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West Virginia DOL Withdraws Proposed Emergency Wage and Hour Regulations

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In welcome news for employers, the West Virginia Department of Labor (WVDOL) has withdrawn a set of emergency regulations that would have significantly revamped state wage and hour requirements and created conflicts with federal wage and hour regulations. The WVDOL proposed the regulations to West Virginia's Secretary of State on November 19, 2014 and requested they take effect on January 1, 2015, giving employers little time to respond to the proposal or develop compliance strategies. Despite the eleventh-hour approach used by the WVDOL, employers mounted a focused response analyzing the various flaws in the proposed regulations, which in many instances were vaguely worded, inconsistent with decades-long practices under federal and state law, and beyond the WVDOL's legislative mandate to amend existing regulations.

In response to these well-founded concerns, Acting WVDOL Commissioner John R. Junkins withdrew the proposed regulations on December 23. In his letter to the Secretary of State, Junkins stated that the WVDOL will submit an amended set of regulations at the next regular legislative session (which is set to convene on January 14) rather than seek an emergency enactment through the Secretary's office. As a result, the WVDOL's withdrawal may only represent a temporary reprieve for employers in West Virginia. Although the WVDOL intends to amend the regulations it will submit to the legislature, employers operating in West Virginia should familiarize themselves with the recently withdrawn regulations, which may provide a useful roadmap for the types of changes the WVDOL is contemplating.

The following is a brief description of the most significant changes to existing wage and hour regulations proposed in the WVDOL's withdrawn regulations:

Determination of Compensable Time

Preliminary and Postliminary Activities

Under the federal Fair Labor Standards Act (FLSA), employers are not required to pay employees for preliminary and postliminary activities that occur before or after performance of the employees' "principal activities."[1] The WVDOL's proposed regulations would have expanded the types of activities occurring at the start and end of workdays for which employers must compensate employees.

1 29 C.F.R. § 254(a).

The proposed regulations would have required employers to pay "the time an employee spends in preparing to begin work at his or her place of employment, or in preparing to leave work at his or her place of employment, such as changing clothes or washing, when such activities are an indispensable part of his or her work, are required by law or by the employer, required by contract, or are the custom and usage of a particular trade." The language concerning "activities [that] are an indispensable part of his or her work" may not represent a significant deviation from federal law, which already considers whether an activity is "integral and indispensable" to a principal activity in determining whether it is compensable.[2] However, the proposed language that would make all activities compensable that are "required by the employer" represents a striking departure from federal law and the longstanding approach under West Virginia law.[3] By its plain language, the proposed regulation would have required employers to pay employees for all time spent performing preparatory tasks such as donning and doffing of uniforms or protective equipment at an employer's place of business, waiting to clear security checkpoints, and booting up computers, so long as these activities are deemed to be "required" and regardless of whether they are integral and indispensable to the employee's primary duties. Such regulation would represent a significant expansion of compensable preliminary and postliminary activities.

Break Time

Federal regulations provide that bona fide meal periods of 30 minutes or more do not constitute compensable work time if the employee is completely relieved from duty and is free to leave his or her work area.[4] Federal regulations further provide that a break of less than 30 minutes may be long enough to constitute a bona fide meal period under "special circumstances" and set the floor for uncompensated breaks at 20 minutes.[5] Accordingly, breaks that last between 20 to 30 minutes may be unpaid under certain circumstances.

The WVDOL's proposed regulations would have removed the flexibility provided under the federal rules and required employers to pay employees for any break that does not last at least 30 minutes. This proposed regulation ignores the reality of many work environments, where employers cannot monitor the duration of employees' breaks to the minute, and creates the potential for costly litigation in circumstances where employees themselves may have chosen to return to work a minute or two early without the employer's knowledge or consent.

On-Call Time

The WVDOL's proposed regulations would also have expanded the scope of compensable on-call time. Under federal law, the compensability of on-call time often is determined on a case-by-case basis. Federal regulations make clear that an employee is entitled to compensation if required to stay on the employer's premises while on call.[6] Otherwise, courts generally assess whether an employee is entitled to be paid for being on-call by determining whether such employee is able to use the on-call time for his or her own purposes. By contrast, the WVDOL's proposed regulations would have required employers to pay employees not only for on-call time spent at the employer's premises, but also for on-call time spent "in close proximity" to the premises or "at his or her home" if the employee "is not free to use the time as he or she wishes." This vaguely worded language expands the scope of compensable on-call time without giving employers any concrete notion of where the WVDOL has drawn the "compensability" line. For example, what is meant by the term "close proximity," and what determines whether an employee "is free to use the time as he or she wishes" is unclear. As a result, had the proposed regulation taken effect, employers would be left to guess when they should be paying employees for on-call time.

Sleep Time

Under the FLSA, when employees are on duty for periods of 24 or more consecutive hours, employers are permitted to treat eight hours as non-compensable sleeping time so long as the employee "can usually enjoy an uninterrupted night's sleep."[7] As a practical matter, for the

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2 *See Integrity Staffing Solutions, Inc. v. Busk*, – U.S. –, 2014 U.S. LEXIS 8293, at *9-10 (Dec. 9, 2014) (citing *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29-30 (2005)).

3 *See* W. Va. Code Ann. § 21-5C-1(h) ("[I]n determining . . . the hours for which an employee is employed, there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday . . . or activities which are preliminary to or postliminary to said principal activity or activities.").

4 29 C.F.R. § 785.19(a).

5 29 C.F.R. §§ 785.18, 785.19(a).

6 29 C.F.R. § 785.17.

7 29 C.F.R. § 785.22(a).

sleep period deduction to apply under federal law, the employee must get at least five hours of uninterrupted sleep.[8] Accordingly, federal law does not require that the employee receive an uninterrupted eight hours of sleep. West Virginia has long followed a similar approach, using the same language as the federal regulations – *i.e.* "can usually enjoy an uninterrupted night's sleep."[9]

By contrast, the proposed regulations would have required employers to pay for all sleeping time unless the employee receives "8 hours of uninterrupted sleep in adequate sleeping quarters provided by the employer." If the employee is interrupted at all during the eight-hour sleep period, even if only for a few minutes, the entire deduction is forfeited. This represents a significant departure from both the federal practice and existing state practice in West Virginia and would make it far more difficult for employers to claim bona fide sleep periods to limit labor costs.

Rounding

The proposed regulations do not differ substantively from federal law on rounding employees' time. Both permit employers to use rounding systems so long as the rounding does not work exclusively to the benefit of the employer. However, the proposed regulations would have required employers to establish written policies setting forth the interval of time used for rounding, which cannot exceed 15 minutes, and explaining how the rounding system works.

Employer Credits Toward the Minimum Hourly Wage

Tip Credit

Starting January 1, 2015, the minimum wage in West Virginia will be $8.00 per hour (and employers will no longer be exempt from this minimum wage when 80% of the employer's workforce is covered by the FLSA). West Virginia permits employers to take a tip credit equal to 70% of the minimum wage for "employee[s] customarily receiving gratuities."[10] As such, employers will be able to take a tip credit of $5.60 per hour under state law. By contrast, the FLSA establishes a minimum wage of $7.25 per hour and allows a maximum tip credit of $5.12 per hour.[11]

In the proposed regulations, the WVDOL sought to clarify how the tip credit would be applied. The WVDOL began by distinguishing among: (1) "service employees," who customarily receive tips or gratuities in connection with their work; (2) "non-service employees," who do not customarily receive tips or gratuities in connection with their work; and (3) "dual job employees," who perform work both as a service and a non-service employee for the same employer. Under the proposed regulations, a dual job employee would have had to be paid the full minimum wage for all hours worked as a non-service employee. Additionally, when service employees spend more than 20% of their time during the workweek performing non-tips duties (*e.g.*, cleaning or setting tables, making coffee), they would have had to be paid the full minimum wage for time spent performing these duties. These rules generally track federal requirements.[12]

The regulations further specify that, to claim a tip credit, employers would have had to maintain written tip records completed by an employee. Employee tip reports would have had to have been signed and dated by the employee and state the time period in which tips were received, the amount of cash, credit and debit card tips received, the amount of tips paid out, and the employee's net tips. IRS Form 4070 (Employee's Report of Tips to Employer), Form 4070A (Employee's Daily Record of Tips), or any other form containing the required information could have been used under the proposal. Additionally, employers would have had to keep record of time worked by a dual job employee as a service employee. Although state law, unlike its federal counterpart, does not contain a tip credit notice requirement,[13] employers that do not provide tip credit notice expose themselves to liability under the FLSA as well as state law, which requires that employees receive written notice of their pay rate when employment begins.[14] Accordingly, tip credit notice should be provided, preferably in writing.

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8 29 C.F.R. § 785.22(b). It should be noted that federal law requires employers to pay for any time the employee actually performs work during an interruption of sleep.

9 W. Va. Code R. § 42-8-9.11(a).

10 W. Va. Code Ann. § 21-5C-4.

11 29 U.S.C. § 203(m); 29 C.F.R. § 531.50.

12 29 C.F.R. § 531.56 (Dual Jobs); United States Department of Labor, Wage and Hour Division, Fact Sheet #15: Tipped Employees Under the Fair Labor Standards Act (FLSA) (rev. July 2013).

13 29 U.S.C. § 203(m); 29 C.F.R. § 531.59.

14 W. Va. Code § 21-5-9.

The proposed regulations also cover tip pooling and sharing, which was not previously addressed by existing regulation. If an employer permits tip sharing or pooling, it would have had to divide shared or pooled tips among only service and dual job employees working as service employees, and ensure employees individually document the amount of tips paid out. An employer would not have been able to receive any shared or pooled tips. These rules are largely consistent with federal requirements, which permit pooling among tipped employees but prohibit including non-tipped employees in a tip pool.[15]

Meal & Lodging Credit

West Virginia allows employers to apply the costs of meals and lodging provided to employees towards meeting their minimum wage obligations.[16] Under the proposed regulations, the meal credit would have increased from $1.00 to $4.00 per day if an employer makes meals available to an employee and the employee eats an available meal and works at least 8 hours in a work day. If an employee works less than 8 hours and eats an available meal, the credit would have increased from $.125 to $.50 per hour. Additionally, the regulations specify a meal credit cannot be applied if an employee does not eat a meal. Notably, the proposed regulations would have eliminated existing provisions related to employees with dietary problems or on paid leave.

The proposed regulations contain numerous changes to the lodging credit. In addition to being adequate, living quarters would have had to be habitable. Hot and cold running potable water would have been necessary, compared to the existing requirement of merely water. Toilet facilities and space for bathing would have had to be included, not just space for toilet purposes. Additionally, the rule would have continued to require heat, light, and space for cooking and sleeping. The maximum credit is essentially the same: one-third of the minimum wage, instead of 33 percent.

Uniforms

The proposed regulations contain slight wording changes to existing rules concerning uniform costs and laundering. Specifically, they provide that an employer would not be able to take a credit against employee wages for uniform costs and laundering if it requires employees to wear a uniform. Currently, the rule provides that a credit cannot be taken where the nature of the business requires an employee to wear a uniform, which is generally consistent with federal law.[17] The proposed regulation did not, however, define what constitutes a uniform. Although federal rules concerning uniforms are not among the numerous federal regulations adopted and incorporated by reference into the proposed regulations, the federal rules, along with U.S. Department of Labor opinions and enforcement materials, may at the very least act as a guide for how West Virginia labor officials interpret their rule; at a minimum, they can be used by employers to understand their FLSA obligations.

Criteria for Student Workers and Volunteers

Student Workers

The proposed regulations would also have affected student workers. Individuals who qualify as "full-time students" would have been exempt from state minimum wage and overtime requirements if they: (1) are enrolled full-time in a school or college; and (2) work no more than 24 hours in a workweek. The proposed regulations defined "full-time student" as a student enrolled in sufficient courses to be treated as full time by his or her institution. By contrast, West Virginia's existing regulations provide that "student workers" are exempt from minimum wage and overtime requirements. A "student worker" is defined as "an individual who has matriculated and participates in regular and prescribed courses at any recognized school, college or university." Accordingly, the proposed regulations would have changed state law by narrowing the student worker exemption to exclude part-time students.

Additionally, if the employer employs a full-time student for more than 24 hours in a workweek, the proposed regulations would have required the employer to pay the student at least the minimum hourly wage for all hours worked and pay the student overtime for all hours worked over 40 in a workweek.

15 29 U.S.C. § 203(m); 29 C.F.R. § 531.54.

16 W. Va. Code § 21-5C-4.

17 *See* 29 U.S.C. § 203(m); *see also* 29 C.F.R. §§ 531.3, 531.32.

Volunteers

The proposed regulations addressed volunteers in two contexts. First, the regulations would have prohibited employers from requiring or permitting an employee to volunteer his or her services in any activity that is a normal and regular part of the employee's job duties. This is fairly consistent with federal law, which likewise prohibits employers from essentially coercing employees to work for free under the rubric of "volunteering."

The regulations would also have incorporated and adopted federal wage and hour regulations governing employees of state and local governments who would like to volunteer their services to other organizations. The federal regulations define a "volunteer" in this context as "an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered."[18] The federal regulations also state that "[i]ndividuals shall be considered volunteers only where their services are offered freely and without pressure or coercion, direct or implied, from an employer."[19] Notably, the regulations state that "an individual shall not be considered a volunteer if the individual is otherwise employed by the same public agency to perform the same type of services as those for which the individual proposes to volunteer."[20] Accordingly, public employees would not have been able to "volunteer" their time to perform the types of services they normally perform for compensation.

Taken as a whole, these provisions concerning volunteers would largely have served to bring state law into line with federal law and likely would not have been as burdensome as many of the other provisions contained in the proposed regulations.

Conclusion

Employers scored a significant, though perhaps temporary, victory in securing the withdrawal of the WVDOL's emergency wage and hour regulations. If they have not already done so, affected employers are encouraged to write the WVDOL to register their concerns about the proposed regulations, as Acting Commissioner Junkins has indicated the WVDOL intends to amend the proposed regulations in light of concerns that have been raised. In the meantime, employers should familiarize themselves with the proposed regulations as currently worded, in preparation for whatever changes are eventually implemented.

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18 29 C.F.R. §553.101.

19 *Id.*

20 *Id.*