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Wage and Hour Defense Blog

Insight and Commentary on Wage and Hour Law Developments Affecting Employers

DOL Withdraws Overtime Rule Appeal

By Paul DeCamp on September 5, 2017

POSTED IN FLSA LITIGATION, WAGE AND HOUR POLICIES

On September 5, 2017, the Department of Labor filed with the Fifth Circuit an unopposed motion asking the court to dismiss its appeal of the nationwide preliminary injunction ruling issued last November by a Judge Amos Mazzant in the Eastern District of Texas. The motion states that DOL's appeal is moot in light of Judge Mazzant's entry of final judgment on August 31, 2017. Barring any unusual further developments, we anticipate that the Fifth Circuit will dismiss the appeal promptly.

By withdrawing the appeal, the Department is signaling that it intends to abandon the 2016 Final rule and, instead, to proceed with a new rulemaking in line with the Request for Information ("RFI") the Department issued on July 26, 2017. That RFI

seeks public input regarding what salary level or levels, if any, the Department should use in place of the 2016 figures in order to update the $455 weekly / $23,660 annual salary requirement for the executive, administrative, and professional exemptions implemented in the Department's 2004 rulemaking, as well as the $100,000 annual compensation threshold for the highly-compensated variant of these exemptions.

The comment period for the RFI currently ends on September 25, 2017. To date, regulations.gov has received more than 138,000 comments in response to the RFI, though most of the comments appear to be identical submissions by numerous different commenters, as is common for this type of rulemaking. Watch for a Notice of Proposed Rulemaking announcing a new salary level for the executive, administrative, and professional exemptions in the next few months.

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Ninth Circuit Rejects DOL's "80/20 Rule" on Sidework and Tipped Employees

By Michael S. Kun on September 6, 2017

POSTED IN DOL ENFORCEMENT, FLSA COVERAGE

Earlier today, the **Ninth Circuit issued its opinion** in cases involving the Department of Labor's ("DOL") "80/20 Rule" regarding what is commonly referred to as "sidework" in the restaurant industry. Agreeing with the arguments made by our new colleague Paul DeCamp, among others, the Ninth Circuit issued a decidedly employer-friendly decision. In so doing, it disagreed with the Eighth Circuit, potentially setting the issue up for resolution by the United States Supreme Court.

As those in the restaurant industry are aware, restaurant workers and other tipped employees often perform a mix of activities in the course of carrying out their jobs. Some tasks, such as taking a customers' orders or delivering their food, may contribute directly to generating tips. Other tasks, such as clearing tables, rolling silverware, and refilling salt and pepper shakers—activity generally known in the industry as "sidework"— arguably generate tips indirectly.

In 1988, the DOL issued internal agency guidance purporting to impose limits on an employer's ability to pay employees at a tipped wage, which under federal law can be as low as $2.13 per hour, if employees spend more than 20% of their working time on sidework. This guidance, commonly known as the "80/20 Rule," has led to a

wave of class and collective action litigation across the country, including a 2011 decision from the U.S. Court of Appeals for the Eighth Circuit deferring to the Department's guidance as a reasonable interpretation of the Fair Labor Standards Act ("FLSA") and its regulations.

Today, the Ninth Circuit issued a 2-1 decision in *Marsh v. J. Alexander's LLC*, concluding that the Department's attempt to put time limitations on how much sidework an employee can perform at a tipped wage is contrary to the FLSA and its regulations and thus unworthy of deference by the courts.

The Department adopted the 20% limitation as a purported clarification of the Department's "dual jobs" regulation, which addresses employees who work in separate tipped and non-tipped jobs for the same employer. The Ninth Circuit explained, however, that the 20% limitation on sidework was inconsistent with the statutory notion of an "occupation," as well as the regulation's focus on two distinct jobs.

Because the 80/20 Rule did not in reality stem from the statute or the regulations, the Court determined that it constitutes "an alternative regulatory approach with new substantive rules that regulate how employees spend their time" and thus amounts to a "'new regulation' masquerading as an interpretation."

In reaching this conclusion, the Court disagreed with the Eighth Circuit's analysis and conclusion, noting that "the Eighth Circuit failed to consider the regulatory scheme as a whole, and it therefore missed the threshold question whether it is reasonable to determine that an employee is engaged in a second 'job' by time-tracking an employee's discrete tasks, categorizing them, and accounting for minutes spent in various activities."

The plaintiffs in these cases may well seek rehearing en banc, and it remains to be seen what approach the Department will take regarding the 80/20 Rule in response to today's decision. And the split between the circuits certainly suggests that this is an issue that may well be resolved by the Supreme Court.

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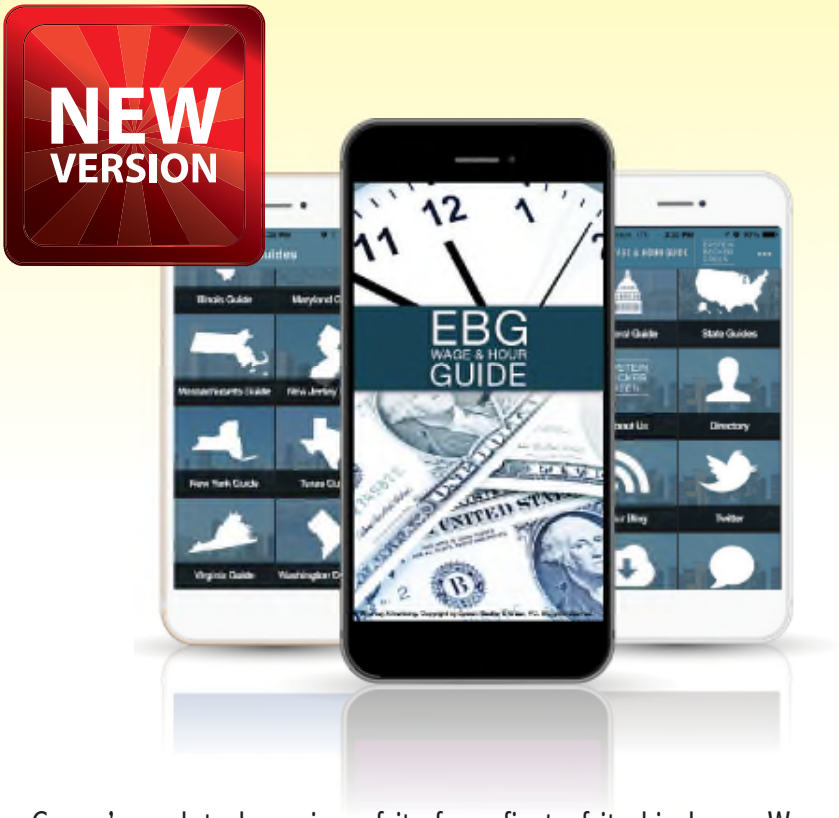
Updated 50-State Wage and Hour App for Employers



Epstein Becker Green's updated version of its free, first-of-its-kind app, Wage & Hour Guide for Employers, now includes all 50 states – and more! The app puts federal and state wage and hour laws at the fingertips of employers. Plus, the updated app supports iPhone, iPad, Android, and Blackberry devices and has new capabilities.

Key features of the update include:

- New summaries of wage and hour laws and regulations covering all 50 states – plus federal law, the District of Columbia, and Puerto Rico)
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With wage and hour litigation and agency investigations at an all-time high, EBG's app offers an invaluable resource for employers, in-house counsel, and human resources personnel.

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