, a truly proactive approach requires that the employer drill a little deeper. The next step is a careful wage/hour audit. It is not enough to establish the proper pay policies for different types of employees. It is also essential to determine that the real job matches the assumptions made about it. If the store manager is being treated as an exempt executive, does he or she have the duties necessary to meet the executive exemption? Do the individuals who are called “sales representatives” actually do what is required to obtain an exemption? Have improper deductions forfeited the exemption? Are the employees really taking their mandatory lunch breaks? Are they working off the clock?

These are not academic questions. Plaintiffs’ attorneys are increasingly attuned to the opportunities that wage-and-hour laws present to them and their clients and to the special opportunities presented to them by state laws in the field. Employers need to be aware of this, too. Indeed, employers need to follow the advice that Poor Richard’s Almanack gave over two hundred years ago – “an ounce of prevention is worth a pound of cure.”

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