Spotlighting potential coronavirus wage-and-hour woes

By Lisa Milam, J.D

Seyfarth Shaw LLP’s Lynn A. Kappelman discusses the numerous wage-hour pitfalls that can arise as employers respond to the pandemic.

Employers are forced to make difficult decisions, often at warp speed, as they operate during the coronavirus pandemic and resulting economic downturn. But making tough decisions without consulting legal counsel can invite costly litigation, and wage and hour suits—particularly class actions—are among the most expensive for employers.

In a recent Seyfarth Shaw LLP webinar on “Litigation Trends in the Post COVID-19 World,” Lynn A. Kappelman, a partner in the firm’s Boston office, discussed the wage-hour issues that arise as employers look to control payroll costs while maintaining operations, and also as they look ahead to reopening as the crisis abates. Kappelman followed up with Labor and Employment Law Daily about the common wage-hour traps that can befall employers during this unprecedented crisis.

“Plaintiff’s attorneys are already laser-focused on these issues,” Kappelman cautions. “Many of them are already publishing on their websites FAQs and guidelines for potential plaintiffs who may have experienced any of these wage-hour class action traps.”

Losing exempt status

The primary wage-hour risk with respect to exempt employees is losing the exempt classification—a misstep that can have longer-term consequences for wage-hour liability, including having to pay overtime going forward to these formerly exempt salaried employees.

Many employers have reduced employees’ pay across the board to spread the pain of forced belt-tightening. An employer that imposes a salary cut must be careful not to reduce exempt employees’ pay below the minimum salary level. (The current FLSA salary threshold is $35,568 per year; the pay floor is higher in many states.).

Out of an abundance of fairness, an employer that imposes a 20-percent pay cut may want to reduce work hours accordingly, and implement a four-day workweek. However, to do so for exempt employees would run afoul of the FLSA’s salary-basis test. “It’s OK to reduce
someone’s pay by 20 percent, but you can’t reduce their duties by a commensurate level, because you’ll undermine the salary basis, and lose the exemption,” she explained.

“The furlough scenario has come up the most. Furloughing exempt employees for anything less than a full week carries a risk of violating the salary-basis test. When an exempt employee works just one hour during the week, she must get paid for the entire week,” Kappelman noted. “If an employer furloughs the employee on a Wednesday, it must pay her for the full week, or she will lose her exempt status. And you may very well see a class action for all those hours you didn’t pay folks during that workweek.

“What if you furlough an exempt employee, but you’re still calling her at home and asking her to respond to emails now and again? ‘Susie, can you tell me where we keep those files?’ Or ‘what’s our usual practice for doing such-and-such?’ In effect, Susie is on furlough, but if she’s answering emails, then she’s actually working, and therefore, she is entitled to pay for the entire week—even if she’s only answered an hour’s worth of emails that week. That may not be a lot of money for one person, but if that’s happening with a number of employees, those class actions can add up quickly.”

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Duties dilution is also a common pitfall, particularly as employers that have been forced to furlough part of their workforce call upon managerial staff to take on additional tasks. Consider a retail establishment. “Many exempt employees are now stocking shelves, working the register, sanitizing the workplace because there aren’t enough healthy employees to do the job. You have to be really careful. If an exempt employee performs more nonexempt work than management work, there is a danger that the employee’s primary duty is no longer managerial, which removes exempt status,” Kappelman noted.

**Off-the-clock claims**

“The largest issue for nonexempt employees is that it will take them longer to prepare to work— cleaning and sanitizing the workspace, getting temperature-scanned, and donning PPE. Employers may make the mistake of not paying for that time,” Kappelman said. “But employees generally must be paid for the time it takes to don and doff protective gear or work clothes. And again, unrecorded time for one person isn’t too costly, but unrecorded time for 100 or 1,000 employees can be quite a costly class action.”

“In the COVID world, off-the-clock claims can arise in the context of screening,” Kappelman noted. “The time an employee spends getting her temperature checked before she can start work
may take only two minutes. But what if the employee has to stand in line for 30 minutes waiting to get temperature-checked? The employer will need to compensate her for that waiting time. What if she has to spend additional time now sanitizing her workspace, putting on face masks, cleaning face masks? Again, it’s probably not de minimis; it’s compensable.”

Employers also must pay nonexempt employees for the time spent getting up to speed with post-COVID changes in the workplace. “There will be new ways of doing business post-COVID. For example, we may see there are no more pin-pads at checkout lanes, which means cashiers must train on contactless payment. They will need to train on new software, new equipment. That’s all compensable time.”

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State-law requirements

Kappelman also cautioned on state-specific class action traps. Meal and rest breaks, required under numerous state laws, will be impacted by the need for social distance. “Consider the employee who says she can’t take her break because she can’t sit in the break room and be socially distant, or says ‘you didn’t provide a safe space for me to eat lunch so I’m eating lunch at my desk but I keep getting interrupted because people think I’m on the clock.’ Or the employee who complains that he has to go eat in his car because you’ve cordoned off the lunchroom, and now there’s not enough time on his lunch hour to eat and also don and doff his PPE.”

In many states, laws governing expense reimbursement will require an employer to reimburse anything purchased by employees attendant to remote work: cell phone, computer monitors, printers. For on-site employees, the costs of employee-supplied PPE may have to be reimbursed. Failure to pay these previously unanticipated expenses also invites class litigation.

In addition, employers faced with financial difficulties may be tempted to change their commission plans midstream. “Perhaps under the current plan, commissioned employees earn the commission as soon as the order comes in the door. Now 90 percent of your customers are suddenly cancelling their orders, and you decide you’ll pay out commissions when the customer order is delivered. That unilateral change means 90 percent of commissions which should have been due under the old commission plan are not due to the employee now. That’s really just a straightforward breach of contract claim, and it may give rise to a class action for failure to pay money earned under a commission plan,” Kappelman cautioned. “Keep an eye on your commission plan, review it, and comply with it.”
Wage nonpayment

The DOL’s Wage and Hour Division has noted an increase in complaints from workers who are simply not getting paid because the downturn has left their employers cash-strapped. Wage nonpayment is an obvious violation for which there is little opportunity to avoid liability.

“For states where the underpayment statute contains a private right of action, you may see private class actions, although the requirement to pay wages is so straightforward, I would expect these cases to settle quickly,” Kappelman said. “Some state underpayment statutes do not contain a private right of action, so the appropriate state agencies would have to pursue these claims.”

Class action risks

COVID-19 and the adjustments that employers have made in response to the pandemic are rife with opportunity for the plaintiffs’ bar eager to bring class claims, which are faster, easier to pursue, and result in quick settlements. “Every industry is at risk,” Kappelman said. “Even law firms can run afoul of the exempt salary basis and duties dilution issues, and employers of nonexempt workers in every industry will need to deal with the time-recording issues involved with necessary changes to meal breaks, rest breaks, and donning and doffing PPE.

“I expect to see retail and hospitality hit the hardest, since their workforce is so public-facing and visible,” she predicts. “And the return-to-work issues will be very similar for these groups of employees, putting employers at greater risk of classwide liability.”

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Kappelman also anticipates an uptick in independent contractor misclassification class actions. “Many COVID-related state and federal government orders group independent contractors and employees under the same umbrella for purposes of benefits, unemployment compensation, notice, and leave payments. As such, many employers followed suit, treating independent contractors like employees with respect to benefits coverage, leave payments, furloughs, and the like.”

Heightening the danger is the fact that the COVID-related adjustments giving rise to the alleged wage-hour violations are based on sweeping policy decisions, making them particularly vulnerable to class treatment. “It may be easier to show commonality, for Rule 23 certification purposes, since everyone was affected at the same time by many of the same issues surrounding COVID shutdowns, and many employers issued companywide policies to address the virus,” Kappelman warned.

“Having said that, the defense bar may have some arguments in the nationwide class cases that employee populations in different states were different, as each governor issued different guidance and the timing and scope of these shutdown orders varied by state.”
For now, at least, the risk of litigation also varies by state. “We will see lawyers aggressively pursue these claims in any location with an active plaintiffs’ bar and substantial penalties for wage and hour violations,” Kappelman cautioned. “We will see the first wave of post-COVID wage and hour class actions in California, Massachusetts, New York, and New Jersey. Plaintiffs’ counsel already have a playbook for these kinds of class claims in these states, and the laws in those jurisdictions allow for lucrative penalties.”

Employers elsewhere, however, should anticipate that wage-hour class actions will spread.