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NY Employers Face Long And Costly Pay Frequency Litigation

By **Daniela Porat**

Law360 (April 22, 2022, 6:15 PM EDT) -- A New York appellate decision granting manual workers the right to sue and recover liquidated damages on late but fully paid wages means employers need to do a risk assessment of whether their workers do any physical labor, attorneys say, noting these new suits won't easily be tossed from courts.

This rush of litigation stems from a 2019 opinion from the First Judicial Department of New York's Appellate Division in Vega vs. CM & Assoc. Constr. Mgt. LLC. The court determined that "the moment that an employer fails to pay wages" in accordance with the frequency of pay law, which requires weekly instead of biweekly pay for manual workers, "the employer pays less than what is required," according to the opinion.

A New York appellate decision involving a state law requiring employers to pay manual laborers on a weekly basis has sparked a flurry of litigation. One key question is what constitutes manual labor. (AP Photo/Mary Altaffer)

Notably, the appellate court recognized that workers have a private right of action for frequency of pay and they can recover liquidated damages.

There has been a noticeable uptick in litigation on this issue, particularly in downstate New York, said Erin Torcello, a member of management-side firm Bond Schoeneck & King PLLC.

"In the face of what are potentially much greater penalties than what [employers] were looking at pre-Vega, which generally was a civil penalty, now you're looking at liquidated damages, attorneys fees," she said. "The stakes are much higher."

Why Weekly Pay Matters

Before the Vega decision, Section 191 of the New York Labor Law didn't have teeth in the form of an effective enforcement mechanism, said Jonathan Bernstein, an attorney with worker side firm Isaacs Bernstein PC and a member of the National Employment Lawyers' Association.

"Qualifying employees need to get their paychecks every week. That's the law," he said. "If they're not giving employees their paychecks every week, then what they're getting is an interest-free loan at the workers' expense and the only way they're going to stop doing it is if they have to pay this really stiff penalty, which is liquidated damages."

A defining question in wage and hour litigation is whether a worker is paid on a salary or hourly basis, and now Bernstein said he is also going to ask prospective clients how often they were paid.

Low-wage workers, including many manual workers, have a more difficult time making ends meet and that's why weekly pay is important, Bernstein said.

"Traditionally, manual workers were paid much less than other categories of workers and these were people who really lived paycheck to paycheck," she said. "They really would run out of money to buy groceries at the end of the week. The New York Legislature took a special interest in them."

But What Is 'Manual Labor'?

Defining exactly who constitutes a manual worker outside of the more obvious jobs like construction workers or repair technicians is what makes this new litigation concerning for employers, attorneys said.

Regal Cinemas and Sephora are among the employers who have recently been hit with lawsuits concerning frequency of pay for manual work.

These cases, many of which the firm Bursor & Fisher PA filed, raise questions about how manual labor is defined in the retail space, Torcello said.

"I do not typically think of a sales clerk as performing physical labor," she said. "One of the cases involves Men's Wearhouse and some of the duties that the complaint has identified as physical labor is helping to size individuals for suits. That is not something that I would typically think of as physical labor."

Bursor & Fisher PA did not immediately respond to a request for comment from Law360 on Friday.

An additional challenge to making a clear assessment of who is a manual laborer is that the state Department of Labor guidance may be outdated, Torcello said, pointing to department opinion letters from 2009

The New York Department of Labor considers a manual worker someone who spends more than 25% of their work time doing "physical labor," which can include a myriad of tasks.

Department opinion letters have said chauffeurs can be considered manual workers because of the heavy-lifting the job sometimes requires.

"I thought about this in the office context, even if you might be an administrative staff member, if you're responsible for picking up boxes or boxes of files and moving them. Does that make you a manual laborer?" Torcello said. "I don't know the answer to that. But those seem to be the types of tasks that at least the Department of Labor has looked at."

Given that there is a lot of room to work with when it comes to defining a manual laborer, employers should approach these classifications more thoughtfully than they may have before when the risks were not as high, said Jonathan Israel, a partner with management-side firm Foley & Lardner LLP.

"Don't just assume," he said. "But even if they were [a manual worker] on some small minor level, is that enough to create a firestorm around litigation that's going to cost people a lot of money and pretty much

line the pockets of the lawyers and not necessarily the workers who already got paid."

A 'Cottage Industry'

This ambiguity surrounding the definition of manual labor means such cases will get past the initial motions to dismiss, because the evaluation of a worker's tasks is a fact-specific inquiry, attorneys said.

That puts plaintiffs' lawyers at an advantage because presumably any worker who might be spending 25% of their time lifting boxes, stocking shelves, cleaning, standing, may be a manual laborer and they can establish a large class of workers, Israel said.

"It's very hard to dismiss the case on a motion to dismiss. It's easy for them to state a claim," Israel said. "And you've created a whole sort of cottage industry around this frequency of payment issue that was never an issue before but now suddenly might become a real hammer in the plaintiffs' bar."

The only way to stop this "gravy train" is for a decision limiting damages on wages that were fully paid but paid late, Israel said.

"You may get interest on the amount you didn't have for one week because you should have had that money for a week," he said. "The damages were the loss of use of that money for a one-week period, over how many weeks … the employer violated the provision."

But once word gets out about among large employers with vast legal and human resources that this weekly pay rule is now enforceable, these businesses will get into compliance and large class actions will naturally dwindle, Bernstein said.

"The liability is enormous," he said. "It doubles an employer's payroll expenses for the last six years. Few employers could satisfy a judgment, a mom-and-pop restaurant in Queens certainly can't."

The complaints that Torcello reviewed are drafted in similar ways, highlighting that the workers received shipments, unpacked boxes, cleaned, and tended to the cash register.

The bar is so low, she said.

"Unless the complaint is drafted in a way that indicates that there's no physical aspect of their job," she said, "I think it will be very difficult for a defendant to argue that as a matter of law, the facts as alleged don't rise to the level of manual labor."

--Editing by Nick Petruncio.