EMPLOYMENT LAWSCENE ALERT: WAGE AND HOUR LIABILITY—THE HIDDEN DANGER IN ASSET ACQUISITIONS

One of the critical keys to a successful asset acquisition is recognizing potential liabilities and negotiating around those liabilities through a well-drafted asset purchase agreement ("APA"). However, certain liabilities that may attach to the buyer following the sale may not be apparent from the seller's balance sheet or from a typical due diligence review—making the risk a hidden liability. One such potential hidden liability in an asset acquisition is the seller's past wage and hour violations under the federal Fair Labor Standards Act ("FLSA"). Even when the potential liability is identified by the buyer and the parties have negotiated contractual terms in the APA for the buyer not to assume such liability, the buyer may still have exposure for such wage claims when it is deemed a successor under federal common law.

Wage and hour claims under the FLSA can result in significant liability to an employer. Most FLSA claims are brought as a collective action (similar to a class action) on behalf of all similarly situated employees which can result in penalties up to double back wages for up to three years for willful violations plus the opportunity for the recovery of attorney's fees. This can oftentimes lead to hundreds of thousands of dollars in liability and even millions of dollars if the collective class is large enough and the violation involves significant underpayment of lawfully required wages. Typical claims under the FLSA include: (i) misclassification of employees as exempt; (ii) failing to pay employees for hours worked such as for travel time, donning and doffing, meals and rest periods; (iii) failure to properly calculate an employee's "regular rate" of pay in the calculation of overtime; and (iv) improperly classifying workers as independent contractors rather than as employees.

Many business people operate under the general assumption that when a company is sold in an asset sale, as opposed to a stock sale, the buyer acquires the company's assets "free and clear" of the seller's liabilities unless expressly or implicitly assumed by the buyer. However, many federal circuit courts have recognized that when liability is based on a violation of a federal statute involving labor relations or employment, then application of successor liability under federal common law is appropriate in suits to enforce federal labor or employment laws, like the FLSA, to prohibit employers who violated those laws from avoiding liability by selling, or otherwise disposing of, their assets and dissolving. For example, we previously addressed in this blog (click here for the post) the Seventh Circuit's decision in *Teed v. Thomas and Betts Power Solutions, L.L.C.* where the Seventh Circuit imposed successor liability upon the buyer in an asset acquisition for the seller's FLSA violations despite language in the APA that expressly disclaimed such liability by the buyer.

Because a buyer could be held liable as a successor for the seller's past wage and hour violations, it is incumbent upon the buyer to perform a thorough due diligence of the seller's compliance with wage and hour laws. If potential wage and hour compliance issues are detected, then the buyer can take necessary steps to protect itself by: (i) drafting appropriate representations and warranties regarding the seller's compliance with labor and employment laws; (ii) shifting the potential obligation back to the seller through a carefully drafted indemnification provision that properly defines "losses" to include all potential liabilities under the FLSA; (iii) either negotiating a reduced basket (a threshold amount of losses or damages the buyer must incur before it is entitled to indemnification from the seller) or excepting any FLSA liability imposed on the seller from the basket; (iv) negotiating an increased escrow fund to cover any potential indemnification obligation created from any past wage and hour liabilities that may be imposed on the buyer as a successor; and (v) negotiating a purchase price adjustment.

Having an experienced law firm with both transactional and employment attorneys on your side who can recognize and address a buyer's potential exposure to FLSA liability can make the difference between a successful acquisition or an acquisition where the buyer is saddled with a liability it never saw coming. Click here to meet your OCHD&L business law team.

EMPLOYMENT LAWSCENE ALERT: COURT INVALIDATES EXPANDED OVERTIME RULE

On Thursday, a federal court in Texas issued summary judgment invalidating the Obama administration's updated overtime regulations, which raised the minimum salary level for exempt employees from $455 to $913 per week. The Court determined that the "significant increase" was outside of the scope of Department of Labor's (DOL) authority, as was the provision that the minimum salary threshold would automatically update every three years.

The Court looked to Congress's intent under the Fair Labor Standards Act and found that the determining factor for whether an employee should be considered exempt is the duties the employee performs and whether those duties are executive, administrative, or professional in nature. By more than doubling the minimum salary level and excluding an estimated 4.2 million employees who were previously classified as exempt from exempt status, the Court found that the DOL had gone too far and essentially rendered the duties test meaningless. Because the emphasis should be on duties, not salary, the Court invalidated the updated overtime rules.

However, the Court did not go as far as to rule that the DOL has no authority to establish a

minimum salary level. The Court found that the current minimum salary level is a permissible "floor" to screen out "obviously nonexempt" employees. Although the Fifth Circuit Court of Appeals is currently considering an appeal of the preliminary injunction the Texas federal court issued last November, the DOL under the Trump administration only continued the appeal for the purpose of establishing that it had the authority to establish a minimum salary level, which has now been done by the Texas court. The DOL is currently seeking public feedback on revisions to the overtime rule and may issue its own revised rule in the future. We will keep you updated on any further changes.

CONGRESS CONTEMPLATES "COMP TIME" BILL

In May 2017, the House of Representatives passed the Working Families Flexibility Act, which would amend the Fair Labor Standards Act to allow nonexempt employees in the private sector to choose to receive compensatory time ("comp time") in lieu of overtime pay for hours worked in excess of 40 hours per week. Under current law, employers in the public sector must pay nonexempt employees a rate of at least one and one-half of their regular wage for each overtime hour worked. However, certain government employees can receive comp time in lieu of overtime pay.

The Working Families Flexibility Act would allow private sector employees who had worked at least 1,000 hours in a 12-month period to accrue up to 160 hours of compensatory time per year, at the rate of one and one-half hours of comp time for each overtime hour worked, which could be used upon reasonable notice by the employee as long as such use does not disrupt the employer's operations. The decision of whether to receive overtime pay or comp time would be up to the individual employee or a collective bargaining agreement covering a group of employees, and any compensatory time accrued by the employee but unused by the end of the year would need to be paid to the employee. Additionally, any employee could, with 30 days' notice, choose to cash out their unused comp time and return to traditional payment of overtime. Similarly, employers could, with 30 days' notice, discontinue offering comp time as an alternative option to overtime pay. The bill states that employers may not intimidate, threaten, or coerce employees to choose to take comp time instead of overtime pay or force them to use accrued comp time. If enacted, this provision is one of the most likely to lead to litigation between employees and employers.

The bill is currently pending before the Senate, which may not have enough support to pass the bill. Proponents of the law believe that the bill would add flexibility for workers, while opponents believe that it would undermine the payment of overtime. Similar bills have been proposed in Congress previously, including as recently as 2013. However, the current bill has

the support of the Trump administration. We will keep you updated on any further developments and, if passed, on techniques for implementation.

DON'T FORGET ABOUT DOL'S NEW OVERTIME RULES JUST YET

In November, a federal court in Texas issued a nationwide injunction blocking the U.S. Department of Labor (DOL) from implementing its updated overtime regulations, which would have required, among other things, that exempt employees be paid a minimum salary of $913 per week. Because of the injunction, the new overtime regulations did not go into effect on December 1, 2016, as planned. However, they have also not completely gone away, and their fate is still uncertain.

The Obama administration immediately appealed the injunction to the Fifth Circuit Court of Appeals and asked for an expedited proceeding, which was granted. The DOL filed its initial brief on December 15, 2016, and the twenty-one states, which had opposed the implementation of the new overtime regulations and were granted the injunction, filed their brief on January 17, 2017. DOL's final reply brief was originally due January 31, 2017. However, since President Trump was inaugurated on January 20, 2017, the Trump administration has asked for three extensions to file its reply brief, all of which have been granted. The first two extension were requested so that the new administration could consider its position on the new regulations and whether it would continue to defend them. Most recently, on Wednesday, April 19, 2017, the Fifth Circuit granted the DOL another two months, until June 30, 2017, to file its brief due to the fact that Alexander Acosta, the nominee for Labor Secretary, has not yet been confirmed.

It is not yet clear what stance the Trump administration will take on the overtime regulations, as there has been no official position taken by the President and nominee Acosta did not take a definitive position during his confirmation hearings. However, even if the administration decides not to pursue the appeal, others may. For example, the AFL-CIO's Texas branch has petitioned to join the litigation as a defendant due to its concerns that the current administration will not adequately defend the prior administration's regulations, and the national AFL-CIO has threatened to sue the DOL if it tries to scale back the regulations in any way. Additionally, the lower court, which issued the initial temporary injunction, could still issue a permanent injunction or rule on a pending motion for summary judgment, as it declined to halt proceedings while the Fifth Circuit reviewed the injunction. Therefore, these overtime regulations should still be on employers' radar, and we will keep you updated on further developments.

FEDERAL COURT HOLDS WISCONSIN'S RIGHT-TO-WORK 30-DAY REVOCATION PROVISION UNCONSTITUTIONAL

Wisconsin's Right-to-Work law provides employees the ability to choose as to whether they want to become or remain members of a labor union. Intertwined with that decision is an employee's right to decide not to pay union dues. In order for an employee to effectively exercise his or her right not to be a member of a union without coercion or duress is the ability to also timely revoke their dues check-off authorizations so they are not committed to pay union dues when they no longer want to be a member of the union.

Wisconsin's Right-to-Work law was designed to address this issue by prohibiting any dues checkoff authorizations unless such authorizations are revocable upon 30 days' written notice by an employee. This means, under Wisconsin's Right-to-Work law, that an employee can terminate a dues checkoff authorization upon 30 days' written notice and, moreover, a labor union cannot bind an employee to a period of more than 30 days in which to exercise that right. However, this provision under Wisconsin law runs contrary to the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)) which permits an employee's authorization for dues check-off to be effective for a period of up to one year or up until the termination date of the applicable collective bargaining agreement, whichever occurs sooner.

Recently, a federal district court in Wisconsin addressed this conflict between the two laws and found that the 30-day revocation provision for dues checkoff authorizations under Wisconsin's Right-to-Work law to be preempted by the federal Labor Management Relation Act (29 U.S.C. § 186(c)(4)), and, as a result, unconstitutional under the Supremacy Clause of the U.S. Constitution. The federal district court premised its holding on a finding that a state law *limiting* the irrevocability of dues checkoff agreements to 30 days directly conflicts with the federal law *permitting* unions to bargain for longer periods of irrevocability. The federal district court further held that the fact that this provision was made part of Wisconsin's Right-to-Work law does not exempt it from federal preemption within the § 14(b) exception to federal preemption.

The federal district court's decision means that a dues check-off authorization that is not revocable for more than one year is lawful and enforceable under 29 U.S.C. § 186(c)(4) despite Wisconsin's Right-to-Work law to the contrary limiting the irrevocability of such authorizations.

The significance of this decision is that labor unions can and will bind employees to continue

to pay union dues for up to a year before they can exercise their right to revoke their dues check-off authorization (and usually within a tight revocation window) even though the employee may have decided they no longer want to remain a member of the union. As a result, this federal court decision will have a chilling effect upon employees' right to decide as to whether they want to remain a member of a labor union when they will be compelled by the same union they want to disassociate themselves from into continuing to pay union dues – exactly what labor wanted to accomplish in commencing the lawsuit challenging this provision of Wisconsin's Right-to-Work law.

BREAKING: NEW DOL OVERTIME RULE WILL NOT GO INTO EFFECT DECEMBER 1

Yesterday, a federal judge in Texas issued a nationwide injunction (full decision here) blocking the U.S. Department of Labor (DOL) from implementing its updated overtime regulations, which would have required, among other things, that exempt employees be paid a minimum salary of $913 per week. The judge ruled that the twenty-one states and certain business groups that had sued to block the implementation of the regulations were likely to be successful on the merits of their case and that there would be harm to the states and businesses if the rule was implemented on December 1.

The basis for the ruling is that the new salary basis test is a *de facto* salary test that no longer takes an employee's job duties into consideration. The Court found that the type of work actually performed by the employee is what Congress intended the exemption to be based on, and that the updated DOL rule supplanted the duties test with a minimum salary threshold. The Court found that this was outside the intent of Congress and, therefore, outside of the DOL's statutory authority. Additionally, the judge ruled that the DOL did not have statutory authority to implement the automatic increase provision of the rules, which would have automatically readjusted the minimum weekly salary level every three years.

Although this may not be the end of litigation over this matter, the DOL's new overtime rules will not take effect on December 1, 2016, and therefore, employers do not need to implement any changes. For those employers who have already implemented changes in preparation for the updated overtime rules, they have the option to keep those changes in place or reverse those changes and wait to see how this matter ultimately resolves. However, employers must keep in mind that, although the minimum salary level will remain, for now, at $455 per week, to be considered exempt, employees must still meet the job duties tests.

FEDERAL DISTRICT COURT TO RULE NOVEMBER 22, 2016 ON ATTEMPT TO BLOCK NEW OVERTIME RULES

As we have previously reported, the U.S. Department of Labor (DOL) has issued an update to the federal overtime regulations defining the overtime exemption for executive, administrative, and professional employees, known as "white-collar" exemptions. These changes focus primarily on updating the salary level for white-collar employees including increasing the minimum salary threshold from $455 per week to $913 per week, among other changes. The new rule is set to go into effect on December 1, 2016.

The new overtime regulations have been controversial and subject to various challenges. Specifically, twenty-one states and certain business groups have sued the DOL in Texas federal district court in an attempt to block the DOL from implementing the new overtime rules. Yesterday, November 16, 2016, the federal district court held a hearing on a motion to enjoin the DOL from implementing the new overtime rules. During the hearing, the federal district court judge stated that the Court would make a decision on the motion for a preliminary injunction by November 22, 2016. This is welcome news given that the new overtime rules' effective date is just two weeks away.

During the motion hearing, the business groups and states made various arguments about why the rule should not be implemented, including that the drastic increase in the salary threshold was a "fundamental, radical social policy change." It was also argued that implementation of the new overtime rules should be at least delayed until it could be reviewed by President-elect Trump's administration. In response to that argument, the Court stated that what a new administration may do with the new overtime rules is not relevant and too speculative to affect as how the Court would rule. On the other hand, the DOL argued that the agency had reached these new salary levels in a reasonable way through the rulemaking process, and as a result, agency should be entitled to deference from the Court.

The Court seemed receptive to some, but not all, of the arguments to block implementation of the new rules. The judge questioned whether the new salary basis was a *de facto* salary-only test, why the change was so drastic, and how 4.2 million employees could go from being exempt one day to non-exempt the next, despite having the same job duties. However, he did state that his role was not to get involved in policy making and he would not base his decision on whether he thought the rule was good or bad.

It is premature to state for certain as to how the Court may rule; so, the wise course of action

for employers, for now, is to continue to move forward with plans on how to implement the new overtime regulations for their workforces on December 1st. We will, of course, provide you with an update regarding the Court's decision as soon as it is issued.

EMPLOYMENT LAWSCENE ALERT: NEW FLSA OVERTIME RULES MAY HAVE EMPLOYEE BENEFIT PLAN IMPLICATIONS

The Department of Labor's (DOL's) final overtime rule (the Final Rule) takes effect December 1, 2016. As described in our prior post, the cumulative effect of the Final Rule will be to significantly expand the categories of employees eligible for overtime protection. As part of preparing to comply with the new wage and hour law, employers must also consider whether and how any changes to compensation practices will affect employee benefit plans. This post describes the tax-qualified retirement plan issues that employers should take into account as the December 1 Final Rule deadline approaches.

Classification Changes

To the extent that benefit plan documents condition eligibility on an employee's classification (such as salaried, hourly, exempt, or non-exempt), compensation structures revised to comply with the Final Rule could cause large cohorts of employees to either lose or gain benefits. As an example, if a specific employee is reclassified from hourly to salaried status (or vice versa) in response to the Final Rule, that individual might gain (or lose) the right to participate in an employee benefit plan. Corresponding modifications to the terms of those plans may be necessary to continue to provide current benefit levels and, or, to ensure that retirement plans will continue to satisfy underlying participation requirements in light of resulting eligibility changes.

Compensation Changes

By the same token, FLSA-related compensation adjustments may result in unanticipated changes to overall benefit contribution obligations. This is particularly true for 401(k)s, and similar tax-qualified retirement plans, under which employer contributions are calculated in accordance with a specific plan definition of "compensation." The impact of pay changes on employer retirement plan contributions will vary case by case, but in general, may fluctuate not only to the extent that employee base pay is increased or decreased, but also by whether a given plan's "compensation" definition includes or excludes overtime pay.

Tax-Qualification Compliance Issues

In some cases, plan compensation definitions should be amended as required to attain a result in line with overall benefits and compensation objectives. Although a tax-qualified retirement plan may exclude (or be amended to exclude) overtime pay from its compensation definition, such exclusion is permissible only if the compensation taken into account after the exclusion satisfies annual nondiscrimination testing requirements. Employers that expect a significant increase in overtime wages as a result of compliance with the Final Rule, as well as employers with plans already excluding overtime pay, should determine now whether projected increases in overtime wages could affect their plans' ability to continue to satisfy tax nondiscrimination requirements in light of existing or revised plan terms.

Employers choosing to amend a retirement plan's compensation definition to exclude overtime pay will need to consider other legal and operational issues in addition to nondiscrimination testing. For example, in the case of a "safe harbor" 401(k) plan, the modification may need to be coordinated with the start of a plan year. In addition, time may be needed to update payroll systems and plan administrative processes to properly capture the new pay exclusion.

Proceed with Caution before Reducing Benefits to Offset New Overtime Costs

Some employers may be facing higher compensation costs as part of a strategy for maximizing the available exemption from the overtime rules. While it may be tempting to offset some of these costs by reducing employee benefits spending, it is crucial to consider underlying benefit-related legal requirements as they proceed. In some cases, benefit reductions are limited by law, while in others, unintended consequences may result.

For example, the Affordable Care Act requires large employers (generally 50 employees and above) to either offer "affordable" and "minimum value" health care coverage to certain employees or risk exposure to significant tax penalties. A large employer may incur penalties, without regard to whether an employee is exempt or non-exempt under the Final Rule, if he or she works more than 30 hours per week but is not offered ACA-compliant coverage. A reduction or elimination of an employer premium contribution (or an increase in employee cost sharing) must therefore be carefully analyzed to assess the extent to which it could affect a group health plan's "minimum value" and "affordability" metrics, thereby increasing employer exposure to ACA penalties.

Conclusion

It is no surprise that the Final Rule requires many employers to make extensive changes to their compensation and employee classification practices. What may be more surprising is

the extent to which FLSA-related changes promise to impact employee benefit plans, as well. To avoid any benefits cost or compliance surprises, employers should carefully review whether and how sponsored employee benefit plans will be affected by other changes made to comply with the Final Rule.

EMPLOYMENT LAWSCENE ALERT: EMPLOYERS MUST UPDATE THEIR FLSA POSTERS

On August 1, 2016, the Department of Labor updated its mandatory Fair Labor Standards Act Minimum Wage poster. All employers subject to the FLSA must display this newly revised poster in prominent locations in the workplace where all employees and applicants can readily see it. The updates to the newly revised poster include information on the consequences of incorrectly classifying workers as independent contractors, information relating to the rights of nursing mothers, updated information regarding DOL enforcement, and revised information relating to tip credits.

Employers must post the new poster immediately. Although employers are only required to post the poster in English, there are also versions available in Spanish, Chinese, Russian, Thai, Hmong, Vietnamese, and Korean. The new version of the poster can be found here.

EMPLOYMENT LAWSCENE ALERT: EEOC INTRODUCES PROPOSED CHANGES TO EEO-1 REPORTING THAT COULD REVEAL PAY DISCRIMINATION

Employers, including federal contractors, with 100 or more employees are required to file employer information reports, called an EEO-1 with the U.S. Equal Opportunity Commission ("EEOC"). The data collected currently includes data on race, ethnicity, and gender.

However, under a revised proposal by the EEOC issued on July 14, 2016, as of March 31, 2018, companies will also need to include data on pay ranges and hours worked. This information must be reported by job category and broken down across 12 pay bands. Employers are to gather wage information from W-2 reports from the prior year, and include

not only base salaries but also bonuses, incentive compensation payouts, and payments for paid time off. For non-exempt employees, calculation of hours worked will reflect only hours actually worked and not paid time off. Additionally, for exempt employees, employers can chose to either report actual hours worked if that is traced or report 40 hours per workweek for full-time employees and 20 hours per workweek for part-time employees.

Although the first reporting deadline is not until 2018, the reported information will include 2017 wage information. The EEOC plans to use this information to identify pay discrimination. Therefore, companies need to identify whether there are pay gaps between protected classes that the EEOC might consider suspicious. Companies with pay gaps will need to analyze whether these are caused by legitimate, non-discriminatory, job-related factors such as location, education, or experience. If employers cannot justify wage differences, they will need to consider how to fix the pay gap. Otherwise, there is a real possibility that they will face a pay discrimination suit.

A sample of the proposed EEO-1 Form to collect pay data can be found here and a Q&A from the EEOC regarding the proposed changes can be found here.