Legal Trends in Corporate Governance

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Part 1: Wage-and-Hour Background

Wage-and-Hour Laws That Cover Colorado Employers:

1. **Fair Labor Standards Act: covers almost every employer.**
2. **Colorado Minimum Wage Order: covers employers in the following industries: health and medical; food and beverage; retail and service; and commercial support service.**
3. **Colorado Wage Act: covers all employers in Colorado.**

Fair Labor Standards Act Background

- Employees must:
  - Receive at least the minimum wage for every hour worked; and
  - Receive 1 ½ times their regular rate for all hours worked over 40 in a workweek (and 12 hours in a day if covered by the current Colorado Minimum Wage Order).
  - Record hour(s) worked (start times, finish times, meal periods, and breaks longer than 25 minutes).

Fair Labor Standards Act Background

- **To be exempt from these requirements, the employer must meet two tests with respect to the employee:**
  - **Duty-Basis Test**
  - **Salary-Basis Test**
- ***Must meet both tests. One test is insufficient.***

Part 2: The DUTIES Test

- The Executive Exemption
- The Administrative Exemption
- The Professional Exemption
- The Computer-Professional Exemption
- The Outside Sales Exemption

Executive Exemption

1. The employee must make at least $455 per week on a salary basis, exclusive of board or lodging;

2. The employee must have the primary duty of management of the enterprise in which he is employed or the duty of management of a customarily recognized department;

Executive Exemption

3. The employee must customarily and regularly direct the work of at least two other employees or their equivalent;

4. The employee must have the authority to hire or fire employees, or their recommendations about hiring, firing, advancement, promotion, etc. must be given particular weight.

Administrative Exemption

1. The employee must make $455 per week salary;
2. The employee must have the primary duty of performing office or nonmanual work that is directly related to the management or general business operations of the employer or its customers;
3. The employee's primary duty must include the exercise of discretion and independent judgment on significant matters.

Professional Exemption

1. The employee must be compensated on a salary or fee basis at a rate not less than $455 per week;
2. The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;

Professional Exemption

3. The advanced knowledge must be in a field of science or learning; and

4. The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

Computer-Professional Exemption

1. The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week or, if compensated on an hourly basis, at a rate not less than $27.63 an hour;

2. The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties; and

Computer-Professional Exemption

3. The employee's primary duty must consist of:
   - The application of systems analysis techniques and procedures, including consulting with users to determine hardware, software or system functional specifications;
   - The design, development, documentation, analysis, creation, testing or modification of computer systems or programs including prototypes based on and related to user or system design specifications.

FLSA's Current Salary-Basis Test

- "Salary basis" means an employee regularly receives a predetermined amount of compensation each pay period. Currently, this amount must be at least $455 per week ($23,660 annually).

- This amount cannot be reduced because of variations in the quality or quantity of the employee's work.

FLSA's Current Salary-Basis Test

- During his confirmation hearing, Alexander Acosta, President Trump's 2nd nomination for DOL Secretary, stated he thought President Obama's wage reforms were too aggressive.
- When pressed, he said the current threshold, adjusted for inflation (*i.e.*, approximately $33,000), would be about right.
- He didn't receive any questions as to an annual update or highly-compensated employee threshold.

Improper Deductions From Salary

- Making deductions from salaried employees for absences during the workweek can destroy the exempt status.
- If the deduction is improper, the employer converts the employee into a nonexempt, hourly employee by deducting from salary for time not worked during a part of a workday.

Proper Deductions

- Exempt employees who are absent for a full day for personal reasons or because of sickness or disability need not be paid for that day once they have exhausted all applicable paid leave benefits.
- Exempt employees who take leave under the Family Medical Leave Act (if it applies) will not be paid for that time unless they have accrued benefits under applicable paid leave benefits. Their pay will be reduced by the hours missed even if it is less than a full day.

Proper Deductions

- Exempt employees who are absent from work for jury duty, attendance as a witness at a trial, or temporary military leave will have their pay reduced by the amount of payment they receive in the form of jury fees, witness fees, or military pay (not including reimbursement of expenses).
- If an exempt employee violates a safety rule of major significance, his or her pay may be reduced in an amount to be determined by the employer as a penalty for that violation.

Permissible Deductions From Last Paychecks

- Colorado law permits employers to deduct the amount of money or the value of property that the employee failed to properly pay for or return to the employer in the case where a terminated employee was entrusted during his or her employment with the collection, disbursement, or handling of such money or property.

Permissible Deductions From Last Paychecks

- Employers may hold final paychecks for 10 calendar days after termination to audit the employee's "accounts."
- Employer must have an agreement (not a handbook policy) stating this.

Class Action Lawsuits

- **Class action lawsuits under the Fair Labor Standards Act have been going up every year for the last five years.**

- **The more than 9,000 collective/class-action suits filed in 2016 is a 400% increase since 2002.**

Class/Collective Action Lawsuits

- Collective actions are “opt-in” procedures. This means that, unlike a class action, class members must actively opt in to the lawsuit, by filing an individual consent to join.
- Class action lawsuits don’t require employees to do anything. Once the class is approved by a court, all employees are in.

Anatomy of a Class-Action Lawsuit

- Employer “sort of/kind of” knows, but doesn’t know for sure, that an employee may occasionally perform minimal work at a central location before traveling to a job site.
- Employee is terminated.
- Employee’s attorney demands the company pay the employee for the 30 minutes in the morning and afternoon for time worked “off the clock.” Then, the attorney demands triple the amount.

Anatomy of a Class-Action Lawsuit

- Employer, hoping to avoid a prolonged litigation, agrees to pay the employee an hour a day (30 minutes in the morning, 30 minutes in the evening). But refuses to pay the "extra amount."
- Employer sends employee a check for the hour a day for the last two years.
- Employee files a class/collective action lawsuit.
- Months, if not years, later…

Anatomy of a Class-Action Lawsuit

- Steps to lessen potential liablity:
  - Don’t let employees ever work off the clock. EVER!!! NEVER!!!
  - Prepare handbook policies regarding this issue.
  - Conduct training on how to complete timesheets.

Anatomy of a Class-Action Lawsuit

- Timesheets should include language that states, “I affirm that these are all the hours I worked during this pay period. I did not work any time off the clock that is not on this timesheet.”

- At every training, employee meeting, etc. employers should end with the statement, “… and don’t forget, no one is permitted to work off the clock.”

Class / Collective Claims

- Frequent bases for claims:
  - Plaintiff attorneys looking for billable hours
  - Off-the-clock work, especially “prep time”
  - After-hour emails
  - Travel time
  - Automatic deductions
  - Tip-pooling arrangements
  - Nondiscretionary bonuses
  - Instructing employees on how to complete time cards

Hours Worked: Issues

- Nonexempt employees must receive compensation for “time worked.” This is defined as:
  - Suffered or Permitted
  - Waiting Time
  - On-Call Time
  - Training Time
- Basically, any time that the employee performs services for the company when the employee cannot use that time for the employee.

Waiting Time

Counted as hours worked when:

- **Employee is unable to use the time effectively for his or her own purposes; and**
- **Time is controlled by the employer**

Not counted as hours worked when:

- **Employee is completely relieved from duty; and**
- **Time is long enough to enable the employee to use it effectively for his or her own purposes**

On-Call Time

On-call time is hours worked when:

- **Employee has to stay on the employer's premises or**
- **Employee has to stay so close to the employer's premises that the employee cannot use that time effectively for his or her own purposes**

On-call time is not hours worked when:

- **Employee is required to carry a pager or**
- **Employee is required to leave word with the employer as to where he or she can be reached**

Training Time

Time employees spend in meetings, lectures, or training is considered hours worked and must be paid, unless

- **Attendance is outside regular working hours and**
- **Attendance is voluntary and**
- **The course, lecture, or meeting is not job related and**
- **The employee does not perform any productive work during attendance**

Prep-time Work

Gerber Products v. Hewitt

- **Employees sought overtime compensation for the activities, which included changing into uniforms and shoes, using a lint roller on their clothing, donning protective gear, washing their hands, walking to a pre-shift meeting, and later removing the protective clothing.**
- **The court held these activities constituted work because it was mandatory and employees were unable to use time for their own purposes.**

Prep-time Work = Booting Up Computer

- Hilton Reservations Worldwide was investigated by the Department of Labor for failure to pay employees for work performed prior to clocking in at the start of scheduled shifts, such as booting up a computer, opening programs required to assist customers and reading emails.
- Hilton Reservations agreed to pay employees more than $715,000.

Prep-time Work = Booting Up Computer

- Factors considered:
  1. Is time spent primarily for the benefit of the employer?
  2. Is time spent related to the employee's principal activity?
  3. Did the employer know that the work was being performed?
  4. How much time was spent by the employee?

Emails “Before” Work

- **“Work” time could include time spent checking voicemails or emails at the start of the day; time developing a plan, schedule, or route for the day; time reading or completing required paperwork; or time loading or stocking equipment.**
- ***Karr v. City of Beaumont, Tex.* -- employees who drive company cars home have to be paid for all time spent cleaning and maintaining the vehicles.**

Travel Time Rules

- Overnight travel
- Special one-day trips
- Travel “all in a day’s work”
- Travel to work when work keeps moving
- Using employer’s vehicle for travel
- Employees traveling to different job sites during meal periods.
- Travel time paid as one lump sum

Employee Commuting Flexibility Act of 1996

This Amendment, which amended the Portal-to-Portal Act, provides that the use of an employer's vehicle for travel by an employee, and activities performed by an employee which are incidental to the use of such vehicle for commuting, shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area of the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employee or representative of such employee.

Automatic Meal-Break Deductions

- A St. Louis medical employer agreed to pay a $1.7 million settlement for unpaid wages related to automatic meal period deductions.
- A Wisconsin hospital agreed to a $3.5 million settlement for a class action for unpaid wages related to automatic meal period deductions.

Automatic Meal-Break Deductions

- A Philadelphia hospital agreed to pay $7.75 million to a collective action member for unpaid wages related to automatic meal period deductions.
  - Published in the Rise of Wage & Hour Class and Collective Actions in Healthcare ASHHRA 50th Annual Conference and Exposition.

Tipped Employee

- Works in occupation in which he or she customarily and regularly receives more than $30 per month in tips.
- Paid at least $6.28 in cash by employer, who may claim a “tip credit” for the rest of minimum wage.
- As the minimum wage increases, the tip credit in Colorado is slated to remain at $3.02 per hour.

Tip Credit

Employer may claim "tip credit" only if:

- **The employer informs each tipped employee about the tip credit allowance, including the amount to be credited before credit is utilized**
- **The employer can document that the employee received at least enough tips to bring the total wage paid up to minimum wage or more; and**
- **All tips are retained by the employee and are not shared with the employer or other employees, unless through a valid tip-pooling arrangement**

Tips and Tip Pools

Steele v. Leasing Enterprises, Limited

- **Restaurant chain's 3.25% deduction from credit card tips for servers violated the FLSA requirement that all tips received by servers be retained by them.**

Nondiscretionary Bonuses

- Employers who use nondiscretionary bonuses, shift incentives, and flat fees normally must include these amounts in the regular rate of pay for computing overtime rate.
- In *Gonzalez v. McNeil Technologies, Inc*., employees testified employer promised bonuses in advance and employees were paid according to the promise.

Nondiscretionary Bonuses

- Examples of promises the employer allegedly made included, telling one employee the “better the employer does, the bigger and better year-end bonuses would be” and another employee testified that each year she was told in October whether she would receive a bonus around Christmas.

Nondiscretionary Bonuses

- The court held that employers must retain discretion both as to the fact of payment and as to the amount until a time quite close to the end of the period for which the bonus is paid.
- So, in *Gonzalez*, the court determined that even though bonuses were contingent and variable, they were still nondiscretionary.

Nondiscretionary Bonus Example

- Employer pays employee $10 per hour (*i.e.*, overtime rate is $15.00 per hour). Employer also pays a bonus of $50 for every week the employee produces more than 100 widgets.
- The bonus will move the employee's overtime rate in an amount equal to the $50 divided by the number of hours worked that workweek times .5 for each overtime hour worked.

Nondiscretionary Bonus Example

- For example, if the employee works 50 hours and the $50 bonus is paid, then the employer will owe another $5.00 in overtime ($50 bonus ÷ 50 hours x .5 x 10 hours overtime = $5.00), in addition to the $150.00 (10 hours x $15) overtime based on the base rate.
- Gifts and totally discretionary bonuses that are not promised by the employer are not counted in determining regular rate or overtime rate of pay.

Sick-Leave Buyback = Nondiscretionary Bonus

Balisteri v. Menlo Park Fire Protection Dist.

- California court said that under Colorado law, an employer must treat sick leave "bought back" by the employer as a nondiscretionary bonus.
- The court further held that this rule only applied to sick-leave buybacks; not vacation buybacks.
- The court did not discus the issue regarding over what term that payment needed to be applied.

The National Labor Relations Board

National Labor Relations Board

- Section 7 of the National Labor Relations Act protects the rights of all nonmanagement employees, union and nonunion, to discuss and to complain about wages, hours, and other terms and conditions of employment.
- In spring 2015, the NLRB's General Counsel released its Report of General Counsel Concerning Employer Rules.

National Labor Relations Board

- The Board, currently comprised of five President Trump appointees, is expected to:
  - Make class action waivers lawful.
  - Make it more difficult for employers to be considered joint employers.
  - Slowdown “quickie” union elections.
  - Reverse the expansion of what is considered “protected concerted activity.”

NLRB Not Going Quietly…

- In a recent case, a hospital terminated two nurses after the hospital learned the nurses exhibited negative, intimidating, and bullying behavior toward others.

- The Board determined that several terms in the hospital's code of conduct were unlawful and repressive. Specifically:

NLRB Not Going Quietly…

- “impeding harmonious interactions and relationships”;
- “[v]erbal comments or gestures directed at others that exceed the bounds of fair criticism”;
- “[n]egative or disparaging comments about the moral characters or professional capabilities of any employee or physician” and
- “behavior that is . . . counter to promoting teamwork.”

NLRB Not Going Quietly…

- **The Board found rules prevented employees from engaging in concerted activity.**
- **In the actual dissent, however, Acting Chairman Philip Miscimarra urged the Board to abandon this approach: "reasonable work requirements have become like Lord Voldemort in Harry Potter: they are ever-present but must not be identified by name" lest they be stricken.**

NLRB & Employee Handbooks

- The following language in an employee handbook would be "unlawful," according to the General Counsel's Report:
  - "Employees may not advocate for outside representation, such as a union;"
  - "Employees may not speak negatively about working conditions at the Company;"

NLRB & Employee Handbooks

- “Employees may not discuss wages, benefits, or disciplinary actions, because those are confidential.”
- “Do not make disparaging remarks about the Company, its managers or its other employees.”
- “Do not disclose confidential Company information, including personnel information such as employee names, addresses, and phone numbers.”

NLRB and Social Media

- *Pier Sixty, LLC and Hernan Perez*
- Mr. Perez received two verbal warnings for "chitchatting" when he was supposed to be working. Annoyed at being reprimanded, Mr. Perez, during a work break, posted on his social media account the following message:

Pier Sixty, LLC and Hernan Perez

- “Bob is such a NASTY MOTHER F***** don’t know how to talk to people!!!!! F*** his mother and his entire f****** family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!!”
- Pier Sixty terminated Perez.

Pier Sixty, LLC and Hernan Perez

- In the subsequent lawsuit that came after Mr. Perez's termination, the Board focused on the following factors to determine if Mr. Perez engaged in protected activity:
  1. The place of the discussion;
  2. The discussion's subject matter;

Pier Sixty, LLC and Hernan Perez

3. The nature of the employee's outburst;
4. Whether the employer provoked the outburst;
5. The level of the employer's antiunion hostility;
6. Whether the employee was impulsive or deliberate;

Pier Sixty, LLC and Hernan Perez

7. Whether the employer considered language similar to that used by the employee to be offensive;
8. Whether the employer maintained a specific rule prohibiting the language at issue; and
9. Whether discipline imposed was typical of that imposed for similar violation.

Pier Sixty, LLC and Hernan Perez

After reviewing these factors, the Board decided as follows:

- "We agree with the judge that Perez' Facebook comments, directed at [his supervisors] asserted mistreatment of employees, and seeking redress through the upcoming union election, constituted protected, concerted activity and union activity."

Pier Sixty, LLC and Hernan Perez

- Sure, but what about the profanity?!?
- The panel found that Perez's comments weren't egregious enough to lose the NLRB's protection because Pier Sixty's workplace was rife with vulgarity that had not been addressed through discipline or policy.

Jimmy John's Poster Case

Jimmy John's Poster Case

- Below the photographs, in larger white letters, the poster stated: "**Can't Tell the Difference**?"
- In smaller red letters, it said : "**That's Too Bad Because Jimmy John's Workers Don't Get Paid Sick Days. Shoot, We Can't Even Call In Sick.**"
- Below that, in even smaller white letters, the posters stated: "**We Hope Your Immune System Is Ready Because You're About To Take the Sandwich Test . . .**"

Jimmy John's Poster Case

- The Company fired 6 workers and issued written warnings to 3 others involved.
- The company argued that the posters were "disloyal" and untrue.
- The National Labor Relations Board ruled that Jimmy John's violated the union-organizing rights of six employees by firing them for publicly protesting the company's lack of sick leave.

Jimmy John's Poster Case

- The NLRB also ruled that the posters were not so "disloyal, reckless or maliciously untrue" as to lose the protection of labor law.

- The NLRB also determined that "derogatory," "disparaging," or simply "false or misleading," was insufficient for adverse action. Instead, the employer must show that the employee had a malicious motive when he or she made the false or misleading statement.

Jimmy John's Poster Case

- On March 23, 2016, a federal appeals court affirmed the NLRB's determination that Jimmy John's violated the rights of the six workers who were fired after they displayed posters in protest of the company's sick leave policy.

Developing a Social Media Policy

1. Effective social media policies are essential for all employers because the same rules apply whether those employers are union or non-union.

2. An employer prohibiting disclosure of confidential and proprietary information should narrowly define “confidential” and “proprietary.” Try using examples.

Developing a Social Media Policy

3. Narrowly tailor prohibitions against using the employer's name or trademark.

4. Be careful when instructing employees about posting photos, videos, or other content involving third parties. An outright prohibition of such postings – even though third party rights may be at issue – could be considered overbroad.

Developing a Social Media Policy

5. An employer requiring employees to report certain activities or communications of others could be problematic, but an employer's policy instructing employees to be cautious or even develop a healthy suspicion of persons trying to "trick" them into disclosing confidential information can be acceptable.

Developing a Social Media Policy

6. A policy requiring employees' posts to be "accurate and not misleading" could be overbroad if it is not clarified or further defined by example or otherwise.
7. Employers should not instruct employees to get prior employer approval before posting.

Developing a Social Media Policy

8. A social media policy instructing employees to “think carefully” about friending colleagues is considered unlawfully overbroad because it can discourage communication among co-workers.

9. Any prohibition on “offensive, demeaning, abusive or inappropriate remarks” should be narrowly tailored and you should consider providing examples.

Colorado Legislation

Act Re: Repeal of Duplicate Reporting Requirements

- In 2008, Colorado enacted a "State I-9 Requirement."
- This bill removed the requirement for employers to complete the Colorado Affirmation form or retain copies of the necessary documents.
- In 2015, Governor Hickenlooper signed this bill into law and it is now in effect.

I-9 Basics

- What is it?
  - Form I-9 is used for verifying the identity and employment authorization of individuals hired for employment in the United States.
  - All U.S. employers must ensure proper completion of Form I-9 for each individual hired for employment in the United States.
  - This includes citizens and noncitizens.
  - Both employees and employers must complete the form.

I-9 Basics

- On the form, an employee must attest to his or her employment authorization.
- And the employee must present the employer with certain documents evidencing identity and authorization.
- The employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and to relate to the employee.
- The employer must also record the document information on the Form I-9.

I-9 Basics

- Employers must complete Section II.
- The employer may not specify which documents the employee may use so long as the employee presents the correct List A or B and C documents.
- The employer may NOT require the employee to show a social security card or a document containing a SSN with one exception (*i.e.*, if the employer uses E-Verify).

NEW I-9 FORM!!

- ***NEW FORM PUBLISHED ON JULY 17, 2017—Employers must start using this form no later than September 18, 2017.***
- What were the changes?
  - **Changed the name of the Office of Special Counsel for Immigration-Related Unfair Employment Practices to its new name, Immigrant and Employee Rights Section.**
  - **Removed the phrase "the end of" from the phrase "the first day of employment."**

NEW I-9 FORM!!

- Any other changes?
  - In List C, form FS-545 is now listed with form DS-1350.
  - Also added to List C is form FS-240.
  - All of the changes related to Certification of Report of Birth or Birth Abroad.
- That's all the changes.

Parental Involvement Leave Act

- In 2009, Colorado legislature passed a bill which allowed employees of FMLA-covered employers to take leave from work for the purpose of attending certain academic activities involving their children.
- In September 2015, that Act “sunsetted.”

A Pregnant Workers Fairness Act

- The Act states that an employer “shall” provide reasonable accommodations for any “health conditions related to pregnancy or the physical recovery from childbirth.”

- Like the Colorado Antidiscrimination Act, it applies to all employers, regardless of the number of employees.

A Pregnant Workers Fairness Act

- So, while the ADA requires accommodation (and prohibits discrimination) only for conditions that constitute a “disability,” this Act requires accommodation so long as the condition is “related to” pregnancy or a condition following childbirth.

- No related disability is necessary beyond the fact of pregnancy itself.

A Pregnant Workers Fairness Act

- The Act identifies possible reasonable accommodations to include, but are not limited to:
  - provision of more frequent/longer breaks;
  - more frequent restroom, food, and water breaks;
  - acquisition or modification of equipment/seating;
  - limitations on lifting;

A Pregnant Workers Fairness Act

- temporary transfer to a less strenuous or hazardous position if available, with return to the current position after pregnancy;
- job restructuring or light duty, if available;
- assistance with manual labor; or modified work schedule.

- The Act prohibits requiring an applicant or employee to accept an accommodation that she has not requested.

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