RECENT CASES MAY BE A HARBINGER OF (BAD) THINGS TO COME FOR EMPLOYERS

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New York Labor Law §191(1)(a) requires employers to pay manual workers on a weekly basis. Although this law has been on the books in one form or another for over a hundred years, recent cases may be a harbinger of a wave of litigation targeting employers, similar to the wage and hour lawsuits that bedevil many companies. Employers that do not currently comply with the law must do so or face potential, and possibly costly, litigation.

Section 191(1)(a) states, "A manual worker shall be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned…." Its purpose, as may seem evident, is to compel prompt payment of wages to those workers who depend upon per diem earnings for support rather than a fixed, periodically paid salary.

A manual worker is defined as a mechanic, workingman or laborer. Case law has determined that cooks, wait staff, chamber maids and domestic help are considered manual workers and are covered by the law. Clerical workers and employees whose principal activity is sales are not considered manual workers.

The law is not new, having been enacted in 1966, but similar versions of the weekly pay requirement existed as far back as 1890. Despite the law's (or its predecessor's) existence for almost 130 years, there has been surprisingly little litigation over it. There are only approximately 70 reported cases, and a portion of those were brought by the government and not private litigants. However, in the past five years, the law has been the topic of approximately ten reported cases, including one decided in September by the Appellate Division that presides over the counties of Manhattan and The Bronx. Although the sample size is small, and based only on published judicial decisions, the frequency of untimely payment claims are increasing – from approximately one every two years to two every year, a four hundred percent increase.

In Vega v. CM and Associates Construction Management, LLC, which was reported in September 2019, a former employee of a construction management company sued claiming she was a manual worker but was paid on a bi-weekly basis. The construction management company moved to dismiss the complaint but was unsuccessful before both the trial court and the Appellate Division. The former employee is now able to proceed with her claims, which include seeking liquidated damages and attorneys' fees, both of which are specifically recoverable for violations of the Labor Law.

And therein lies the problem for (some) employers. Where employers pay their manual workers bi-weekly rather than weekly, the actual damage incurred by the employee is negligible. It is composed of just the minuscule amount of lost interest for receiving wages a week later than required. But as a technical violation of the Labor Law, it allows a plaintiff to seek liquidated damages and attorneys' fees. The claim may even be brought as a class action. The fact that the employee received the full amount of his or her wages, albeit slightly late, is not a defense. The recent Appellate Division decision addressed this explicitly and rejected the employer's attempt to assert this defense.

It is not uncommon for some employment lawyers to solicit former employees in order to bring claims based on wage and hour violations. A claim alleging untimely payment is another avenue for a plaintiff's employment lawyer to exploit. It provides another basis for a claim that, while perhaps not as potent as unpaid wages, is far simpler to prove. For example, where the number of hours an employee actually worked may be a disputed issue of fact, the frequency of payment should be irrefutable and easy to prove.

Large employers, those who employ more than one thousand workers, may seek an exemption from the Commissioner of Labor, but that provides no solace to most employers. There is also pending legislation in the New York Senate that would permit employers with less than five hundred manual workers to pay on a bi-weekly basis. However, considering how long the current law has been in effect, and the importance of protecting low wage workers, the likelihood of passage is not high.

Employers that employ manual workers should not rely on a change in the law and must make sure they are complying with the law. If they do not, based on the recent uptick in lawsuits invoking Labor Law Section 191(1), the employer may be in for an unpleasant surprise.

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