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Are Payroll Providers Really the Best Option to Protect Employers Against Wage Claims?

On March 28, 2019, China Grill Inc. ("China Grill") sued payroll provider ADP, LLC ("ADP") in the New York Supreme Court, asserting claims for breach of contract and negligence in connection with ADP's alleged failure to include information on employees' paychecks as required by the Section 195 of New York Labor Law ("NYLL"), also commonly known as the New York Wage Theft Protection Act ("WTPA").

The lawsuit comes on the heels of a settlement by China Grill of a class and collective action filed against it and its various affiliates by four employees, acting as class representatives, who alleged that they had not received pay statements or been paid wages in accordance with the WTPA. In its complaint against ADP (the "Complaint"), China Grill asserts that it "believed, and had been told, that ADP's payroll services complied with existing law and were otherwise adequately performed." However, China Grill states that after performing an investigation of the claims levied against it in the underlying class and collective action, it determined that ADP failed to comply with existing labor laws, including the WTPA, in several material respects. Specifically, China Grill alleges that ADP failed to properly (1) disclose gross wage rates; (2) disclose overtime rates; (3) display "spread of hours" and "call in pay" wages; (4) calculate tip credits; (5) show tip credits as a deduction from gross income; and (6) display and/or calculate tipped wages. Moreover, China Grill alleges that ADP failed in numerous instances to properly calculate and pay overtime wages when processing payroll for employees on behalf of the company in accordance with applicable law.

WTPA Penalties: As the Complaint explains, the NYLL provides substantial penalties for employers that violate its provisions. By way of example, under the WTPA, an employer who fails to provide an employee with an appropriate wage statement along with his/her wages (otherwise referred to as paystubs) is potentially liable in the amount of $250 per day (to a maximum of $5,000 per employee in civil actions). The WTPA also provides that employers who fail to give an appropriate Notice of Pay Rate form to employees at the time of hire are subject to damages of up to $50 per day (against, to a maximum of $5,000 per employee in civil actions). Thus, an employer who has failed to meet both the wage notice and wage statement requirements of the WTPA could very quickly face penalties of up to $10,000 per employee. For

larger employers, this may be a crippling circumstance. For more information on the WTPA, please revisit our prior alerts here, here and here.

Minimum Wage and Overtime Violations: Liability can be even more severe for employers that fail properly to pay minimum wage and/or overtime compensation. Indeed, both the Fair Labor Standards Act ("FLSA") and the NYLL provide for an award of liquidated damages equal to 100 percent of the amount the employee is owed in unpaid wages. *See* FLSA § 216(b) and NYLL § 198(1-a). In other words, if an employer fails properly to pay minimum wage or overtime premiums to an employee, the employee can recover not only his/her underlying unpaid wages, but an additional equal amount in liquidated damages. The FLSA and NYLL also award attorneys' fees, costs, and interest to a prevailing plaintiff in a wage and hour lawsuit. For more information on minimum wage and overtime compliance, please revisit our prior alerts on this issue here, here and here.

Tip Credit Compliance: New York law allows employers in certain industries to satisfy the hourly minimum wage thresholds by combining a "cash wage" paid by the employer with a credit or allowance for tips that the employee receives from customers. For example, "large employers" (11 or more employees) in New York City within the hospitality industry are permitted to pay $12.50 hourly cash wages and apply a $2.50 per hour tip credit to reach the minimum wage threshold of $15.00 per hour. In order for an employer properly to avail itself of the tip credit under the WTPA (and pay a reduced hourly wage in conjunction with the tips received by the employee), however, such employer must (i) prove that the employee actually received such tips; and (ii) give employees, at or before the time of hiring, written notice that the employer will apply a tip credit toward their hourly minimum wage. If the employer fails to meet any of these requirements, the employer can be held liable for the amount of the withheld tip credit, along with liquidated damages, costs, interest, and attorneys' fees. For more information on tip credit compliance, please revisit our prior alerts on this issue here, here and here.

Returning to the ***China Grill*** Complaint, it is alleged in that pleading that 80% of the settlement amount in the class and collective action previously filed against it (and which was later consensually resolved) was based on WPTA violations. As such, China Grill seeks indemnification by ADP for what it characterizes as ADP's "grossly negligent and reckless failure to properly calculate wages and provide statements that comply with the WTPA." The damages sought are estimated to be in excess of $2,000,000.

While it is too early to conclude whether or not China Grill will be successful in its attempt to be indemnified by ADP for these labor law violations, the ***China Grill*** lawsuit raises a bigger question: are payroll providers really the best option to protect employers against wage claims? Historically, employers have rested easy in delegating these responsibilities, however, this may no longer be the case given what is at stake in potential wage and hour litigation. It is also important to remember that federal and New York state wage and hour laws are nuanced, complex and require strict compliance, as the WTPA makes clear. The law is also clear (as evidenced by the new ***China Grill*** action) that relying on payroll providers will not shield employers from substantial liability.

This notwithstanding, many employers continue to rely for a broader spectrum of legal obligations on their payroll service providers to ensure their compliance with applicable wage and hour legislation among other related labor laws. Thus, in addition to providing paychecks, wage notices, and calculating overtime and tip credits (where applicable), payroll providers have now branched out into the drafting and distribution of employee handbooks and even offer programs of mandatory sexual harassment training. While these "package deals" are enticing to employers from a cost perspective, employers must be careful not to rely on payroll providers for legal advice, as further evidenced by the ***China Grill*** action.

Accordingly, employers must determine whether using payroll service providers to handle more than just payroll is truly a less expensive alternative if ultimately it leaves them vulnerable to costly wage and hour claims, expansive liability, and potential large dollar settlements. Based on China Grill's experience, employers must also make sure that the payroll services being provided to them comply with all applicable wage and hour laws. In the exercise of prudence, we thus strongly encourage employers to seek guidance on these legal issues from seasoned employment counsel rather than from—or solely from—their payroll service providers.

If you require any further information concerning wage and hour guidance, auditing payroll, drafting and distributing appropriate wage notices pursuant to the WTPA, or guidance on any other employment-related issues, please feel free to contact:

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