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The Unkindest Cut

Deliver employees' final pay in full and on time—or risk painful consequences.

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Imagine that your organization recently expanded operations and now has employees in more than one state. It's been decided to terminate the employment of a salesperson in a field office. You alert your payroll processing service to cut the final paycheck in accordance with existing practices.

Processing takes some time, and delivery is delayed because the employee failed to tell you whether to mail the final check or to hold it for pickup. The final check includes only the employee's pro rata salary. According to your standard practice, commissions,

expense reimbursements and unused vacation pay are not included, but will be paid later.

Next thing you know, you're notified by the employee's attorney that the final check not only was untimely but also was insufficient, and that you now face civil and even criminal liability. Moreover, the attorney states that you also will be responsible for paying his client's legal fees subject to penalty provisions of the state's final-paycheck statute.

Worst of all, the attorney proposes to undertake discovery into whether the company has failed to deliver other employees' final pay in full and in a timely manner. Now you can expect to face a class-action lawsuit.

"Yikes!" you exclaim. "How could such a short period of time and such a small amount of money lead to such trouble?"

No doubt you are familiar with your company's home-state wage laws, including how to pay employees who quit or are fired. But you may not be fully versed in all of the states' final-payment laws. Employers' mistakes occur typically because most states' statutes require the final paycheck to be both complete and timely. The meanings of those terms vary from state to state, however, and often depend on whether the employee was terminated voluntarily or involuntarily.

To help you steer clear of harsh legal consequences that can befall companies that overlook important details in calculating and delivering that last check, this article discusses common features and foibles of state final-payment laws and offers tips for

complying.

You should also check reliable information sources such as state departments of labor, wage and hour agencies, and employment commissions—most have web sites—for information on how to administer final pay. In addition to their statutory provisions, some states also have regulations further explaining how to calculate and deliver final paychecks.

If there is any question about the proper course of action in a particular situation, seek the advice of counsel to avoid having the final paycheck become—for the employer—the unkindest cut of all.

Peculiarities And Peccadilloes

Employers who fail to pay terminated employees in accordance with the applicable final-payment law may be subject to both civil and criminal penalties. A number of states allow employees to sue not only for unpaid wages but also for other forms of damages, including penalties doubling or tripling the amount due, or for additional wage payments covering up to 30, 60 or 90 days. Costs and attorneys' fees also may be assessed.

Louisiana's wage payment statute, for example, requires "all amounts due under the terms of employment" to be paid to departing employees by the next regular payday or within 15 days, whichever occurs first. Employers who fail to comply are also liable for penalty wages up to 90 working days at the employee's regular daily rate. The statute defines vacation pay as wages, and a prevailing plaintiff is entitled to attorneys' fees regardless of the amount recovered.

Jerry Huffman, Esq., who practices in New Orleans, says he knows of claims for under \$100 that resulted in attorneys' fees awards in the thousands of dollars.

In Oregon, the timing of the final wage payment varies according to the circumstances. Specifically, if the employee:

- Resigns with at least 48 hours' notice, the final paycheck is due upon termination.
- Resigns with less than 48 hours' notice, the final paycheck is due by the next regular payday or within five days.
- Is discharged, the final paycheck is due the next business day.

There is a penalty of one day's pay for each day the check is late, up to a maximum of 30 days. In addition, an employer cannot mail the check or rely on direct deposit of the check without the employee's consent.

Oregon, like many other states, allows "stand-alone" claims for penalty wage violations. That is, even if the employee already has received all the pay that is due, the employee still can sue for penalties, plus attorneys' fees and court costs, if the employer failed to comply with the statute's technicalities.

While some states might be expected to have stringent final-payment laws—as does

California, for example—even states considered friendly to business can have tough rules. Utah, for example, requires final paychecks for discharged employees to be paid within 24 hours and has wage penalties of up to 60 days plus attorneys' fees. Utah also has criminal penalties, including fines of up to \$1,000 per violation and up to six months' jail time.

Rhode Island and Pennsylvania require all final pay by the employee's next regular payday. Their penalties for late payment include fines of \$100 to \$300 and up to 90 days of jail time.

Massachusetts has civil penalties (subject to doubling for willful violations) as well as criminal penalties—up to a \$10,000 fine, six months in jail or both for the first offense, and a \$25,000 fine or one year's jail time for subsequent offenses.

Severe as such penalties may be, one thing you never want to see is a lawsuit filed on behalf of one of your former employees and "all similarly situated" employees for failure to pay all wages due upon termination. It's a real possibility, though, because of states' exacting and widely varying final-payment rules, combined with plaintiffs' attorneys' aggressive pursuit of class-action wage litigation.

Quit, Fired or Other?

Often, final-payment statutes distinguish between employees who quit and those who were terminated involuntarily. In most states, employees who are fired or laid off must be paid at termination or very soon afterward; employees who quit typically have to wait until the next regular payday.

Sometimes, however, the line between "quit" and "fired" is blurry, such as when an employee is a no-call-no-show, but—before you separate him from payroll—he calls to tell you he'll be in next week. Your policy treats this as job abandonment, and there are no complicating factors such as health issues, so you inform the employee that he is no longer employed.

So far, so good. But what day is the employee's final day? The last time he showed up? Or the day you told him not to bother showing up again? Do you use the statute's longer deadline for voluntary separations or the shorter one for involuntary terminations?

Your answers to these questions will depend on which state's law you're dealing with. But when in doubt, treat the termination as involuntary and use the appropriate termination date and rules for delivering the final paycheck. Better yet, make sure the check is actually in the employee's hands or mailbox on the day you separate him from employment.

Using this approach does not mean, however, that you must record the termination as involuntary if that's not what you consider it to be. Personnel files should both identify the termination date and specify whether the employee was discharged or quit. A few states, such as New York and California, also require the employer to provide a written notice of termination that spells out the employee's final pay.

Note that some jurisdictions classify an indefinite suspension as a termination for purposes of calculating and paying wages owed. According to Edwin A. Keller Jr. of Kamer Zucker & Abbott in Las Vegas, the Nevada labor commissioner treats an open-ended, unpaid suspension pending investigation as a termination and uses the start date of the suspension to set the deadline for final payment of wages.

A Wage by any Other Name

Because “wages” is defined broadly, an employer often must pay amounts such as commissions, bonuses, overtime pay—and, in some states, reimbursement for expenses—within the final-payment deadlines set by state statute.

Commissions. Typically, commissions are considered wages, and the timing of their payment usually is a matter of agreement between the parties. Courts that find ambiguity in an agreement as to when commissions are earned and paid normally will construe the unclear terms against the employer.

One of the authors’ clients learned this the hard way in California, where the employer’s failure to communicate year-end changes in a commission plan in writing, before their effective date, meant that the employer had to use the earlier, more lucrative plan to calculate final pay.

Accordingly, the best protection is a clear, simple commission agreement signed by the employee that explains how commissions are earned, when they are due during employment and when they are due if employment ends.

In addition, an employer may not be able to withhold earned commissions—when all the work has been done with respect to the sale—solely on the basis of a policy that conditions payment on the passage of a specified time, on the buyer’s payment or on the employee’s continued employment for a minimum period.

Some state statutes address the issue of when wages of certain commissioned employees are due. Iowa, for example, gives employers additional time to pay the difference between commissions credited and those actually earned. Final commission payments need not be made on the next regular payday but must be made within 30 days of the commissioned employee’s suspension or termination.

Similarly, in Kansas all “earned commissions” (defined as those for goods or services delivered, furnished to, accepted or paid for by the last day of employment) must be paid within 30 days after termination.

The elements of this definition may be difficult for employees to prove, however, as was the situation in *Claytor v. Computer Associates International*, 262 F. Supp. 2d 1188 (D. Kan 2003). The employee couldn’t establish that the alleged commissions were “earned” as of his last day of work, so the employer was liable for no wage penalty.

Bonuses. Be sure to calculate bonuses correctly. They are governed by both law and contract, and they may be due an employee on termination, unless the bonus agreement says otherwise. Clarify what an employee must do to receive a bonus and

what happens upon voluntary or involuntary termination.

Vacation and sick pay. Vacation pay typically is considered to be wages, and failure to include it can result in miscalculation of an employee's final pay. How vacation is accrued and if and when it is paid upon termination usually are matters of contract between employer and employee. Unless the employer specifies otherwise, however, any unused vacation must be included in a final paycheck. Note that California prohibits a so-called "use-it-or-lose-it" approach to accrued vacation—if it is earned, you must pay it.

Sick pay, many jurisdictions presume, is not an accrued wage, but others treat it the same as vacation pay—dependent on the agreement between the employer and the employee. Compensatory time. Public employees' compensatory time, or "comp time," is a wage that must be included in their final paycheck.

Stock options. Although the U.S. Department of Labor opines that stock options are not considered to be wages, state wage laws differ. Maryland, for example, requires the final check to include all fringe benefits.

Expense reimbursements. If your state wage statute is broad enough to cover wages and "any agreed upon compensation," as in some states, reimbursement for expenses also must be included in the final paycheck.

Where Final Pay Intersects Wage and Hour Laws

As a general principle, the final paycheck must contain all compensation due. In many states, failure to include overtime pay in a final check means that the employer is not paying everything "due and owing," even if the check is delivered within the time limits set by the state's final-payment statute. Accordingly, an employer's calculation of final pay sometimes gives rise to claims for overtime and minimum wage violations—yet another reason to classify employees correctly and to protect their exempt status. Oregon, for example, imposes the final-payment "wage penalty" for failure to pay minimum wage or overtime correctly within an employee's regular pay period. Accordingly, in Oregon it is possible to have multiple final-payment penalty violations. For example, off-the-clock work for employees who are paid a minimum wage can create minimum wage and overtime violations in addition to final-payment violations. State claims and penalties may be coupled with federal claims and penalties, giving plaintiffs' counsel two—or more—bites at the apple.

Delivering The Final Paycheck

Most states have tight deadlines for final payment, ranging from "immediate" to "24 hours" to "three business days" to "next regular payroll," depending on the circumstances of termination. These deadlines often present problems for multistate employers.

"In the past, we have had problems with national clients that have centralized payroll," attorney Keller reports. "For example, a client's Nevada office wants to terminate an employee, but has to wait up to four days to get a check from its

Florida headquarters—too late to comply with Nevada law. The solution was to set up a local bank account that the local office could use to issue final paychecks and coordinate with headquarters to print out a summary of the deductions, etc.”

Does your state allow mailing a final paycheck or simply using direct deposit without an employee’s consent? Can you simply notify the employee that the check is ready and to come pick it up? Be aware that some states require actual receipt of a paycheck by the terminated employee. Employers in these states must be proactive in ensuring that the check gets to the employee.

“When there are unusual circumstances surrounding a separation of employment, state law is sometimes ambiguous as to when and/or how final payment is to be given to the separating employee,” says Virginia Pettinelli, human resources counsel for Engelhard Corp., a global technology company based in Iselin, N.J., with U.S. operations in 17 states. “In such instances, in order to avoid the potential fines or penalties you might get hit with, you sometimes have to incur the added expense of an express delivery charge even though you would like simply to put the check in the mail or tell the employee to come and get it.”

Deduction of Amounts Owed from Final Pay

What if the departing employee still has an expensive company laptop and an outstanding \$200 advance? Can the employer deduct amounts from the employee’s final paycheck to satisfy such legitimate debts?

Generally, no. Most states prohibit certain deductions from paychecks. Even if an employee indisputably owes you money, do not withhold it from the final paycheck except on the basis of a careful evaluation of the state’s wage statutes. Even in relatively employer-friendly Utah, deductions from a final paycheck are limited essentially to deductions that the employee has authorized explicitly. Accordingly, if you contemplate making deductions beyond those that are typical or customary, obtain the employee’s signed authorization in advance and preserve that document.

Because final-paycheck rules are replete with illogical requirements and technical deadlines, multistate employers must understand each state’s rules and the nuances of their application before calculating and delivering an employee’s final pay. In other words, look before you leap.

Editor’s Note: This article should not be construed as legal advice. Consult qualified employment counsel with respect to specific situations.

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