Scaling The Wall Of Conflicting "Tip Credit" Provisions

Insights
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We've all struggled with what to do when we're given conflicting orders. Grandma says "have some pudding," and Pink Floyd's Roger Waters responds, "how can you have any pudding if you don't eat your meat?!" Employers are increasingly facing similar (though perhaps less-existential) wage-related conflicts.

We've recently written about the steady stream of states and localities that have implemented their own minimum-wage laws. These laws, which often create rights and obligations in addition to increased minimum-wage rates, can give some employers heartburn befitting a meal of pot-roast and pudding.

Sure, employers may be required to pay workers more in some places under these laws. But multi-state employers often also have to decide whether to implement varying pay policies that mirror the patchwork of local, state, and federal laws, or to implement blanket nationwide policies that are based upon the highest applicable standards.

Recent tip-credit developments illustrate these points.

Example: Colorado's New Tip-Ownership Option
These decisions can become even more complicated when provisions intersect. For example, on January 1, 2017, Colorado's new minimum wage of $9.30 per hour took effect. The state also raised the direct cash wage to at least $6.28 per hour for tipped employees for whom an employer takes the balance as a "tip credit" under state law. (See our previous posts on tip-credits for more information – the details are not as simple as you might assume.)

Presumably as part of a lawmakers' bargain underlying these changes, Colorado's legislature also added a provision that supposedly allows employers to claim ownership of an employee's tips. The employer must display a "conspicuous notice" to the general public stating that *all* tips are the employer's property, rather than the employee's.

We say "supposedly", because Colorado's new tip-ownership provision directly conflicts with the U.S. Department of Labor's current tip-credit regulations under the federal Fair Labor Standards Act. Those regulations prohibit an employer from diverting or asserting control over an employee's tips for any reason, except:

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◊ To the extent necessary to cover a proper credit against its FLSA minimum-wage obligations to the employee; or

◊ To use them in furtherance of a valid tip pool.

Litigation is ongoing as to whether USDOL's position is valid with respect to employers who take *no* FLSA tip credit. But at least some courts have backed the USDOL in this respect.

Consequently, Colorado's new "conspicuous notice" tip-ownership provision will be of no help to employers who are using the FLSA tip-credit for workers in that state. Moreover, even employers who are *not* taking an FLSA tip-credit for Colorado workers must keep in mind the possibility that eventually a court consensus will emerge to the effect that asserting control over their employees' tips runs afoul of the FLSA.

The Bottom Line
The Colorado illustration is by no means the only one.

For instance, New Hampshire's minimum-wage rate is currently the same as the FLSA's – $7.25 an hour. But that state's law requires a higher direct-wage for tipped workers – $3.27 an hour – than today's $2.13-an-hour FLSA figure. An employer of tipped workers in New Hampshire must ensure that the employees' pay plan properly melds both state and federal obligations.

As another example, California takes a different approach altogether. That state's law requires employers to pay tipped workers the *full* state minimum wage, without regard to tips.

Employers must take into account the requirements and restrictions of all jurisdictions in which they employ tipped workers, as well as how these provisions interact with the FLSA's requirements. Sometimes the correct approach is obvious, but sometimes it is not. Given that many new state and local requirements take effect early in the year, now is a good time for employers to make sure that they are in compliance with all applicable laws.

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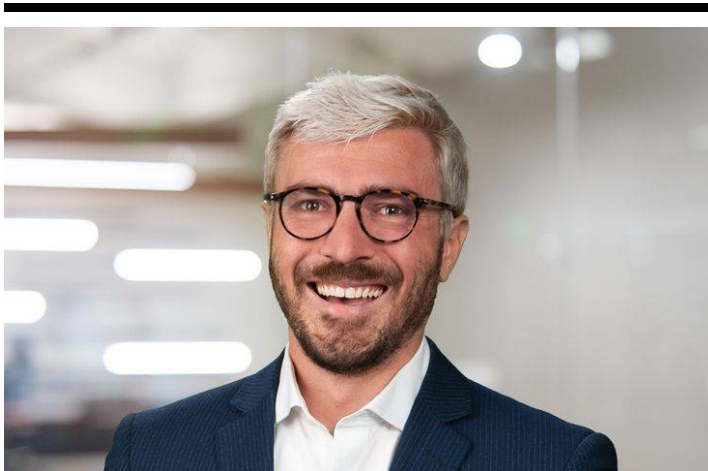

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