

SILICON VALLEY BANK COLLAPSE: IMPLICATIONS FOR EMPLOYERS

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U.S. Labor, Employment, and Workplace Safety Alert

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UPDATE: SVB depositors are expected to be able to access their deposits on 13 March, 2023. We are closely watching developments on this topic.

For more information, refer to this [Joint Statement](#) by the Department of the Treasury, Federal Reserve, and FDIC.

OVERVIEW

On 10 March 2023, the financial world was rocked by the collapse of Silicon Valley Bank, a choice institution for tech startups and venture capitalists. Numerous companies had millions or hundreds of millions in cash deposits at Silicon Valley Bank, with only US\$250,000 per customer insured. Overnight, many employers in the tech space went from a position of high liquidity to one where their deposits were frozen. Even companies who were not customers of Silicon Valley Bank may be impacted if their payroll provider utilized Silicon Valley Bank to process employee payroll.

Employers across the United States are subject to wage and hour obligations, and many states have specific rules regarding timing of payment, method of payment, and penalties for failure to comply with those specific rules. This resource provides an overview of an employer's obligations, including payroll timing obligations, and issues surrounding potential short-term solutions such as furloughs. This article will be updated as lawmakers and government agencies weigh in on issues relating to the Silicon Valley Bank collapse.

PAYROLL OBLIGATIONS

When an employee performs compensable work, the employer must issue payment in accordance with state and federal law. Under the Fair Labor Standards Act (FLSA), employers are not subject to specific restrictions on the time or place of wage payments but must pay minimum and overtime wages promptly on the employee's regular payday.

Most states have more specific rules regarding frequency and timing of pay, as well as liability and penalties triggered by failure to comply with such regulations. Some of these requirements, such as California's rules regarding timing of wage payment upon separation from employment and payment by check with insufficient funds, are subject to defenses such as lack of willfulness and unintentional withholding of wages. Other statutes do not expressly contemplate such "unintentional" defenses, though certain advocates have lobbied governing bodies to extend leniency and waive penalties associated with Silicon Valley Bank's collapse.

SHORT-TERM CONSIDERATIONS

Without access to funds to pay wages, employers may be considering temporary solutions such as furloughs or layoffs. When an employer furloughs its employees, it requires them to work fewer hours or to take a certain amount of unpaid time off. For example, an employer may require employees to take an unpaid leave (e.g., three weeks) until the employer regains access to its funds. Employers who opt for this route should ensure that exempt employees do not work partial weeks, but rather take entire weeks off work. This is because under the FLSA, if an exempt employee works a partial week, the company has to pay the employee the full salary week. A furlough that encompasses a full workweek is one way to minimize risk of running afoul of the FLSA, since the FLSA provides that exempt employees do not have to be paid for any week in which they perform no work. Please note that some states may have additional obligations for furloughs.

On the other hand, many employers consider a temporary or permanent layoff to be a separation from payroll. An employer may opt to lay off employees due to inability to fund payroll. A layoff can be temporary if the employer advises that it believes that this condition will change in quick order and intends to recall the employee when it regains access to its funds. Employees are typically able to collect unemployment benefits while on an unpaid layoff (temporary or permanent) or furlough, and frequently an employer will allow employees to maintain benefit coverage for a defined period of time as an incentive to remain available for recall (for furloughs and temporary layoffs).

Employers should note that furloughs and layoffs may trigger notice requirements under the federal Worker Adjustment and Retraining Notification Act (WARN), as well as state-specific counterparts, so-called “mini-WARN” laws. WARN requires employers with 100 or more employees to provide at least 60 calendar days’ advance written notice of a plant closing or mass layoff affecting 50 or more employees at a single site of employment. “Unforeseen business circumstances” is a recognized exception, as are furloughs with a pre-determined return to work date within six months. State-specific mini-WARN laws may provide for broader coverage or increased minimum notice. For example, New York’s “mini-WARN” Act may cover employers that employ at least 50 employees, in contrast to the 100 employee threshold under federal WARN.

Employers should also remain cognizant that layoffs may impact employees’ healthcare coverage and COBRA rights. Most health plans/insurance policies provide that short leaves of absence, whether paid or not, do NOT result in the loss of health coverage, in part to avoid triggering COBRA when the employee is expected to return to work. Most plans require that an employee on leave be away from work for at least 30 to 60 days before the health coverage terminates, but that is a matter of plan design. If a separated employee loses healthcare coverage, COBRA rights may be triggered.

The primary decision on how best to proceed will be based on the needs of the business. If a company wants people to be available because it expects to regain access to its funds quickly, it may make more sense to furlough or layoff temporarily. If there are more long-term concerns regarding access to funds, a company may permanently layoff and rehire if needed.

JURISDICTION-SPECIFIC CONSIDERATIONS¹

State	Timing of Payment of Wages	Penalties	Exceptions & Defenses
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Federal	<ul style="list-style-type: none"> ▪ The Fair Labor Standards Act (FLSA) does not mandate a specific frequency for wage payments. Instead, wages are due on the regular payday for the pay period covered. Courts have interpreted the FLSA to require “prompt” payment of wages. ▪ Many states have their own frequency of wage payment requirements that may be more restrictive. 	<ul style="list-style-type: none"> ▪ Liquidated damages, back pay. (29 U.S.C. § 216 (b)). ▪ Willful violations of the FLSA may also result in criminal prosecution and a fine up to \$10,000 and/or imprisonment. (29 U.S.C. § 216(a)). 	<ul style="list-style-type: none"> ▪ Good faith effort to comply with the law is a recognized defense.
Arizona	<ul style="list-style-type: none"> ▪ Wages must be paid at least twice a month. Payments must be within five working days after the pay period ends and no later than 16 days apart. ▪ Overtime pay or exception pay no later than 16 days after it is earned. (A.R.S. § 23-351). ▪ Employers whose principal place of business and central payroll system is outside the state may establish one or more fixed paydays each month for 	<ul style="list-style-type: none"> ▪ An employee may bring a claim in court for wages due and anyone may file a complaint with the Industrial Commission of Arizona (ICA). (A.R.S. §§ 23-364(C), (E)). ▪ Employers that fail to pay required wages are liable for the balance of the unpaid wages, interest, and twice the amount of unpaid wages. (A.R.S. § 23-364(G)). ▪ If the ICA finds an employer liable for 	<ul style="list-style-type: none"> ▪ Good faith dispute re wages owed. Apache E., Inc. v. Wiegand, 119 Ariz. 308, 312 (Ct. App. 1978).

	professional, administrative, executive employees, or employees employed in the capacity of an outside salesperson. (A.R.S. § 23-351).	penalties, the employer has 10 days to pay the employee the wages due. An employer who fails to pay within 10 days after the order becomes final may be liable to pay the employee an amount which is equal to triple the amount of the unpaid wages plus interest. (A.R.S. § 23-360).	
California	<ul style="list-style-type: none"> Wages must be paid at least twice each calendar month at regular paydays designated by the employer. Work performed between the 1st and 15th of each month must be paid between the 16th and 26th days of the same month. Work performed between the 16th and the end of each month must be paid between the 1st and 10th days of the following month. Overtime must be paid by the payday for the next regular pay 	<ul style="list-style-type: none"> Civil penalties of \$100 per employee for initial violation; \$200 per employee plus 25% of withheld wages for subsequent violations. (Cal. Lab. Code § 210). Individuals (such as managers, officers, and directors) may be subject to personal liability. (Cal. Lab. Code § 558). Where an employer pays wages with a check, draft, or voucher that is drawn on a nonexistent account or dishonored for insufficient funds 	<ul style="list-style-type: none"> Penalties arising from payment with a bad check or insufficient funds may be avoided upon showing that violation was unintentional. (Cal. Lab. Code § 203.1). Obligation to timely pay wages upon separation from employment triggers waiting time penalties only if such failure is "willful" or intentional. (Cal. Lab. Code § 203). PAGA penalties are subject to discretionary decrease to

	<p>period.</p> <ul style="list-style-type: none"> Employees on a weekly, biweekly, or semimonthly payroll (other than default 1st-15th, 16th-end of month) must be paid within 7 calendar days following the close of the payroll period. (Cal. Lab. Code § 204). 	<p>within 30 days of receipt, such wages continue as a penalty until paid, up to 30 days. (Cal. Lab. Code § 203.1).</p> <ul style="list-style-type: none"> Failure to timely pay wages at separation from employment may give rise to waiting time penalties equivalent to the employee's daily wages for each day wages are unpaid, up to 30 consecutive days of wages. (Cal. Lab. Code § 201-203). Private Attorneys General Act (PAGA) penalties may be applicable for violations of Labor Code sections pertaining to timing of wage payments. (Cal. Lab. Code § 2698 et seq.) 	<p>prevent unjust, oppressive, or confiscatory penalties given the situation presented. (Cal. Lab. Code § 2699).</p>
Colorado	<ul style="list-style-type: none"> Wages must be paid at least monthly or every 30 days, whichever is longer. Payments must be made on regular paydays and no later than 10 days after the close of each pay period. 	<ul style="list-style-type: none"> Recovery of damages due and may also recover the greater of either two times the amount of wages, compensation, or \$1,000. (Colo. Rev. Stat. Ann. § 8-4-109(3)(b)). If willful failure to pay, 	

	<ul style="list-style-type: none"> Employers and employees may agree on different pay periods. (Colo. Rev. Stat. § 8-4-103). 	<p>penalty is increased to three times the amount of wages or compensation due or \$3,000. (Colo. Rev. Stat. Ann. § 8-4-109(3)(b)).</p> <ul style="list-style-type: none"> If employer acted without good faith in withholding wages, the employer must pay up to three times the amount wrongfully withheld, plus attorneys' fees and court costs. (Colo. Rev. Stat. Ann. § 8-4-105(1)(c)). An employer that willfully or intentionally fails to pay wages or compensation due under this law is guilty of theft. (Colo. Rev. Stat. Ann. § 18-4-401). 	
Florida	<ul style="list-style-type: none"> Florida generally relies on the federal FLSA as to the timing of payment of wages. Wages are generally due on the regular payday for the pay period covered. 	<p>An employer that violates Florida minimum wage law may be liable for:</p> <ul style="list-style-type: none"> Any back wages owed. An additional amount of liquidated damages equal to the back wages owed. Attorneys' fees and 	<ul style="list-style-type: none"> If an employer proves by a preponderance of the evidence that they acted in good faith and reasonably believed the actions were not violations, the court may, in its discretion, award

		<p>costs.m(\$ 448.110(6)(c), Fla. Stat.).</p> <p>Employers who willfully violate the payment of minimum wages may be imposed a fine of \$1,000 per violation, payable to the state. (§448.110(7), Fla. Stat.).</p>	<p>no liquidated damages or award any amount less than the amount of unpaid minimum wages. (§ 448.110(6)(c), Fla. Stat.).</p>
Georgia	<ul style="list-style-type: none"> Wages must be paid on regular paydays at least twice a month and paydays must divide the month into at least two equal pay periods (excluding employers in the farming, sawmill, and turpentine industries). Employers may pay officials, superintendents, or other heads or subheads of a department within the company monthly at an agreed salary. (O.C.G.A. § 34-7-2(b)). There is no required time for when wages must be paid following a pay period. 	<ul style="list-style-type: none"> Georgia law does not impose penalties for failure to make timely wage payments. Employers who fail to redeem checks or promissory notes are liable for the full amount plus a \$10 penalty. (O.C.G.A. § 34-7-5). 	<ul style="list-style-type: none"> Employers can avoid or reduce liability for liquidated damages if they prove insolvency or actual inability to redeem at the time of demand and presentation of the check or promissory note. (O.C.G.A. § 34-7-5).
Illinois	<ul style="list-style-type: none"> Every employer is required to pay all wages earned at least 	<ul style="list-style-type: none"> Damages equal to 5% of the underpayment, per 	

	<p>semi-monthly.</p> <ul style="list-style-type: none"> For employers who pay semi-monthly, all wages are to be paid no later than 13 days after the end of the pay period in which the wages were earned. For employers who pay weekly, all wages are to be paid no later than seven days after the end of the weekly pay period in which the wages were earned. Wages of executive, administrative, and professional employees, as defined in the FLSA, may be paid once a month. (820 ILCS 115/3). 	<p>month (calculated from the date of the underpayment) for each month during which wages or final compensation remains unpaid.</p> <ul style="list-style-type: none"> Damages are payable and continue to accrue, without limitation, until the amount owed is paid. In a civil action, the employee shall also recover costs and all reasonable attorney's fees. Employers who are able to pay wages and willfully refuse are guilty of: (1) Class B misdemeanor for unpaid wages, final compensation or wage supplements in the amount of \$5,000 or less; or (2) Class A misdemeanor for unpaid wages, final compensation or wage supplements in the amount of more than \$5,000. Employers who have been ordered to pay wages, final compensation, or wage supplements due to employees must pay a \$250 	
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		<p>administrative fee to the Department of Labor if the amount ordered by the Department as wages owed is \$3,000 or less; \$500 if the amount ordered by the Department as wages owed is more than \$3,000, but less than \$10,000; and \$1,000 if the amount ordered by the Department as wages owed is \$10,000 or more. (820 ILCS 155/14).</p>	
Massachusetts	<ul style="list-style-type: none"> ▪ Weekly or bi-weekly (non-exempts) <ul style="list-style-type: none"> ▪ Within six days of the end of the pay period if employed for five or six days in a calendar week; or ▪ Within seven days of the end of the pay period if employed seven days in a calendar week; or ▪ Within seven days of the end of the pay period if employed less than five days. ▪ Exempt employees 	<ul style="list-style-type: none"> ▪ Late wages (even 1 day late) are subject to treble damages and attorneys' fees (plus interest) even if the employer pays the employee before the employee brings a claim. (Mass. Gen. Laws ch. 149, § 150) 	

	can be paid semi-monthly (or monthly at their election). (Mass. Gen. Laws ch. 149, § 148)		
Nevada	<p>Wages that are earned before:</p> <ul style="list-style-type: none"> ▪ The first day of the month must be paid no later than 8 a.m. on the 15th day of the month immediately after the one that the wages were earned in. ▪ The 16th day of the month must be paid no later than 8 a.m. on the last day of the same month. ▪ Employer and employee may agree to a different payment schedule. ▪ Employer must provide affected employees with at least seven days' written notice before changing the payday or place of payment. (Nev. Rev. Stat. §§ 608.060, 608.070) 	<ul style="list-style-type: none"> ▪ Employers that violate the wage payment law are guilty of misdemeanors. ▪ Employees may bring a civil action against an employer and, are entitled to all remedies available under law or in equity appropriate to remedy the violation, including without limitation, back pay, damages, reinstatement or injunctive relief, and reasonable attorneys' fees and costs. ▪ An employer who knowingly issues to an employee a negotiable instrument in payment of wages for which there is insufficient money to pay it in full upon presentation shall reimburse the employee for any penalty or charge incurred by the employee arising from his or her 	

		reliance on the validity of the instrument (Nev. Rev. Stat. §§ 608.130, 608.140, 608.195)	
New York	<ul style="list-style-type: none"> Manual workers² must be paid weekly and not later than seven calendar days after the end of the week in which the wages are earned. Manual workers for nonprofit entities must be paid in accordance with their agreed terms of employment but not less frequently than semi-monthly. Clerical or other non-manual workers must be paid in accordance with the agreed terms of employment and not less frequently than semi-monthly (N.Y. Lab. Law § 191 (McKinney)). Commissioned salespersons must be paid in accordance with the agreed terms set forth in a written commission agreement but not less frequently than once a month and not later than the last day 	<ul style="list-style-type: none"> NYDOL may bring action against employers for the full amount of wage underpayment and additional liquidated damages, which are capped at 100% total wages owed. (N.Y. Lab. Law §§ 191, 196, 197, 198, 198-a (McKinney)). Employees bringing wage actions can receive full recovery of the underpayment, all reasonable attorney's fees, ordinary costs, prejudgment interest, and an additional amount as liquidated damages equal to 100% of the total amount of wages owed. (N.Y. Lab. Law §§ 191, 198 (McKinney)). NY employers that fail to pay wages may be fined \$500 per failure. (N.Y. Lab. Law § 197 (McKinney)). 	<ul style="list-style-type: none"> If employer believed in good faith it was complying with wage payment law in wage underpayment action, may not be assessed liquidated damages. (N.Y. Lab. Law § 198).

	<p>of the month following the month in which the wages are earned. (N.Y. Lab. Law § 191).</p> <ul style="list-style-type: none"> ▪ New York has no frequency of pay requirements for exempt executive, administrative, or professional employees (N.Y. Lab. Law §§ 190(7) and 191(1)(d)). ▪ Employers must pay fringe benefits or wage supplements within 30 days after payment is due. (N.Y. Lab. Law § 191 (McKinney)). ▪ Employers must pay wages to discharged employees on next regular payday, and wages can be mailed upon employee request. (N.Y. Lab. Law §§ 191-c, 195 (McKinney)). 	<ul style="list-style-type: none"> ▪ Misdemeanor carrying fines between \$500-\$20,000 and up to 1 year imprisonment for first offense; second offense in six year period qualifies as a felony with additional fines. (N.Y. Lab. Law § 198-a (McKinney)). 	
North Carolina	<ul style="list-style-type: none"> ▪ Employees may be paid daily, weekly, bi-weekly, semi-monthly, or monthly. ▪ Wages based on bonuses, commissions, or other forms of calculation may be paid as 	<ul style="list-style-type: none"> ▪ Employers who fail to pay wages when due are liable for: (i) all unpaid wages; (ii) interest; and (iii) liquidated damages equal to unpaid wages. (N.C.G.S. §§ 95-25.22(a), (a1)). 	<p>Employers can avoid or reduce liability for liquidated damages if they show both:</p> <ul style="list-style-type: none"> ▪ The violation was in good faith; and ▪ They had reasonable grounds for

	<p>infrequently as annually. (N.C.G.S. § 95-25.6).</p> <ul style="list-style-type: none"> There is no required time for when wages must be paid following a pay period. 	<ul style="list-style-type: none"> A court may also award reasonable attorneys' fees and costs (N.C.G.S. § 95-25.22(d)). 	<p>believing the act or omission was not a violation of the North Carolina Wage and Hour Act. (N.C.G.S. § 95-25.22(a1)).</p>
Oregon	<ul style="list-style-type: none"> Employers must pay all wages due on the established regular payday. Pay periods cannot exceed 35 days but may be more frequent. (Or. Rev. Stat. § 652.120). 	<ul style="list-style-type: none"> The Oregon Bureau of Labor and Industries (BOLI) may require an employer to post a bond if the employer fails to pay wages within five days of a scheduled payday. Willful failure to pay final wages due on termination of employment may result in penalty wages for every day the employee remains unpaid, up to 30 days. Such penalties are calculated at the employee's regular hourly rate multiplied by eight hours in a day. BOLI may also impose a \$1,000 penalty for willful failure to pay final wages. 	<ul style="list-style-type: none"> Penalty wages are generally limited to the unpaid wages due, unless: (1) the employee provides written notice of wages due; and (2) the employer fails to respond within 12 days of such notice. (Or. Rev. Stat. § 652.150(2)). Lack of willfulness is a recognized defense to failure to pay final wages. (Or. Rev. Stat. § 652.150).
Pennsylvania	Must pay all wages on:	<ul style="list-style-type: none"> Employees may sue to recover unpaid 	

	<ul style="list-style-type: none"> ▪ Regularly scheduled paydays by the employer; or ▪ Within 15 days from the end of such pay period; or ▪ Within the number of days after the expiration of said pay period as provided in a written contract. (43 Pa. Cons. Stat. § 260.3). 	<p>wages and damages.</p> <ul style="list-style-type: none"> ▪ PA Department of Labor may pursue a wage claim on behalf of employees. If employers fail to pay wage claims or make satisfactory explanations to the department within 10 days of notice, a penalty of 10% of the amount due is added. ▪ If wages are unpaid 30 days after payday or if shortages exceed 5% of the wages due on any two paydays in a three month quarter, employees are entitled to claim damages equal to the greater of 25% of the total wages due or \$500. (43 Pa. Cons. Stat. §§ 260.9a, 260.10, 260.11a). 	
Texas	<ul style="list-style-type: none"> ▪ An employer must pay an employee who is not paid on a payday for any reason, including the employee's absence on a payday, on another business day on the employee's 	<ul style="list-style-type: none"> ▪ Lesser of wages claimed or \$1,000 (Tex. Lab. Code Ann. § 61.019). 	

	request (Tex. Lab. Code Ann. § 61.013).		
Utah	<ul style="list-style-type: none"> Employers must pay at least twice a month on days designated as regular paydays. (Ut. Code § 34-28-3(1)(a)). Employees must be paid within 10 days following the close of the prior pay period. If the payday falls on a weekend or legal holiday, payment must be made <i>before</i> weekend day or holiday. Employees hired on a yearly salary basis may be paid monthly, on or before the 7th day of the month following the earning period. (Ut. Code § 34-28-3(1)(d)). 	<ul style="list-style-type: none"> Violation of wage payment laws may result in a penalty of 5% of unpaid wages owing to the employee, assessed daily for a maximum of 20 days. (Ut. Code § 34-28-9). Failure to pay final wages to a discharged employee within 24 hours of employee's written demand may result in a penalty equivalent to the employee's daily rate of pay for each day wages are unpaid, up to 60 days. (Ut. Code § 34-28-5(1)(c)). 	<ul style="list-style-type: none"> No penalties for failure to timely pay wages upon termination, unless the employee has made a written demand. (Ut. Code § 43-28-5(1)(c)).
Virginia	<ul style="list-style-type: none"> Weekly or bi-weekly (non-exempt) At least monthly (exempt) Non-exempt employees may agree to be paid once each month if their weekly wages total more than 150% of the average weekly wage. (Va. Code Ann. § 40.1- 	<ul style="list-style-type: none"> Employers that knowingly fail to pay wages may be fined \$1,000 for each violation ("knowingly" means having actual knowledge of the information, acting in deliberate ignorance of truth or falsity of information, or acting in reckless disregard of the truth or falsity 	<ul style="list-style-type: none"> None "unless the failure to pay was because of a bona fide dispute between the employer and its employee" (Va. Code Ann. § 40.1-29(E)).

	29(A)).	<p>of the information.)</p> <ul style="list-style-type: none"> ▪ In addition to any civil or criminal penalty, courts may award wages owed, an additional equal amount as liquidated damages, prejudgment interest at 8% per year, reasonable attorneys' fees, and costs. (Va. Code Ann. §§ 18.2-182(H)-(K)). 	
Washington	<ul style="list-style-type: none"> ▪ Employers must pay wages at least monthly on regular paydays. If employers pay more frequently than monthly, the payday must be within 10 days after the end of the pay period. (WAC § 296-126-023). 	<ul style="list-style-type: none"> ▪ Must pay employees all wages owed and may be assessed 1% interest per month on all wages owed. (RCW § 49.48.083). ▪ May also be deemed guilty of a misdemeanor and fined not less than \$25 and not more than \$1000. (RCW § 49.12.170). 	<ul style="list-style-type: none"> ▪ Must reimburse employees for any fees caused by a dishonored paycheck returned for insufficient funds. Employers will not be liable for reimbursement if they provide written confirmation from their financial institutions showing that an error other than insufficient funds resulted in the paycheck being dishonored. (RCW § 49.48.010).

FOOTNOTES

¹ We have provided jurisdictions where Silicon Valley Bank has a physical presence in the United States: <https://www.svb.com/locations>

² Defined as “a mechanic, workingman or laborer; individuals who spend more than 25% of working time engaged in 'physical labor' fit within the meaning of the term “manual worker” with “physical labor” interpreted

broadly to include countless physical tasks performed by employees.”

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