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General Counsel Employment Law Report

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New Year, New DOL Opinion Letters

Well, it is a new year, and although the government remains shut-down, the DOL managed to publish a couple of new opinion letters that are worth noting. As a reminder, opinion letters are the DOL's way of letting employers know how they interpret the FLSA, the federal wage and hour laws. However, these opinion letters address only federal law, and do not apply to state wage and hour law, with which employers must also comply.

The **first opinion letter** is limited in scope, applying the ministerial exception to volunteers who live and work in a self-sustaining religious community. However, the letter does includes a good reminder that volunteers may be excluded from the scope of the FLSA: "[a]n individual who, 'without promise or expectation of compensation, but solely for his personal purposes or pleasure, worked in activities carried on by persons either for their pleasure or profit,' is outside the sweep of the Act." Tony & Susan Alamo Found. v. Sec'y of Labor, 471 U.S. 290, 295 (1985) (quoting Walling v. Portland Terminal Co ., 330 U.S. 148, 152 (1947)).

The **second option letter** has more general applicability, and addresses the calculation of overtime when employees have varying rates of pay. As a general rule, the FLSA required that nonexempt employees total wages for the workweek divided by hours worked equal or exceed the applicable minimum wage, and that nonexempt employees must receive overtime of at least time and a half for all time worked in excess of 40 hours per workweek. To determine the regular rate of pay, the employer divides the employee's total pay (all hours at all rates of pay) by the total hours worked for the workweek. The opinion letter provides a reminder that an employee's average hourly pay rate may vary from workweek to workweek, but that the employer must always make sure that the average hourly pay rate exceeds the FLSA's minimum wage requirement for all hours worked. Additionally, the employer must pay overtime based on the actual regular rate of pay, rather than a fixed rate.

Again, state laws differ in terms of calculating the rate of pay for employees with multiple pay rates, and employers must comply with both the FLSA and states law. In Massachusetts, where an employee works at two or more different pay rates (no pay rate may be less than minimum wage) in a single work week, his/her regular hourly rate of pay for that week is the weighted average of all such rates. The regular hourly rate for that employee is determined by adding together all earnings for the week and dividing this total by the number of hours worked at all jobs. See Opinion Letter **MW-11.27.01**, November 27, 2001.

Verifying Employment Eligibility without E-Verify

Since the start of the government shutdown that began on December 22, 2018, E-Verify and E-Verify services have been unavailable for use by employers. E-Verify, which is mandatory in some states (it is not mandatory in Massachusetts), is a federal program where employers, through the E-Verify site, can check work eligibility for prospective new hires.

What should employers do during the outage?

- You don't currently use E-Verify: If you don't currently use E-Verify, the outage obviously won't impact your hiring operations. Continue to verify identity and employment authorization through the form I-9 and associated supporting documents.
- You currently use E-Verify by choice: If you operate only in states, or are currently hiring only in states, that do not require E-Verify, you can continue hiring operations and remain in compliance with the law by verifying identity and employment authorization through the form I-9 and associated supporting documents. Once E-Verify becomes available again, you could retroactively enter the I-9 data for any employee hired during the shutdown. If, at this later date, you learn the employee is not authorized to work, you could take adverse action at that time.
- You are obligated to use E-Verify based on your state(s) of operation: You have a few choices, each of which has a varied level of risk and impact to operations.
  1) Pause all hiring practices until the shutdown ends and E-Verify is available. This option poses no legal risk but may be operationally infeasible.
  2) Pause some hiring practices until the shutdown ends and E-Verify is available. Maybe you elect to only hire for certain critical positions and freeze all non-critical positions. There is some risk of non-compliance if the hires occur in states where E-Verify if required, but this is more feasible operationally.
  3) Continue all hiring practices following the three-day rule for I-9s and entering data into E-Verify as soon as possible once the system is available. Here, there is little to no operational impact. But, there is some risk of legal non-compliance as certain state laws require that employers use E-Verify and that they enter data into the system within three days of the employee's date of hire. So, non-entry into E-Verify is a violation of state law. However, the Federal Department of Homeland Security has indicated that during the E-Verify outage, its policy that data must be entered with three days will be suspended, meaning retroactive entry is permissible.

Additional important notes:

- If an employee is currently in a TNC status, they will have additional time to resolve this status. According to https://www.e-verify.gov/e-verify-and-e-verify-services-are-unavailable, "the number of days E-Verify is not available will not count toward the days the employee has to begin the process of resolving their TNCs."
- If a newly hired employee is "in an interim case status, including while the employee's case is in an extended interim case status due to the unavailability of E-Verify" the employer may not take adverse action against that employee.

If you're unsure of whether E-Verify is required in the states in which you operate, or if you'd like specific guidance as to how to minimize legal risk and operational impact, please reach out.

An Overview of Massachusetts' "Grand Bargain"

In late June 2018, Massachusetts' Governor, Charlie Baker, signed "An Act Relative to Minimum Wage, Paid Family Medical Leave, and the Sales Tax Holiday," more commonly known as the "Grand Bargain." As the Act's long name suggests, the law raises minimum wage while eliminating mandatory Sunday and holiday pay, introduces paid family medical leave, and establishes an annual statewide sales tax holiday.

Minimum Wage

Over the next five years, the state will raise the hourly minimum wage and the hourly tipped minimum wage as follows:

Effective Date	Minimum Wage	Tipped Minimum Wage
1/1/2019	$12.00	$4.35
1/1/2020	$12.75	$4.95
1/1/2021	$13.50	$5.55
1/1/2022	$14.25	$6.15
1/1/2023	$15.00	$6.75

In addition to increasing the tipped minimum wage, the law requires that as of January 1, 2021, employers calculate "the additional amount on account of tips" at the "completion of each shift worked by the employee" rather than performing this calculation on a pay-period basis.

On its face, this is a straightforward (albeit potentially costly) change. But, it's important to think of this in the larger scheme of employer pay practices. Consider, for example, the impact this change can have to your compliance with the Massachusetts Equal Pay Act ("MEPA"). Under MEPA, employers must pay employees equally for comparable work. Employers may justify differences in pay using a very limited set of permissible bases. Changes to the minimum wage are not among those limited set of permissible bases. If an employer were to increase employee wages to comply with the minimum wage requirements, but failed to review the pay of those doing comparable work, the employer could run afoul of MEPA. Consider, too, the employee relations implications. An employee who made $12.00/hour prior in 2018 made a full dollar more than minimum wage. While that employee's pay need not be increased in 2019 to comply with the law, might that employee not feel undervalued because they're suddenly making "only" minimum wage?

Sunday and Holiday Pay

Massachusetts Blue Laws currently require that retailers pay time-and-a-half to employees who work on Sundays or certain holidays, even if their hours do not exceed 40 in a single workweek. The new law will phase out this requirement as follows:

Effective Date	Rate for Sunday and Holiday Work
1/1/2019	1.4x regular rate
1/1/2020	1.3x regular rate
1/1/2021	1.2x regular rate
1/1/2022	1.1x regular rate
1/1/2023	Regular hourly rate

Unfortunately, the phase-out of Sunday and holiday premiums will not be a clean process. Under the FLSA, extra compensation provided by a premium rate for work on Sundays or holidays must be included in calculating an employee's regular rate. The only exception is when the premium rate is at least 1.5 times the rate for comparable work performed in non-overtime hours.

The current Sunday and holiday premium requires time-and-a-half for Sunday and holiday work, which means retailers do not have to include the Sunday/holiday premium in calculating employees' regular rate of pay. However, once the level drops to 1.4 in January 2019, the premium will have to be included in calculating the regular rate for overtime purposes. This could result in retailers paying more overtime, in addition to the Sunday/holiday premium. Retailers should take a look at their scheduling practices to determine whether lowering the premium prior to 2023, when it is eliminated, is actually in their best interest.

The new Sunday law continues to provide that employees cannot be required to work, or be penalized for refusing to work, on Sundays or holidays.

Paid Family Leave

Important Dates

- **March 31, 2019:** Proposed regulations published. This means that many of the current questions should be answered this spring.
- **July 1, 2019:** Employers must post a notice describing benefits available under the law and provide each employee and contractor (within 30 days of hire) a written explanation of employee's rights.
- **July 1, 2019:** State begins collection of the .63% payroll tax.
- **January 1, 2021:** Paid leave benefits begin.

Overview

Starting on January 1, 2021, Massachusetts workers will be entitled to up to 12 weeks of paid leave to care for a sick family member or a newborn, and up to 20 weeks of paid medical leave to attend to their own serious medical needs.

For the purposes of family leave, the law broadly defines "family member" to include a domestic partner, grandparents, grandchildren, siblings, and the parents of a spouse or domestic partner. The law adopts a broader definition of "serious health condition" than that set forth in the FMLA (either inpatient care or continuing treatment by a healthcare provider).

The law will apply to all employers with at least one employee working in Massachusetts, regardless of the employee's hours or length of service with the employer. Former employees and self-employed workers may also be entitled to paid leave under the law if criteria are met.

The state will administer the new leave program and the leave will be funded through a 0.63% payroll tax, which the employer and employee will split. Workers on paid leave will be required to pass through a seven-day waiting period (with the exception of new mothers following childbirth). Thereafter, they will begin earning 80% of their wages (capped at 50% of the state average weekly wage) and then 50% of their wages beyond that amount (capped at $850 per week).

Employer Required Notice of Family Leave

By July 1, 2019, in accordance with certain requirements of the newly established Department of Family and Medical Leave, employers must inform employees of their new rights by (1) conspicuously posting a notice of benefits, and (2) beginning to issue written information to new employees (and independent contractors). Employers who are found not to have satisfied these notice requirements will face fines.

Contribution of Wages

Also, starting on July 1, 2019, Massachusetts employers must begin contributing 0.63% of each employee's wages to the state trust funding the paid leave. Employers will be permitted to deduct certain percentages of the contribution from the employee's wages—up to 40% for medical leave and up to 100% for family leave (it is not yet known how the .63% will be allocated between medical leave and family leave). If the employer has 25 or more employees, it will have to contribute any additional amount beyond the employee-deduction. If the employer has less than 25 employees, it will not have to contribute any additional amount beyond the employee-deduction.

Additional Considerations

- Employers must continue to honor employee accrual of benefits (e.g., vacation, sick leave, seniority, and bonuses) and to contribute to employer-sponsored health insurance during an employee's period of family/medical leave.
- Employers must also continue to comply with all preexisting laws, company policies, and/or collective bargaining agreements providing greater leave benefits.
- Employers with greater leave benefits will have the option of applying for an exemption from the program.
- Employers may not retaliate against employees for exercising their rights under the law, and any adverse employment action taken against an employee during or within 6 months of their leave will be considered presumptively retaliatory. The law provides employees with a private right of action to pursue retaliation claims.
- Leave must be provided on a rolling 12-month basis. Consider now current polices that operate on a different calendar year and consider moving them to a rolling 12-month basis (changing FMLA calculation requires ample notice and significant care).

General Counsel's Office Hours

Special Member Benefit

All CCHRA members in good standing will have the special benefit of being able to call Attorney Michael E. Foley, in his role as the CCHRA General Counsel, to obtain his guidance on employment law compliance issues and corresponding HR-related risk management during his CCHRA GC Office Hours – **at no cost**.

Click here for the description of the role of the CCHRA General Counsel. As General Counsel, Mike will be available within his virtual and gratis office hours for all CCHRA members from 2 pm to 3 pm on the first and third Tuesday of each month. The guidance Mike provides during his office hours will cover all issues that arise within the broad spectrum of the employment relationship to help CCHRA members achieve compliance with the extensive regulations that govern their workplace and to better understand best employment practices.

Issues related to the Internal Revenue Code/the Internal Revenue Service or ERISA-related issues will not be covered under this arrangement, nor will the interpretation, editing or drafting of documents. The office hours will be limited to providing guidance on employment law questions and corresponding HR-related risk management that can be answered in one telephone conversation. Mike can be reached during his CCHRA General Counsel Office Hours at 508-548-4888.

Mike Foley has been representing employers, small and large, for-profit and not-for-profit within all industry sectors and in all matters of labor and employment law for over 30 years. He draws on the breadth of his experience to offer employers an uncommon approach and practical solutions. Click here for Mike's bio.