

Labor and Employment Alert

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What Officers and Directors Need to Know about Personal Liability for Unpaid Wages

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Key Points

- Corporate officers and directors can be held personally liable for unpaid wages.
- As companies and their officers and directors make difficult decisions to address the impact of COVID-19 on their workforce, they should carefully assess any potential exposure relating to wages.

As the novel coronavirus (COVID-19) rapidly spreads across the country, United States businesses are facing increasing financial uncertainty and difficult operational decisions. For firms facing a cash-crunch, the decisions may include whether and when to lay off or furlough personnel, reduce wages and/or otherwise reduce overhead. Among the risks company officers and directors should consider is the specter of personal liability in the event a company fails to make payroll and provide employees with earned wages.

Under federal law, the Fair Labor Standards Act (FLSA) imposes personal liability on corporate officers and directors for minimum wage and overtime violations under certain circumstances. An “employer” for purposes of the FLSA includes “any person acting directly or indirectly in the interest of an employer in relation to an employee.”¹ Courts have interpreted this definition to include individuals who exercise significant operational control over corporate affairs, regardless of whether such individuals were directly responsible for the wage law violations. Among the factors courts consider in determining whether to impose personal liability are whether the person at issue (1) has the power to hire and fire employees, (2) supervises and controls employee work schedules or conditions of employment, (3) determines the rate and method of compensation and/or (4) maintains employment records.² Not all officers and directors with a position of authority or ownership interest will meet this standard; companies should consult counsel in analyzing the risk with respect to any particular individual.

State laws governing the liability of company officers and directors for unpaid wages vary widely. Many states, including New York and California, have imposed personal liability on officers and directors. For example, New York Business Corporation Law Section 630 provides that the ten largest shareholders of privately held corporations, including foreign corporations, “shall jointly and severally be personally liable” for

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wages or salaries due to any of its employees for services performed in New York.³ Some states, including New York and Illinois, have even imposed criminal penalties on officers and directors for willful failure to pay wages. In other states, however, such as Nevada, officers and directors cannot be held personally liable for wage and hour violations under state law.

As officers and directors make difficult decisions to address the impact of COVID-19 on their operations and workforce, they should carefully evaluate any potential exposure relating to wages. Short-term solutions to avoid individual and corporate liability may include pay cuts, reduced hours, furloughs, layoffs, temporary closures or other means of scaling back operations and curtailing costs. Corporations, executives and boards of directors should consult with legal counsel to navigate the complex legal environment in this area.

¹ 29 U.S.C. § 203(d).

² See, e.g., *Irizarry v. Catsimatidis*, No. 11-4035-cv (2d Cir. 2013) (finding the chief executive officer of a New York grocery store chain personally liable for FLSA violations where he had the power to hire and fire employees and determine their compensation, despite a lack of evidence that he was responsible for the violations).

³ Similarly, Section 558.1 of the California Labor Code states that "(a) Any employer or other person acting on behalf of an employer, who violates, or causes to be violated, any provision regulating minimum wages or hours and days of work. . . may be held liable as the employer for such violation. (b) For purposes of this section, the term 'other person acting on behalf of an employer' is limited to a natural person who is an owner, director, officer, or managing agent of the employer. . ."

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