Developments in Wage and Hour Law That May Impact the Construction Industry

As 2020 draws to a close, this is a great time to review the many developments in wage and hour law that may affect your business. Below I highlight issues that have been the subject of recent litigation or otherwise reflect changes in the legal landscape that are likely to have a significant impact on the construction industry. I also offer suggestions that you may want to consider to ensure that your company remains compliant.

1. Calculating hours worked: Pay must be based on the workweek, even if you pay your employees bi-weekly or semi-monthly. On a related note, make sure that you are recognizing and counting compensable hours appropriately. For example, typically it is not proper to reduce hours by classifying *de minimus* break time as "down time" or "rain delay." And time spent traveling from job site to job site during the workday is work time and must be counted as hours worked (contrast: ordinary travel from home to work and from work to home is not compensable). Review your pay practices and policies to confirm that you are capturing all hours worked.

2. Bonus season is upon us. But employers need to be aware that bonuses might also carry legal obligations. For non-exempt employees, that might include paying additional overtime based on the bonus payment. Indeed, if a bonus is "non-discretionary," then it is a part of an employee's total compensation and so it must be included when calculating an employee's "regular rate" of pay for purposes of calculating overtime. Review your bonuses or other incentive-pay and assess whether it is discretionary (paid without prior contract, promise or announcement and the decision as to the fact and amount of payment lay in the employer's sole discretion) or not and, if not, re-calculate overtime pay.

3. An employee may not qualify for the "executive employee exemption" just because his job title is "supervisor." In order to qualify for the executive employee exemption, the "supervisor" must: (1) be compensated on a salary basis at not less than $684 per week; (2) the employee's *primary duty* must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise; (3) the employee must *customarily and regularly* direct the work of at least two or more full-time employees or their equivalent; and (4) the employee must have the authority to hire or fire other employees, or the employee's suggestions or recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight. Review not only job descriptions but also the actual tasks performed to confirm that supervisors qualify for the executive employee exemption.

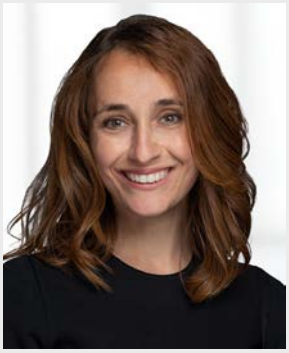
4. Many in construction utilize subcontractors to perform work on their behalf. This potentially exposes the company to exposure for FLSA compliance based on a theory of "joint employer" liability. Earlier this year, the U.S. Department of Labor published a business-friendly Final Rule regarding joint employer liability. The Rule addressed the two joint employment scenarios. One is "horizontal joint employment"—which means that the employee has employment relationships with multiple and related or associated employers. For those relationships, the rule provides that employers will generally be sufficiently associated if there is an arrangement between them to share the employee's services, one employer is acting directly or indirectly in the interest of the other employer

in relation to the employee, or they share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under some common control with the other employer. The other is "vertical joint employment"—which means the employee has a relationship with one employer (e.g., a subcontractor) but performs work on behalf of another entity. For vertical joint employment the DOL focused exclusively on control. A federal court in New York struck down the vertical joint employer rule but upheld the horizontal joint employer rule. While the future of the vertical joint employer rule is unclear (particularly with a new administration), employers should be aware that absence of control over workers will not automatically result in the avoidance of joint employer status. Rather, courts will evaluate joint employment by considering the overall economic reality of the parties' working relationships. Companies should review their contractual relationships with third parties as well as the actual working relationships with the workers who are performing work for the benefit of the putative joint employers to assess the risk of a joint employment relationship.

5. Whether an individual is an employee or an independent contractor is a critical determination that faces construction companies frequently. The decision has significant consequences, including wage and hour liability. In September, the U.S. Department of Labor announced a proposed rule to assist how to determine whether a worker is an employee or an independent contractor. The rule adopts an "economic reality" test that focuses on two core factors, the nature and degree of the worker's control over the work and the worker's opportunity for profit or loss based on initiative and/or investment. These factors help determine if a worker is economically dependent on someone else's business or is in business for themselves. Three other factors that may serve as additional guideposts include: the amount of skill required for the work; the degree of permanence of the working relationship between the worker and the potential employer; and whether the work is part of an integrated unit of production. The rule has not yet been finalized. Even if it is published, the proposed rule will have no impact on state law or other definitions of "independent contractor" issued by other agencies (NLRB, IRS). Review your independent contractor relationships and consider the various laws to which you are subject. Consider applying the most restrictive of those laws.

This year has been full of change and next year appears poised to be equally dynamic. If you have questions or wish to discuss your wage-and-hour policies or a particular issue, just let me know.

Katelyn M. Matscherz
Associate
katelyn.matscherz@bipc.com
412 562 1863 | Pittsburgh, PA



Katelyn M. Matscherz

Associate
katelyn.matscherz@bipc.com
t: 412 562 1863 | Pittsburgh, PA

Practices
Labor & Employment

Employment Litigation

Education
J.D., University of Pittsburgh School of Law, *Order of the Coif*, 2010

B.S., Cornell University, School of Industrial and Labor Relations, graduated *with honors*, 2007

Admissions
Pennsylvania

U.S. District Court for the Western District of Pennsylvania

U.S. Court of Appeals for the Third Circuit

How Katie Helps Clients

Katie's practice concentrates on complex litigation in state and federal court, specifically class and collective actions.

Katie has significant litigation experience in a variety of industries with a focus on business disputes in the financial, energy, and construction sectors. She has represented clients in a number of different venues, including jury trials in state and federal court as well as arbitration. She also has managed complex litigation and has taken and defended numerous individual, corporate representative, and expert depositions.

In addition to her litigation experience, Katie also served as national coordinating counsel for a leading technology company, providing strategic advice and defending a portfolio of litigation in jurisdictions around the country.

Katie maintains an active pro bono practice. In connection with a collaboration with the Innocence Project, she and a team of other lawyers successfully exonerated a woman who had spent more than a decade in prison wrongly incarcerated.

What Clients Can Expect

Katie is an energetic, detail-oriented litigator. Her diligence positions the client to achieve favorable results. Katie is also able to identify and understand a client's business needs and objectives and considers those things when developing a legal strategy.

Outside the Office

Katie enjoys exercise of all varieties, but especially hiking, spinning, yoga, and barre, as well as documentaries, novels, and travel. When she is not working, she is likely doing one of those things, spending time with her family, or walking her dog.