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Rebalancing the Books: Employment Compliance for Financial Services Companies

SPEAKERS

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In this special crossover episode of *The Consumer Finance Podcast* and *Hiring to Firing*, hosts Taylor Gess, Tracey Diamond, and Emily Schifter map out obligations hiding in plain sight for multistate financial services employers. The conversation covers crafting a legally defensible employee handbook, pay transparency complexities, and wage and hour classification risks. Together, they deliver guidance for banks, fintechs, lenders, and card issuers operating across state lines, in addition to addressing the thorny intersection of earned wage access, remote workers, and the rapidly evolving assortment of AI hiring laws. It is the episode every financial services employer should hear before their next hire, expansion, or employment compliance review.

Transcript

Podcast: *The Consumer Finance Podcast* and *Hiring to Firing* Podcast
Episode: Rebalancing the Books: Employment Compliance for Financial Services Companies
Hosts: Taylor Gess, Tracey Diamond, and Emily Schifter
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Taylor Gess (00:05):
Welcome to this crossover episode of *The Consumer Finance Podcast* and *Hiring to Firing*. I'm Taylor Gess, an associate in Troutman Pepper Locke's Consumer Financial Services Regulatory practice, and I'll be your guest host for today's episode. Today we're joined by colleagues from our Labor + Employment team to highlight questions we frequently hear from our financial services clients operating across multiple states. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, troutmanfinancialservices.com and consumerfinancialserviceslawmonitor.com.

And don't forget about all of our other podcasts. We have the *FCRA Focus*, all about credit reporting, the *Crypto Exchange*, about crypto and digital assets, *Moving the Metal*, our auto finance podcast, and *Payments Pros*, about trends in the payments industry. All of those are available on all popular podcast platforms. Speaking of those platforms, if you like this podcast, please let us know. Leave us a review on your podcast platform of choice and tell us how we're doing. Here I'm joined by my colleagues Tracey Diamond and Emily Schifter from the *Hiring to Firing* podcast to discuss what is happening in the labor and employment space. Tracey and Emily, welcome to the podcast.

Emily Schifter (01:06):
Thanks so much. So excited to be here and hopefully this will be an interesting topic for your listeners. I think whether you are someone who's got locations all across the country or you've got a bunch of people working remotely from their living rooms, I think your challenge is the same. There's not sort of one employment law you've got to comply with. You've got about as many as you have states or as you have people. But the good news is this is something that Tracey and I see every day, so hopefully we can give you some good strategies to manage it.

Taylor Gess (01:32):
Yeah. Thank you guys so much. So Tracey, a lot of our financial services clients, whether that's a bank, a fintech, a card issuer, small business lender, or any other type of financial technology platform, operate across multiple states, perhaps with physical locations, remote employees, or both. What is the fundamental thing these clients with multi-state employees need to first understand?

Tracey Diamond (01:52):
Well, in that sense your clients are very similar to many of our clients which really work across multiple states, both because they have remote employees or because they have multiple locations, or both. And it's important to note that the law of the state where the employee is physically sitting, whether it's their home office or one of the company's many locations, is the state law that's going to govern here. So it's not where the company is incorporated or where the company is headquartered necessarily, it's where the employee is actually doing the work. And this sometimes trips people up. If you have a company operating in 10 states, whether through offices, branches, or employees, that means 10 potentially sets of different compliance obligations. And this is a lens through which we view pretty much everything we're about to say today.

Taylor Gess (02:37):
Thanks, Tracey. When a client comes to you and says, "We just opened a location in California," or, "We've expanded and now have employees in eight states and our handbook is from when we only operated in New York," where do you even start?

Tracey Diamond (02:47):
That's a really good question. There's many areas that you need to think about, but I'm going to break it down into four main ones for purposes of today. The first area that we want to flag is wage and hour. So there's different minimum wage laws, different triggers for when overtime gets counted, whether it's a daily overtime rate or a weekly overtime rate. Some states have meal and rest breaks while others don't. States have different expense reimbursement requirements. And then some states have, for example, pay frequency statutes or job posting statutes that others don't. So for example, a company with employees in New Jersey would only have to give a meal break to minors, but there are strict meal break requirements for adults in California.

The second area is leave laws. So certain states have paid sick leave laws that require employers to provide a certain number of hours or days of paid sick leave accrued over time, or sometimes the employer can front-load them at the beginning of every year. Some states have paid family and medical leave requirements, and then there are state-run programs that come with payroll contribution requirements. I just mentioned before pay transparency laws, and that's where employers have to provide salary range disclosures in job postings and sometimes have to respond to internal employee questions about salary ranges. And then there's a sort of general rules about policies and handbooks.

Drafting a handbook sounds like it should be a rote exercise, but actually it can be very challenging to have one document that's supposed to hold all of this together. So we're not going to walk through every state's rules here. That would be a very long and very boring podcast and we don't want to bore your listeners, but what we want to give you are some things to consider when you are a multi-state employer managing employees across the country.

Taylor Gess (04:31):
Emily, let's take that handbook question because I think that's the most relatable. So a company comes to you, maybe they've grown through acquisition or they've expanded into new markets and their handbook is out of date for where they actually operate now. What are their options?

Emily Schifter (04:44):
Yeah. It's a great question. And like Tracey mentioned, it can be really overwhelming to try and cover every single applicable law in your handbook, especially when you start expanding. So when we're talking to clients about this, there's different approaches that they might take depending on kind of what their geographic scope is and the stage that they are in. So the most generous option is saying we're going to look at all of the laws that apply to us and we are going to draft one policy that complies with all of those laws and kind of whatever that floor is. If we're in California, we're going to offer everybody what that benefit is. The obvious pro there is it's pretty simple in one sense. You've got one policy that you are administering, one policy that employees are looking at. Everybody's getting kind of the same experience.

The obvious con, of course, is that it can be expensive. If you are giving California-level benefits to everyone where you don't have to, that can be, sometimes it's a cost or even sort of a work disruption type of an issue to consider. And sometimes it's not as easy as it sounds to draft one policy that complies with all of the different laws. Tracey mentioned the sick leave laws, that's a great example. They all have different rules about accrual and carryover and the waiting period that you can impose and how much notice you can require that employees give you. And sometimes it's really tough to marry those together in a way that makes sense. And if you've got one policy, of course you're faced with the question of do we have to update it every time you go into a new state, every time we have a change in the law somewhere?

So this approach is better for if you're a smaller company, maybe earlier stage, where you're not in quite as many locations, you're not making new hires every week, or you really just value simplicity in having sort of one set of policies consistently for everybody. Another option that we'll see clients use is kind of having one baseline handbook and that is sort of your national standard. And then you have appendices or exhibits basically that are specific to each state that will layer in additional requirements for each state where they differ. Obviously the pros there is that you're only offering the benefits you have to offer where you have to offer them. You can have a policy that is exactly tailored to whatever minute detail the state law requires.

And in some ways they're easier to update as laws change because you're just updating one policy and not the entire handbook. But it can be more complex to maintain. If you've got a fully blown-out appendix for the state of Illinois and Illinois comes out with a new law, it is a little bit of a gap to not make that update, to not make that change. And in some companies, there's a cultural issue, because if you have different policies for different states, depending on where those states are, you can have employees with meaningfully different benefits, different experiences. And if you've got people on the same team working in different states and they hear very different answers to the question of what leave is available to me for whatever life event I'm going through, sometimes that can be a real cultural problem.

So that approach tends to be better for midsize or maybe growing companies where you've got meaningful presence in a lot of states or a group of states. Not the situation so much where you've got maybe one or two people in 20 different states working remotely. That can be a lot to keep up with from an appendix perspective and again, really leads to some disparate results. Kind of the middle ground option that we'll see is trying to focus on key states and maybe not hitting every single state requirement for every single location that you might be implicated by based on where your employees are in a handbook.

So we'll sometimes see clients choose to do this if they've got a couple of states where they've got big locations or a headquarter state, really focusing on where they've got the most number of employees, or states where there's more risk. We're picking on California here, but states like a California, Illinois, New York, and just try to focus on those states and not hit every detail. And obviously the pro there is it's more efficient. You're not necessarily trying to hit everything. You don't always feel like you have to update in real time. But the obvious con, of course, is the compliance risk and if something falls through the cracks, if you don't have a policy where a state says you need one. Sometimes there's penalties for not putting something in a handbook. Usually they're minimal, but something to be aware of.

This approach is really good for companies where maybe they're smaller or, again, where you're in that situation where you've got one person in Minnesota, for example. A lot of state laws aren't even triggered until you hit a certain number of employees, and if everybody else is in Georgia, you really don't need to have an appendix specific to that one Minnesota person. It's also good if you've got a strong HR team who's very aware that, "Hey, if this employee in this state comes to me and says I need witness leave and that's not in our handbook," knowing that I might need to look into that before just choosing to deny it. So whatever approach you choose, practically, best recommendations are make sure you have some sort of review cadence.

We commonly say, "Hey, let's look at it every year, every couple of years," and that's great for a full refresh, but we would advise you the law is changing so fast here that you don't want to just sort of put this on the shelf and not think about it for a year. Not saying that you need to do a comprehensive overhaul of the written document all the time, but make sure you have something in place where somebody's being triggered to think about it if you're making a hire in a new state, if they're in a state where the law does change a lot, that you're keeping up with those things just so you know what your obligations are, can easily find out so you're not surprised and you don't just sort of forget about it until that annual or biannual review that you choose to do. And also to make sure the approach you chose still works for you. If you close a couple of locations and you're in fewer states, maybe you don't need 10 appendices anymore, or if you decide to hire a fully remote team, maybe you do need to change your approach.

The other recommendation, whether you're in one state or 50, is make sure your handbook doesn't just collect dust on a shelf. It's there to help you, not to hurt you, and one of the biggest mistakes we see employers make is to have a beautiful handbook with all of their aspirational goals and "We're gonna give you performance reviews and we're going to offer you all this training and here's all the things we're gonna do," and then they don't comply with it, and then that gets thrown in their face when somebody files an EEOC charge or discrimination claim. It's sort of, you knew better and you didn't do better. So make sure that it's not collecting dust on a shelf and make sure that what you have in there actually works for your organization day to day.

Taylor Gess (10:45):
Tracey, Emily mentioned pay transparency. We hear about this a lot. What do employers actually need to know?

Tracey Diamond (10:50):
So this is one of the fast-moving areas of the law with really new statutes on the books. I think we're up to maybe 18-plus states now that require some version of salary ranges in job postings, and this includes our friends in California as well as Colorado, D.C., New York, Illinois, New Jersey, and several more. And so this can be a trap for multi-state employers in particular because, like the sick leave laws, the individual obligations of these various pay transparency laws are different. They're not all exactly the same. And keep in mind again, like what I said at the beginning of this podcast, that the obligation follows where the employees are actually sitting, not where your HR team sits or where your company headquarters are necessarily.

So, a job posting that is visible in a covered state may trigger that state's requirements even if you weren't intending to hire there, which clearly becomes tricky when you're advertising nationally for a remote job position, for example. Some states' laws require posting and sharing of information with internal existing employees as well as applicants, so keep that in mind as well. Some require it upon request, some require it without the employee requesting it or the applicant requesting it. So practically speaking, for any broadly distributed job posting, assume the most demanding applicable state's rules apply, including posting a salary range and a description of benefits. The cost of including a range is nothing, but the cost of a violation can be thousands of dollars per posting.

Also keep in mind that pay transparency means that your pay ranges are going to be looked at and scrutinized. So having in place an audit for and making sure that you have pay equity in place internally is really important before you start posting ranges externally, also before your existing employees can have a look at them. So it's worth having this conversation proactively rather than reactively. And actually, we did a deep dive on this in a prior podcast episode of *Hiring to Firing*[1] that is really worth a listen, if nothing else, because we used audio clips from My Cousin Vinny, Legally Blonde, and The Big Short to illustrate our issues. We'll add the information to our show notes.

Taylor Gess (13:04):
Emily, what about wage and hour issues? I know this is something I've reached out to you about before. Are there any traps you see employers in this space fall into specifically?

Emily Schifter (13:12):
Absolutely. And this could probably be, I don't know, 10 different podcasts. There's so much to cover there. But I'll hit on a couple of the biggest traps that we see or the most common questions we get. The first is classification, and this is both classification of employees versus contractors and also classification under the Fair Labor Standards Act and some of the similar state laws as exempt or non-exempt from overtime and minimum wage. So starting with contractors, it's a bit of a minefield regardless of your industry. There are all sorts of different legal tests under state law, under federal law, under different federal and state laws. They're similar, but all a little bit different. And misclassification, if you get it wrong, it can come at a real cost.

There are wage and hour penalties, usually things like unpaid overtime, but there's also potential benefits liability and significant tax exposure. That ends up being sometimes the biggest area of exposure depending on the role. So it touches lots of legal areas. It's an important issue in particular for companies that really rely on contractors to do their business. And something we see a lot with clients is they'll say, "But it's always been done this way in our industry," or, "They want to be contractors. They've come to me asking to be a contractor." And if we hear that, it's a bit of a red flag, just like the phrase "1099 employee." Not a thing. If you catch yourself saying that, it's definitely worth a look.

So definitely something that we see clients struggling with, especially in those higher-risk states where the state laws are pretty tough. And then as far as Fair Labor Standards Act classification issues, this has always been an issue that causes headaches for employers. It continues to be one. I will say that the administrative exemption from overtime is one of the most misunderstood, and I think for your audience, probably a good one to focus on. We see a lot of account manager type of a role or administrative assistant. People sometimes think any kind of non-blue-collar role is exempt, and that is a mistake. Outside sales is another one that we see. If people are really inside sales, it's an area where the law hasn't kept up with practice.

So it's definitely something to think through. If you have almost everybody working in an office role classified as exempt, it may not be right. So definitely something to think about, especially if you're expanding into different states. There are different state laws that address this. There's different classification tests, different exemption pay thresholds. The federal threshold's fairly low, only a little bit over $35,000, but some states are significantly higher. So it's worth considering, especially if you do have a remote workforce. The burden in these cases is on the employer basically to disprove that overtime was worked. It's the employee's word against yours. So definitely something to be taking a look at proactively rather than reactively if you can.

And even if you've got your classification pretty well buttoned up, it's important to know, and Tracey mentioned this before, about the different laws that states have related to pay that go beyond overtime: meal periods, rest breaks, frequency of pay, expense reimbursement, deductions from pay, final pay, all of those things. Whether you have to pay out vacation, all of that varies by state. Sometimes how you calculate overtime and what has to be included in that. So if you're someone, if you're a company that has started in one or two states and you've started expanding beyond that especially, or you've grown a lot, even if you've just grown a lot and you've added different forms of incentive compensation that you haven't really considered or run by counsel, it's definitely something worth taking a look at.

Taylor Gess (16:28):
Tracey, since we're on the topic of compensation and because this sits right at the intersection of employment and consumer finance, let's touch briefly on earned wage access.

Tracey Diamond (16:37):
Ah, one of my favorite topics because it's sort of this exotic product that we're just starting to see make its way into employers' radar. So earned wage access lets employees access wages that they've already earned, but they get to access their wages early before they're actually paid. So think about an employer who pays their payroll run as monthly. If employees have already worked one or two weeks into that pay period, they can access those wages before that end of the month when they would normally be paid. Then the employees have to repay that amount, which could be either subtracted from their next paycheck or it could be a direct deduction from their

bank account. So employers across industries are starting to offer this as a benefit and fintechs are increasingly building it. So it's a really interesting intersection between our two worlds, Taylor.

So how earned wage access is structured can really create wage and hour law issues. So for example, if an employer is deducting the quote, unquote advance from the employee's wages in the next payroll cycle, it could create a wage and hour violation if it is in fact considered an advance, even though they've already worked that time. And that could affect such things as minimum wage rules, payment of overtime and bonuses, wage garnishments, et cetera. Or maybe not, right? Because maybe it's not even considered a wage deduction. It's all sort of unclear. This varies significantly by state, and it's one of those areas where technology has outpaced how the statutes are actually written.

From a regulatory angle, this is a rapidly evolving area of the law. Some states treat earned wage access as a loan, and lending regulations apply. Other states have standalone earned wage access statutes, and the structure of the product matters enormously for both sides of the table. We actually did a full deep dive on this topic as well on our *Hiring to Firing* podcast, which was a crossover episode with our firm's *Payments Pros* podcast[2], and we'll also link it. I believe for that one, Emily, didn't we use Shark Tank as our kicking off point?

Emily Schifter (18:34):
I think that's right. Another reality show.

Tracey Diamond (18:36):
Super fun.

Taylor Gess (18:37):
I think we at least have to flag AI because that is a topic on everyone's minds right now. A lot of our clients are either building AI products or integrating them into their operations. What should they be thinking about on the employment side?

Emily Schifter (18:49):
Yeah. And I know we're coming up on time, and this is again an area that I feel like could be 10 different podcasts. But I'll hit on a couple of the big areas that we're seeing because I actually think the laws in the employment space are some of the biggest right now and the ones that our clients tend to be facing, sometimes without even realizing it. The vendors of these products make it very compelling and very easy to roll out tools. So we see this mostly with hiring and screening, resume tracking, filtering tools, video interview technology, candidate assessments, and that sort of a thing. But we also see AI come up in monitoring, whether it's a productivity tracker, communication monitoring, a lot in call centers, surveillance software for remote employees, things like that.

The first thing to sort of know in this area is that just because an AI does it does not mean that you are immune as the employer. So if the AI makes a decision that's discriminatory, that's still discrimination. Common sense, but something that's worth saying if you've never looked into this area. This is another area where states are really leading the way. You may have heard of some of the big laws in this area. There's a New York City law, Colorado, where there are requirements for bias audits for certain automated employment decision tools, other requirements before you deploy them, but there's new laws all the time. Connecticut just released its new law.

Other states like Texas and Illinois have laws and there's pending legislation in other states as well. And it's kind of constantly growing.

The Senate recently voted to strip a proposed federal AI law moratorium, as many of your listeners might have heard, which means that this is only going to continue and the confusion will only continue to proliferate. Something else to be aware of is just because a tool doesn't make the final decision alone, or just because it's not operating completely independently and there's still a human in the loop, does not always necessarily mean that these state laws are not implicated. That's a pretty complicated determination. It really depends on the state law at issue, on the use case, on the human's role. So complicated area, fast growing area, no single federal rule to follow, definitely one to keep an eye on.

Like I said, even just taking a look at what you have right now and doing an audit of what existing technology might have been rolled out with or without authorization, and taking a look at what laws might be implicated, what those tools do and what the contracts say. Very important.

Tracey Diamond (21:04):
Just to sort of wrap things up for you, Taylor, as you can see, having employees in multiple states creates a myriad of complex employment law issues. And here are three important takeaways for employers in this space to keep in mind. Number one, know where your people are. Compliance follows the employee, not the headquarters address. Whether it's a branch, an office, or even a home office, if you have workers there, you have obligations there. Number two, have a policy strategy, not just a policy. The goal isn't having a handbook per se. What's more important is having a system in place for staying current as your workforce and the law both continue to evolve.

And then number three, now, I'm not saying for number two not to have a handbook. I'm just saying make sure that your handbook is current. Number three is get ahead of it before a regulator or a plaintiff does. Retrofitting compliance after a Department of Labor audit, a class action, or an agency investigation is many times more expensive than building it in from the start. Particularly with all of the pay transparency laws that we discussed before that really span across states, it is important to make sure your house is in order before you are scrutinized from the outside.

Taylor Gess (22:14):
Thank you, Tracey and Emily, for being on the podcast today and updating the audience on what we are seeing in the world of labor and employment law. We'll pick back up with another very interesting topic on our next episode of *The Consumer Finance Podcast*. Also, be sure to check out the *Hiring to Firing* Podcast, including its prior episode on pay equity and the crossover episode with *Payments Pros* on EWA. In the meantime, thanks to our audience for listening today, and don't forget to visit and subscribe to our blogs, troutmanfinancialservices.com and consumerfinancialserviceslawmonitor.com.

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Show Notes

1. "Perms, Pay Equity, and the Power of Experts" – *Hiring to Firing*, Troutman Pepper Locke
2. "Before You Front the Funds: Benefits and Pitfalls of Earned Wage Access Tools" – *Hiring to Firing*, Troutman Pepper Locke

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