CLIENT ALERTS & INSIGHTS

New Ohio Law Revamps the Landscape of Overtime Exemptions and Collective Action Procedures

APRIL 7, 2022

Authors: Adam Primm

On April 6, 2022, Ohio Governor Mike DeWine signed Senate Bill 47 ("SB 47") into law, signaling significant changes to overtime exemptions in the state and restructuring the procedure by which an employee may join a collective action for alleged state overtime violations. The new law incorporates specific language of the federal Portal to Portal Act of 1947 ("PPA"), which grants an employer immunity from liability under the federal Fair Labor Standards Act ("FLSA") when the employer does not pay overtime under certain circumstances, and other long-standing FLSA regulations regarding overtime. Further, the law precludes an employee from joining as a party plaintiff in a lawsuit alleging violation of state overtime law unless the employee first gives written consent to become a party plaintiff and that consent is filed with the court in which the lawsuit is brought. The law will take effect on July 5, 2022.

Overtime Compensation Exemption

SB 47 codifies certain exemptions to overtime in the Ohio Revised Code, which have been present in the PPA and FLSA regulations for over seventy years. Employee activities explicitly exempted from overtime pay under SB 47 include:

- Walking, riding, or traveling to and from the actual place of performance of the principal activity or activities that the employee is employed to perform;
- Activities that are preliminary or postliminary to the principal activity or activities; and
- Activities requiring insubstantial or insignificant periods of time beyond the employee's scheduled working hours.

The exemption applies to any of the above activities when they occur before the time on any workday that the employee commences the principal activity, or after the time on any workday that the employee stops performing the principal activity.

However, there are exceptions to SB 47. The exemption from overtime, consistent with longstanding federal law, does not apply if an employee performs preliminary or postliminary tasks under the following circumstances:

- The employee performs the task during the regular workday or during prescribed hours; or
- The employee performs the task at the employer's specific direction.

Notably, however, SB 47 provides additional exemptions not provided in federal law, as follows:

- An express provision of a contract in effect at the time the employee performed the activity, including a collective bargaining agreement;
- A custom or practice in effect at the time of the activity that is not inconsistent with a contract in effect at the time the employee engaged in the activity, including a collective bargaining agreement.

Collective Actions for State Overtime Violations

Under the new law, an employee may not be joined as a party plaintiff in a lawsuit alleging a violation of Ohio's overtime law unless or until that employee gives written consent to become a party plaintiff and the consent is filed with the court in which the lawsuit is filed. This requirement that an employee "opt in" to the action to recover overtime is consistent with the FLSA, which similarly requires all members of the group to affirmatively "opt in" to a collective action to participate in the lawsuit. This is opposite how most class actions proceed across the country, which normally follow an "opt out" process where similarly situated individuals or employees are assumed to be part of the putative class unless or until they affirmatively "opt out" by providing a signed document that they do not wish to participate in the lawsuit. If the individual is silent, then they are included in the class.

Under the normal structure, a claim that seeks group action to recover unpaid wages under state and federal laws historically proceeds with both the opt-in (federal/FLSA) procedure and the opt-out (state) procedure, which complicates such actions. Under SB 47, Ohio's procedure for forming a group action (class or collective) would be consistent with the federal equivalent under the FLSA and remove that complication.

Key Points

The substantive changes described above regarding when overtime work is compensable or not provides clarity and consistency with long-standing federal law and regulation. SB 47 ensures that state wage law will be applied consistently with federal law.

The procedural change regarding how plaintiffs and their attorneys may form a class or collective action may result in significant changes for Ohio-based employers. Rather than relying on the opt-out structure under historical procedure, plaintiffs and their attorneys will need to obtain affirmative support from the broader group of employees or individuals allegedly impacted by the allegations in the underlying complaint instead of being able to assume participation in the action without an affirmative withdrawal by the individuals. That difference may result in a significant impact on certification of class or collective actions under Ohio law seeking to recover allegedly unpaid wages by requiring an early showing of interest by the group as a whole that - if missing - could defeat certification, or, if the class or collective is certified, limit the size and scope of the resulting group seeking damages.

Adam Primm at aprimm@beneschlaw.com or 216.363.4451.