WHAT'S NEW ON THE WAGE AND HOUR FRONT?

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After a flurry of rulemaking activity from the US Department of Labor (Department) during the first year of the Biden Administration, this past year has seen a pause in publicly detectable activity, as the Department turns its attention toward analyzing public comments and preparing a number of new proposed and final rules. At the same time, the courts have remained active in addressing important substantive and procedural issues in the wage and hour space. This article examines the most important developments that may be of interest to businesses, unions, and workers alike.

RECENT FEDERAL REGULATORY ACTIVITY

After issuing an initial volley of proposed and final rules, the Department's Wage and Hour Division (WHD) has spent much of the last year receiving and analyzing public comments and preparing to issue the next wave of rulemaking documents.

Updating the Davis-Bacon and Related Acts Regulations

On March 18, 2022, WHD published in the Federal Register a Notice of Proposed Rulemaking for its first significant proposal to update the regulations implementing the Davis-Bacon Act, which addresses

prevailing wage standards for federal construction contracts, as well as related statutes, in roughly forty years.[2] The comment period ended on December 13, 2022. The Final Rule took effect on October 23, 2023.[3]

The proposed revisions to the regulations were voluminous, with the new regulatory text alone occupying approximately 22 pages of three-column text in the Federal Register. A detailed analysis of the new regulations is, therefore, beyond the scope of this paper.

The key elements of the changes, however, are as follows:

- WHD reverted to the pre-1983 concept the agency used to determine "prevailing wage." Under prior standards, WHD identified a single rate as prevailing in a locale only if more than 50 percent of the workers in a classification receive that wage. WHD returned to the standard it used from 1935 to 1983, whereby in the absence of a single rate paid to a majority of workers in a classification in an area, WHD can consider a wage prevailing if at least 30 percent of the relevant workers receive that wage.[4]
- WHD modified its procedures in order to reduce the need for contractors to pursue conformances when wage determinations do not reflect a work category required for a contract.[5]
- WHD plans to establish a mechanism for more frequently updating the wage rates for non-union contractors.[6]
- WHD also seeks to enhance enforcement and deterrence through various means, including anti-retaliation provisions as well as modified cross-withholding procedures.[7]

The amended law helps to correct a challenge that practitioners in the prevailing wage space have long faced: the lack of significant published guidance from WHD concerning Davis-Bacon and related act standards and procedures. The existing regulations are quite sparse, particularly when compared to the regulations under the Service Contract Act, which addresses prevailing wages for federal service contracts. Historically, much of the guidance in this area was informal, unwritten, and based to some extent on which individual one spoke with at WHD on any given day. WHD has, in recent years, taken steps to provide further guidance to the federal contracting community through prevailing wage seminars and written subregulatory compliance assistance materials. Simply codifying WHD's standards in the regulations has significant value to the regulated community.

Nondisplacement of Qualified Workers Under Service Contracts

On July 15, 2022, WHD published in the Federal Register a Notice of Proposed Rulemaking to implement Executive Order 14055, issued by President Biden on November 18, 2021.[8] The proposed rule would create a new Part 9 within Title 29 of the Code of Federal Regulations, setting forth a general requirement that workers on covered federal service contracts receive a right of first refusal to continue in their work on the contract in the event that a successor contractor assumes the contract, along with a detailed enforcement mechanism.[9] The comment period closed on August 15, 2022.[10]

Employee or Independent Contractor Classification Under the Fair Labor Standards Act

On September 25, 2020, the Department published in the Federal Register a Notice of Proposed Rulemaking proposing a new regulation for differentiating independent contractors from employees.[11]

The preamble to the proposed rule contains extensive analysis of the case law and other interpretive guidance surrounding the meaning of independent contractor under the Fair Labor Standards Act (FLSA),[12] ultimately concluding that the current state of the law reflects "[c]onfusion,"[13] "[l]ack of [f]ocus,"[14] and"[i]nefficiency."[15] The preamble then discusses at length the Department's understanding of the proposed regulatory text.[16] Of particular interest is the Department's analysis of what it means for work to be an integral part of the putative employer's operations, which appears to depart from how some

courts and many practitioners currently understand that issue, particularly in connection with state-law ABC Tests most commonly used to define coverage under workers' compensation or unemployment insurance statutes, though in some instances applicable to wage and hour laws.[17]

After noting that the FLSA defines an "employee" as an individual whom an employer suffers or permits to work, the proposed regulation states that "[a]n employer suffers or permits an individual to work as an employee if, as a matter of economic reality, the individual is economically dependent on that employer for work."[18] By contrast, "[a]n individual is an independent contractor ... if the individual is, as a matter of economic reality, in business for him- or herself."[19]

The proposed rule then sets forth five factors for evaluating economic dependence, declaring that the first two factors, described as the "core" factors, "are the most probative" and "therefore afforded greater weight in the analysis[.]"[20] Under the proposal, "[g]iven the greater weight afforded each of these two core factors, if they both point towards the same classification, whether employee or independent contractor, there is a substantial likelihood that this is the individual's accurate classification."[21] This is so "because other factors, which are less probative and afforded less weight, are highly unlikely, either individually or collectively, to outweigh the combined weight of the two core factors."[22]

The proposal identifies and describes the two core factors as "[t]he nature and degree of the individual's control over the work"[23] and "[t]he individual's opportunity for profit or loss."[24] The proposal then sets forth the remaining three factors: "[t]he amount of skill required for the work,"[25] "[t]he degree of permanence of the working relationship between the individual and the potential employer,"[26] and "[w]hether the work is part of an integrated unit of production."[27]

The proposed regulation further states that "[i]n evaluating the individual's economic dependence on the potential employer, the actual practice of the parties involved is more relevant than what may be contractually or theoretically possible."[28] For example, "a business' contractual authority to supervise or discipline an individual may be of little relevance if in practice the business never exercises such authority."[29]

The Department published its Final Rule, which mirrored the proposed rule, on January 7, 2021.[30] The Final Rule did not take effect before the end of the Trump Administration, and in early February 2021 the Department pushed back the effective date of the Final Rule to May 7, 2021.

On May 6, 2021, the Department published in the Federal Register a Final Rule withdrawing the Trump Administration's independent contractor Final Rule.[31] Several trade associations filed a lawsuit challenging the withdrawal of the Trump-era Final Rule, and on March 14, 2022, the Eastern District of Texas issued a ruling invalidating the withdrawal.[32] The court concluded that the Department's rule delaying the effective date of the Trump-era Final Rule violated the Administrative Procedure Act (APA) because its 19-day comment period failed to provide an adequate opportunity for public comment and did not fall within an exception to the notice and comment requirements.[33] The court then determined that the Department's rule purporting to withdraw the Trump-era Final Rule was arbitrary and capricious under the APA because it failed to consider any alternatives beyond simply withdrawing the rule, such as replacing that rule with a different standard.[34] The Department appealed that ruling to the Fifth Circuit and then filed an unopposed motion for a stay of the appeal pending further rulemaking, which the Fifth Circuit granted on June 10, 2022.[35]

The net result of these various actions is that the Trump-era independent contractor rule remains in effect, though perhaps not for long. On October 13, 2022, WHD published a new Notice of Proposed Rulemaking in the Federal Register to withdraw the Trump Administration's Final Rule.[36] The comment period for that proposal closed on December 13, 2022. On June 9, 2023, the Fifth Circuit granted another unopposed motion for a stay of legal

proceedings while WHD analyzes the more than 54,000 comments it received before issuing a final rule.[37]

Other Items on the Current Regulatory Agenda

In addition to the rulemakings discussed above, the current semi-annual regulatory agenda for WHD lists two further items:

- Revising the regulations implementing the FLSA section 13(a)(1) exemptions for executive, administrative, professional, outside sales, and computer employees (RIN 1235-AA39).[38] At a minimum, the expectation is that WHD will propose a significant increase to the minimum salary threshold for the executive administrative, and professional exemptions. But the rulemaking could go further, including potentially modifying the duties test for one or more of the exemptions, or other changes. Looming over this rulemaking proceeding is the judicial rejection of the Department's 2016 Final Rule, which would have raised the salary threshold to nearly $50,000 per year. It remains to be seen whether WHD will elect to "go big" by proposing a substantial increase that is likely to draw a court challenge or, instead, to play it safer by proposing a more modest increase; and
- Implementing various provisions of the United States-Mexico-Canada Agreement Implementation Act, including certain certification and verification requirements relative to wage protection (RIN 1235-AA36); projected date for Final Rule: March 2024.[39]

DEPARTURE FROM THE TWO-STEP CONDITIONAL CERTIFICATION PROCESS

The FLSA provides for so-called "collective actions," explaining that "[a]n action to recover [under the FLSA] may be maintained against any employer ... by any one or more employees for and [o]n behalf of himself or themselves and other employees similarly situated."[40] Importantly, however, collective actions are not representative, and providing notice of the suit to "similarly situated" employees is often crucial to maintaining the action.[41] Notably, however, section 216(b) does not itself require notice; it is a judicial creation. *Hoffman-La Roche v. Sperling*, the landmark Supreme Court case on the topic, "present[ed] [only] the narrow question whether ... district courts *may* play any role in prescribing the terms and conditions" of notice, and the Court answered only narrowly in the affirmative.[42] Yet, the Court emphasized the importance of the district court's role remarking that, in cases "where written consent is required by statute," "trial court involvement in the notice process is inevitable," and that the benefits of collective actions "depend on employees receiving accurate and timely notice concerning the pendency of the collective action."[43] Subsequently, at least one circuit court has observed that "it may be that a district court abuses its discretion in refusing to allow notice to putative collective action members."[44]

The *Lusardi* Two-Step Approach

Collective action notice is now a prevalent feature of the FLSA, and trial courts overseeing FLSA collective actions have a "managerial responsibility" to facilitate it.[45] Thus, at the outset of an FLSA collective action, if the plaintiff is seeking notice to other employees, a trial court must determine whether the plaintiff has sufficiently shown that there exists a "similarly situated" group of workers who should receive notice of potential FLSA violations and who should be given the opportunity to join a lawsuit seeking to remedy those violations. Until recently, nearly all district courts conducted this inquiry as the first step of a broader two-step approach to collective actions, sometimes referred to as the *Lusardi* approach.[46] In this first step of the *Lusardi* approach—referred to as the "conditional certification" or "notice" step—trial courts determine at the outset of litigation whether the initial plaintiff has made (i) "a modest factual showing," that (ii) the initial and putative plaintiffs are similarly situated (i.e., that they were subject to a common decision policy, practice, or plan that violated the FLSA).[47] This is a "fairly lenient" standard, and courts do not evaluate the merits of claims, or make credibility determinations during the first step.[48] If the court finds that the plaintiff has sufficiently alleged the

existence of a similarly situated group of employees, it will "conditionally certify" the collective action (i.e., authorize notice, allow an opt in period, and allow the case to proceed to discovery as a collective action).[49]

The second step of the *Lusardi* approach occurs at the close of discovery, often upon a motion by the defendant to "decertify" the collective action.[50] At this stage, to maintain the collective action, the plaintiffs must make more than the first step's "modest factual showing" that the plaintiffs are similarly situated.[51] Additionally, at the second stage, the court considers a broader base of facts than simply whether the plaintiffs were all subject to the same decision policy, practice, or plan. While there is some deviation, most courts apply a flexible, three-prong inquiry considering: (i) the "disparate factual and employment settings of the individual plaintiffs"; (ii) "the various defenses available to the defendants which appear to be individual to each plaintiff"; and (iii) "fairness and procedural concerns."[52]

It should be noted, however, that the *Lusardi* analysis is not based on specific statutory language, and largely without express endorsement by the appellate courts. Instead, it is "a loose consensus as to the proper procedure for determining whether the collective mechanism is appropriate," arrived at within the broad case management discretion afforded to trial courts.[53] Thus, until recently, where circuit courts discussed the *Lusardi* approach in their cases, they often framed it as a practice of the district courts, rather than as a rule of law under the FLSA.[54]

The New *Swales* and *Clark* Approaches

Both the Fifth and Sixth Circuits recently rejected the *Lusardi* approach. In *Swales v. KLLM Transport Services, LLC*, the Fifth Circuit seemingly did away with any sort of preliminary or conditional "similarly situated" finding, whether in the form of a lower standard of proof (i.e., a "modest factual showing") or in the form of a simplified conception of what it means to be "similarly situated" (i.e., considering only whether putative plaintiffs were subject to the same policies or decisions).[55] Instead, *Swales* requires that courts "rigorously scrutinize the realm of 'similarly situated' workers ... from the outset of the case," including both factual and legal questions that weigh on the determination, so that the court only authorizes sending notice to putative plaintiffs "who are *actually* similar to the named plaintiffs."[56] The court did not specify the evidentiary standard to be used in this evaluation, but given the focus on "actual" similarity, it might be the preponderance of the evidence standard undergirding the ultimate factual findings of the action.[57]

Additionally, this past May, in *Clark v. A&L Homecare and Training Center, LLC*, the Sixth Circuit rejected the lenient, "modest factual showing," conditional certification standard, instead holding that plaintiffs must "show a strong likelihood" of being similarly situated.[58] This "strong likelihood," the court explained, is the same standard courts apply in determining whether to grant preliminary injunctions, deciding whether the party seeking the injunction has a "strong likelihood of success on the merits."[59] This standard, the Sixth Circuit explained, "requires a showing greater than the one necessary to create a genuine issue of fact, but less than the one necessary to show a preponderance."[60]

While they arrived at different standards, *Swales* and *Clark* were driven by similar concerns in their reasoning, expressing consternation that notification allegedly created undue settlement pressure on defendants and operated as claim-solicitation, citing the Supreme Court's remarks in *Hoffman-La Roche* that a court's involvement in the notice process is "distinguishable in form and function from the solicitation of claims;" that "courts must be scrupulous to respect judicial neutrality;" and that "trial courts must take care to avoid even the appearance of judicial endorsement of the merits of the action."[61] Where they differed, however, was in how much risk they were willing to tolerate that notice would be sent to non-similarly-situated putative plaintiffs. While the Fifth Circuit viewed such a possibility as unacceptable, and adopted its "actual similarity standard," the Sixth Circuit explained only that, "to the extent practicable ... court-approved notice ... should be sent only to employees who are

in fact similarly situated," and adopted the "strong likelihood of success" standard.[62] Under the Sixth Circuit's approach, it is unrealistic to expect that the question of whether plaintiffs were actually similarly situated could be answered prior to discovery. The preliminary decision to send notice is similar to the preliminary decision to grant a temporary injunction, in that both have significant immediate impacts on the parties.[63] Notably, unlike the Fifth Circuit, the Sixth Circuit does not appear to have done away entirely with the two-step approach. While the *Swales* actual similarity approach seems to only leave open the possibility for, but not require, an eventual motion on whether the plaintiffs are similarly situated, *Clark*'s "provisional" likelihood of success finding seems to still require an additional finding to solidify the plaintiff collective before trial.

Furthermore, the Fifth Circuit made clear in *Swales* that the court should consider all "facts and legal considerations that will be material" to the similarly situated determination, and courts should not shy away from "[c]onsidering, early in the case, whether merits questions can be answered collectively."[64] The Sixth Circuit also appears to have opened up the similarly situated evaluation to whatever evidence might be available, doing away with a hesitation to consider the merits at the outset, and considering issues such as potential defenses when determining whether putative plaintiffs are similarly situated. As the Sixth Circuit remarked, "[t]he parties can present whatever evidence they like ... [and] the district court should consider that evidence" when making the similarly situated finding.[65] In fact, in holding that district courts should consider whether or not certain putative plaintiffs were subject to an arbitration defense before deciding that they were sufficiently similarly situated to receive notice, it applied the three-prong test previously reserved for the second-step evaluation.[66]

Both of these cases are sufficiently new that it is difficult to determine at this point what effect they will ultimately have on FLSA collective actions.

THE SUPREME COURT ADDRESSES THE HIGHLY COMPENSATED EXEMPTION AND DAILY RATE WORKERS

Earlier this year, the Supreme Court addressed whether daily rate workers can satisfy the "salary basis" test under the FLSA executive or highly compensated employee (HCE) exemptions. In *Helix Energy Solutions Group, Inc. v. Hewitt*, the Court determined that the salary basis test for daily rate workers can only be satisfied by meeting the 29 CFR section 541.604(b) requirements.[67]

Generally, the FLSA "white collar" exemptions require that an employee be paid on a "salary basis" and that the amount paid must be more than $684 a week.[68] The regulations further provide that:

> [a]n employee will be considered to be paid on a "salary basis" . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed.[69]

However, an employer may base an employee's pay on an hourly, daily, or shift rate without violating the salary basis requirement if: (i) the employer guarantees the employee's minimum salary level for each week, regardless of the hours, days, or shifts worked; and (ii) the guaranteed amount reasonably relates to the amount actually earned by the employee in a typical work week.[70]

In *Helix*, an oil rig worker working as a "toolpusher," a role that is supervisory and "largely administrative" and "typically second-in-command on the entire vessel," sued for unpaid overtime. The plaintiff received bi-weekly pay at a daily rate of at least $963. The plaintiff argued that that he could not be deemed exempt from overtime pay without satisfying 29 CFR section 541.604(b), because his pay was "computed" on a daily basis and not a "salary basis." The employer argued that 5 CFR section 541.604 was not relevant because the plaintiff was "employed in a bona fide executive, administrative, or professional

capacity" and exempt as a "highly compensated employee" under 29 CFR section 541.601 because his daily rate of pay exceeded the minimum weekly amount needed to qualify as a salaried employee.

The district court granted summary judgment for the employer, concluding that the plaintiff was exempt under the executive and highly compensated employee exemptions because he was paid on a salary basis. However, the Fifth Circuit reversed, in a 12-6 en banc decision, holding that Hewitt was not paid on a salary basis and thus was not entitled to overtime pay notwithstanding his high compensation.[71]

Upon granting certiorari, the Supreme Court was presented with the question of "whether a high-earning employee is compensated on a 'salary basis' when his paycheck is based solely on a daily rate—so that he receives a certain amount if he works one day in a week, twice as much for two days, three times as much for three, and so on."[72]

The Court rejected the employer's basis of payment argument in holding that "a 'basis' of payment typically refers to the unit or method of calculating pay, [and] not the frequency of its distribution."[73] The fact that the worker received bi-weekly paychecks exceeding the salary threshold is irrelevant because his pay was calculated on the days he *actually* worked rather than based on the "predetermined amount" required under section 541.602(a). Since, as the Court explained, the "predetermined amount" must be paid without regard to the number of days or hours an employee actually works, the section 541.602(a) salary basis test does not apply to daily rate workers.[74]

The Court affirmed the Fifth Circuit's application of the two-part test in section 541.604(b) and concluded that the employer failed both elements, particularly since the employer did not claim to have met the test under section 541.604(b). The Court, in affirming the Fifth Circuit's decision, held that an employee who is paid a daily rate, and not guaranteed a predetermined number of days of work, is not paid on a "salary basis" under the FLSA.

GOVERNMENT SHUTDOWN CASES AND THE STATUS OF LATE PAYMENT CLAIMS

While neither the FLSA's overtime provision, 29 USC section 207(a), nor its minimum wage provision, 29 USC section 206(b), explicitly provides a prompt payment provision, courts have generally held that the FLSA guarantees the timely payment of both minimum and overtime wages, with the goal that employees be paid on the regular payday for the workweek in which the pay period ends. Indeed, the Department has provided a test in 29 CFR section 778.106 to determine whether late paid overtime or minimum wage payments require the payment of liquidated damages. The test is whether the payment has been made as soon as "reasonably practicable" after the work was performed. In *Biggs v. Wilson*, for example, the Ninth Circuit explained that the FLSA mandates that "employers shall pay a minimum wage," and that this "obligation kicks in once an employee has done covered work in any workweek."[75] As such, the court explained, the phrase "'shall pay' plainly connotes [']shall make a payment.['] If a payday has passed without payment, the employer cannot have met his obligation to 'pay.'"[76]

As will be discussed further below, the circuits take varying approaches to late payment, and even within circuits there may be variance between the treatment of late payment of minimum wage and late payment of overtime. As a general rule, however, unless an employer can point to some legitimate reason why it is unable to timely pay wages, an employer must pay both minimum and overtime wages "by the employee's regular payday" or be liable for an equal amount as liquidated damages.[77]

The Government Shutdown Cases

Recently, in *Avalos v. United States* and its companion case, *Martin v. United States*, the Federal Circuit held that federal employees did not have a claim against the federal government for its failure to pay them minimum and overtime wages for as long as six weeks during two separate government shutdowns.[78] While acknowledging that the FLSA requires employers to "pay its employees in a timely

manner," the court nevertheless "h[e]ld that the FLSA's timely payment obligation considers the circumstances of the payment."[79] There, the relevant circumstance was the Anti-Deficiency Act, which prohibits "'an officer or employee of the United States government from "making or authorizing an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation."[80] Because the FLSA requires only that employers "pay their employees as soon as practicable under the circumstances," the court held that it was not a violation of the FLSA to fail to pay federal employees when Congress had discontinued appropriations for payment, even though the employees were required to work without pay. Since there were no appropriations of funds, the Court found that the government agencies were expressly prohibited from paying their employees under the Anti-Deficiency Act.[81] This holding, the court explained, allowed it to "give effect to both" statutes, and to avoid the "absurd result" of forcing the federal government to choose between violating the FLSA and violating the Anti-Deficiency Act.[82]

The Federal Circuit took the "as soon as practicable" standard from the Supreme Court, which remarked in *Walling v. Harnischfeger Corp.* "that the FLSA 'does not require the impossible' but requires payment only 'as soon as convenient or practicable under the circumstances.'"[83] It is worth noting, as the Federal Circuit does in *Avalos*, that *Walling* involved the FLSA's overtime provision, 29 USC section 207(a), rather than its minimum wage provision, 29 USC section 206(b).[84] The claims in *Avalos*, however, were for the late payment of both minimum and overtime wages.[85] In applying *Walling* to resolve the issues in *Avalos*, then, the Federal Circuit appears to be indicating that it will use the same "as soon as practicable" standard to evaluate claims for both late minimum wage and late overtime payments.

How Other Circuits Address Late Payment Claims

As discussed above, the approach a court takes to evaluating a late payment claim can vary depending on the circuit within which it is brought, as well as on whether it is a claim for late payment of minimum or overtime wages. As an initial matter, the law on late payment within the DC Circuit is undeveloped. This seems likely to be because the DC Wage Payment and Collection Law (DCWPCL) has more specific timely-payment requirements than the FLSA, requiring that employers "pay their employees 'at least twice during each calendar month, on regular paydays,'" and prohibiting no more than 10 days to pass between the end of a pay period and the date on which the wages for that period are paid.[86] Thus, a DC worker is likely to bring a late payment claim under the DCWPCL, rather than under the FLSA. The same phenomenon seems to be in effect in the First Circuit, where that circuit's most populous state—Massachusetts—explicitly mandates the timely payment of wages and also provides for treble damages when an employer fails to pay timely.[87]

The Second Circuit has held that the "FLSA requires wages to be paid in a timely fashion."[88] Additionally, as the court explained in *Rogers v. City of Troy*, "what constitutes timely payment must be determined by objective standards," which include whether a deviation from the preexisting pay schedule: (i) "is made for a legitimate business reason"; (ii) "does not result in unreasonable delay in payment"; (iii) is intended to be permanent; and (iv) does not have the effect of evading the FLSA's substantive minimum wage or overtime requirements.[89] Under these factors, the Second Circuit held that a company did not violate the prompt payment requirement of the FLSA when it paid wages late as a result of changing its regular payday for business purposes.[90] Notably, though, *Rogers* dealt only with the FLSA's minimum wage provision. When dealing with overtime, the district courts in the Second Circuit focus instead on "how often late payments were made[,] ... how late they were[,] ... [and] on whether the payments were made as soon as practicable."[91] While "the Second Circuit has no bright line rule for determining what qualifies as an 'unreasonable' amount of time for an employer to delay paying its employees," several courts have held that "two weeks is an unreasonable amount of time for an employer to delay a paycheck."[92]

The Third Circuit has directly imported the language of the Department regulation discussed above, explaining that payment of overtime "may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may be delayed beyond the next pay day after such computation can be made."[93] This regulation, however, addresses only overtime payments, and it is unclear the extent to which the Third Circuit also applies its standard to the minimum wage context.

The Fourth Circuit has held that a claim for unpaid overtime arises on the payday that the wages are due, and the District of Maryland has explained that this also applies to a claim for minimum wages.[94] The Fifth Circuit has similarly held that both overtime and minimum wages are due on the normal payday.[95] And the Sixth Circuit has adopted the regulation at 29 CFR section 778.106 for the late payment of overtime.[96] Additionally, the Seventh Circuit has held, in *Calderon v. Witvoet*, that "the FLSA requires the employer to pay *on time*."[97] While that case addressed minimum wage, the case that the Seventh Circuit relied upon for its reasoning, *Brooklyn Savings Bank v. O'Neil*, dealt with overtime, something that the *Calderon* opinion acknowledged.[98] As such, the Seventh Circuit seems likely to apply this same requirement in the late payment of overtime context.

Similarly, in holding that a group of workers had alleged that they had suffered a sufficient injury to establish standing, the District of Minnesota in the Eighth Circuit recently explained that it did not matter whether an employer had allegedly made employees whole after realizing it had failed to pay them overtime.[99] Rather, because "failure to pay overtime on the regular pay day constitutes a violation of the FLSA," the workers had sufficiently alleged an injury.[100] Furthermore, while *Futrell* involved overtime payments, the court there relied in part on the Ninth Circuit's decision in *Biggs v. Wilson* for its reasoning, a case that, as the District of Minnesota stated, "concerned a similar FLSA provision on minimum wage."[101] Accordingly, it appears that the District of Minnesota will treat the overtime and minimum wage provisions the same. In *Biggs* the Ninth Circuit explained that the FLSA mandates that "employers shall pay a minimum wage," and that this "obligation kicks in once an employee has done covered work in any workweek."[102] As such, the court explained, the phrase "'shall pay' plainly connotes [']shall make a payment.['] If a payday has passed without payment, the employer cannot have met his obligation to 'pay.'"[103]

The Tenth Circuit does not appear to have addressed the issue. In *Benavides v. Miami Atlanta Airfreight, Inc.*, the Eleventh Circuit acknowledged that "liquidated damages may be available if the employer fails to pay [minimum] wages or overtime on the regular payment date."[104] Nevertheless, the court there held that the FLSA did not prohibit paying employees in arrears—on a "regular payment date" that was "seven or eight days" after the end of the pay period.[105] As the court explained, "no requirement exists those wages be paid simultaneously with the end of the pay period."[106]

There is some difference amongst the circuits on how to treat late payment issues, as well as some uncertainty regarding what, if any, distinction exists between how minimum wage and overtime late payments should be evaluated. However, there also seems to be at least a majority consensus that workers should be paid for work on the first pay date following the pay period in which they did that work unless there are some particular facts demonstrating that on a particular occasion doing so was not reasonably practicable. To the extent that employers will be allowed to deviate from that schedule, they will need to make at least *some* showing that the deviation is justified.

ONGOING LITIGATION OVER THE TIP CREDIT AND SIDE WORK

On October 29, 2021, WHD published in the Federal Register a Final Rule regarding the circumstances under which employers may use the tip credit

allowed by section 3(m) of the FLSA.[107] Effective as of December 28, 2021, this rule accomplishes several things:

- It withdraws a Final Rule issued during the Trump Administration that, had it gone into effect, would have eliminated WHD's "80/20 Rule" that limits to 20 percent of an employee's working time the amount of time a tipped employee may spend on tasks that do not directly and immediately generate tips while subject to the tip credit.[108]
- It codifies in regulations for the first time a version of the 80/20 Rule by creating three categories of activity: (i) "tip-producing work," which is subject to no temporal limits with respect to the tip credit; (ii) "directly supporting work," which is subject to at 20 percent temporal limit; and (iii) by implication, work that does not fall into either of the preceding categories, for which the employer may take no tip credit.[109]
- It declares, for the first time, that an employer may not take a tip credit for any continuous period of time that exceeds 30 minutes in which the employee performs only "directly supporting" work rather than "tip-producing" work.[110]

Trade associations are currently challenging the regulation, arguing that the Department impermissibly created a new definition of "tipped occupation" that lacks support under the FLSA.[111] After the Western District of Texas declined to issue a preliminary injunction solely on the basis of absence of irreparable harm, the Fifth Circuit reversed and remanded. The Fifth Circuit determined that the district court erred in its analysis of the irreparable harm prong of the preliminary injunction test in failing to acknowledge that "the nonrecoverable costs of complying with a putatively invalid regulation typically constitute irreparable harm."[112] The Fifth Circuit pointed out that the Department conceded that businesses will incur costs to comply with the rule. In addition to ordering reexamination of the irreparable harm prong, the Fifth Circuit ordered the district court to analyze the remaining prongs of the preliminary injunction test, including whether the threatened injury outweighs any harm that will result to the non-movant if the injunction is granted, and whether the injunction will serve the public interest.[113] The district court is currently considering the fully-briefed motion for a preliminary injunction and cross-motions for summary judgment, with a return trip to the Fifth Circuit all but inevitable regardless of which way the district court resolves those motions.

CASES TO WATCH

The following cases have the potential to have a major influence on the wage and hour space for years to come:

Non-Wage-And-Hour Cases

On May 1, 2023, the Supreme Court granted certiorari in *Loper Bright Enterprises v. Raimondo*[114] on the following question:

> Whether the Court should overrule *Chevron* or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.[115]

In *Loper Bright*, a collection of commercial fishing firms in southern New Jersey that participate in the Atlantic herring industry challenged a Final Rule by the National Marine Fisheries Service (NMFS) implementing the Magnuson-Stevens Act. The statute provides, among other things, that the NMFS may require vessels to carry federal observers. Under the Final Rule, the industry would not merely have to allow the observers to on the vessels but also pay the salaries of the monitors. The plaintiffs argued: (i) that while the statute authorized the placement of at-sea monitors aboard vessels, it "is silent as to whether Defendants may further require that vessel operators pay for the monitoring services";[116] (ii) "that certain canons of statutory interpretation demonstrate that Defendants have exceeded their authority";[117] and (iii) that "[t]here is no evidence of congressional recognition of any sort of pre-existing, implied authority to impose monitoring costs on the

regulated industry."[118] On June 15, 2021 the district court applied *Chevron* deference and granted the Secretary of Commerce's motion for summary judgment, holding that the defendants "acted within the bounds of their statutory authority" in promulgating the rule and that "[e]ven if Plaintiffs' arguments were enough to raise an ambiguity in the statutory text, the Court, for the same reasons identified above, would conclude that Defendants' interpretation is a reasonable reading of the [statute]."[119]

On August 12, 2022, a divided three-judge panel on the DC Circuit upheld the district court's ruling.[120] The DC Circuit reasoned that although the statute was silent as to who must pay for the monitoring, it was reasonable for the fisheries to bear the costs, because "[w]hen an agency establishes regulatory requirements, regulated parties generally bear the costs of complying with them."[121] A decision by the Supreme Court to overrule or to significantly curtail *Chevron* could upend decades of case law involving deference to Department regulations, leading to significant uncertainty regarding whether and to what extent the Department's pronouncements impose binding obligations on the regulated community.

Similarly, the Sixth Circuit is considering a challenge to the Occupational Safety and Health Act (OSH Act) under the non-delegation doctrine. In *Allstates Refractory Contractors, LLC v. Walsh*, a contractor sued the Secretary of Labor and the Occupational Safety and Health Administration (OSHA) challenging OSHA's ability to promulgate permanent safety standards.[122] The district court denied the challenge and held that OSHA's discretion to promulgate permanent safety standards is sufficiently limited by the intelligible principle under the OSH Act so as not to constitute a violation of the non-delegation doctrine. The court's decision relied on the definition section of the OSH Act, and specifically how the term "occupational safety and health standard" is defined. The court determined that, based on the definition and relevant case law, Congress lawfully granted OSHA the discretion to implement safety standards.[123] The Sixth Circuit heard oral argument on April 27, 2023, and a decision is pending.[124]

Although *Allstates* does not directly address wage and hour issues, the Sixth Circuit's decision may have a major impact on wage and hour cases, particularly given the extent that Congress, in contrast to the OSH Act, has left terms vague and undefined under the FLSA. The Sixth Circuit decision may also influence similar challenges pending in other jurisdictions.[125]

Arbitration and Jurisdiction

In *Singh v. Uber Technologies, Inc.*,[126] the Third Circuit joined the First[127] and Ninth Circuits[128] in holding that nationwide rideshare drivers do not constitute a "class of workers engaged in foreign or interstate commerce" under the exclusion of the Federal Arbitration Act (FAA) provided by section 1.[129] The Third Circuit rejected the drivers' argument that "even a trivial amount of interstate transportation work suffices to bring a worker within the exception[,]"[130] instead concluding that "[i]ncidental border crossings are insufficient if a class of workers is not typically involved with the channels of interstate commerce."[131] With almost 65 percent of Uber's most active drivers having never made at least one interstate trip, and with just 2.5 percent of uber trips being interstate, the Third Circuit affirmed the District of New Jersey's decision and held that, as a class, "Uber drivers are in the business of providing local rides that sometimes—as a happenstance of geography—cross state borders." The court stressed however, that the infrequency of the interstate trips was not dispositive, but also that if the court "[r]emove[d] interstate commerce from the equation, [] the work of Uber drivers remains fundamentally the same."[132]

In *Bristol-Myers Squibb Co. v. Superior Court*,[133] a group of plaintiffs consisting of 86 California residents and 592 out-of-state plaintiffs sued a pharmaceutical company (BMS), alleging that one of its prescription drugs had damaged their health. The Supreme Court held that the California state court lacked personal jurisdiction over the Defendant with respect to the claims brought by the out-of-state residents because California was not an "equivalent place" for BMS to an individual's domicile—"one in which the corporation is fairly regarded as at home."[134] The

Court also held that the claims brought by the non-resident Plaintiffs did not arise out of or relate to the Defendant's contacts with California because "BMS did not develop, create a marketing strategy for, manufacture, label, package, or work on the regulatory approval for Plavix in the State."[135] The *Bristol-Myers* case concerned the due process limitations on the exercise of jurisdiction by State courts, so the Court expressly "[left] open the question whether the Fifth Amendment imposes the same restrictions on the exercise of personal jurisdiction by a federal court."[136]

Since *Bristol-Myers*, a circuit split has developed regarding whether the decision applies to collective actions brought under the FLSA. In *Canaday v. The Anthem Companies, Inc.* ,[137] the Sixth Circuit affirmed a Tennessee District Court's decision to dismiss all the of the out-of-state overtime claims brought by nurses due to lack of personal jurisdiction. The court determined that "[g]eneral jurisdiction is not an option" because the Defendant insurance company was based in Indiana. To determine whether it had specific jurisdiction over the Anthem Companies, the court considered, "[i]s there a claim-specific and Anthem-specific relationship between the out-of-state claims and Tennessee?" The court answered that "Bristol-Myers goes a long way to showing why there is not."[138] The court then likened mass actions and collective actions, noting that "[t]he key link is party status. In an FLSA collective action, as in the mass action under California law, each opt-in plaintiff becomes a real party in interest, who must meet her burden for obtaining relief and satisfy the other requirements of party status."[139] The court determined that the out-of-state Plaintiffs failed to satisfy *Bristol-Myers's* requirements because Anthem did not employ them in Tennessee, pay them in Tennessee, or shortchange them overtime compensation in Tennessee.[140]

In *Vallone v. CJS Solutions Group, LLC*,[141] the Eighth Circuit affirmed a Minnesota District Court's decision to limit a collective action for travel-time wages under the FLSA to employees who either resided in or traveled to or from a job site in Minnesota.[142] The Eighth Circuit rejected Plaintiffs' argument that if "the court had personal jurisdiction over one set of claims that arose based on travel to Minnesota, the court could exercise jurisdiction over all travel-time claims against the defendant."[143] The court determined that "[p]ersonal jurisdiction must be determined on a claim-by-claim basis[,]" and that "[i]n order for a court to exercise specific jurisdiction over a claim," there must be an "affiliation between the forum and the underlying controversy"—"unconnected activities do not establish jurisdiction."[144]

On January 13, 2022, the First Circuit departed from the majority view when it affirmed a Massachusetts district court's denial of a motion to dismiss the out-of-state claims in a FLSA putative collective action in *Waters v. Day & Zimmerman NPS, Inc.*[145] The employer Defendant was based in Delaware with its principal place of business in Pennsylvania. The court determined that *Bristol Myers* was inapplicable because "[t]he Court's reasoning in BMS rests on Fourteenth Amendment constitutional limits on state courts exercising jurisdiction over state-law claims. Here, it is agreed that the Fourteenth Amendment does not directly limit a federal court's jurisdiction over purely federal-law claims."[146] The court observed that the Fifth Amendment "does not bar an out-of-state plaintiff from suing to enforce their rights under a federal statute in federal court if the defendant maintained the "requisite 'minimum contacts' with the United States."[147]

The court rejected the defendant's argument that Rule 4(k) of the Federal Rules of Civil Procedure "incorporates the Fourteenth Amendment's limits on the jurisdiction of federal courts wherever a federal statute does not provide for nationwide service of process[,]"[148] reasoning that it depends on the contention that Rule 4(k)(1) governs not just service of a summons, but also limits a federal court's jurisdiction after the summons is properly served."[149] The court explained that the rule's text revealed that "Rule 4 is limited to setting forth various requirements for effectively serving a summons on a defendant in federal court, thereby establishing personal jurisdiction over the defendant."[150] The court also noted that the rule's history demonstrated that "its limited purpose was to govern service of a

summons, not to limit the jurisdiction of the federal courts after a summons has been served."[151] The court then determined that "the FLSA and its legislative history show that Congress created the collective action mechanism to enable all affected employees working for a single employer to bring suit in a single, collective action. The FLSA's purpose was to allow efficient enforcement of wage and hour laws against large, multi-state employers, a 'broad remedial goal' that the Supreme Court has instructed 'should be enforced to the full extent of its terms.'"[152] The Supreme Court denied defendants petition for a writ of certiorari on June 6, 2023.[153]

In *Fischer v. Federal Express Corp.*,[154] a FedEx Ground security specialist in Pennsylvania brought a collective action against Federal Express Corporation for unpaid overtime under the FLSA. The plaintiff sought to certify a class consisting of both FedEx Ground security specialists who worked in Pennsylvania and FedEx Ground security specialists outside the state. The district court held that it did not have specific personal jurisdiction over the claims by the out-of-state plaintiffs, and on interlocutory appeal the Third Circuit affirmed, joining the Sixth and Eighth Circuits in ruling that "where the basis of personal jurisdiction in an FLSA collective action in a federal court is specific personal jurisdiction established by serving process according to Federal Rule of Civil Procedure 4(k)(1)(A), every plaintiff who seeks to opt in to the suit must demonstrate his or her claim arises out of or relates to the defendant's minimum contacts with the forum state."[155]

On March 6, 2023, the Supreme Court denied certiorari in *Fischer*,[156] leaving the circuit split, currently three circuits to one, unresolved.

Paid Time Off and Salary Basis

As a matter of first impression, the Third Circuit recently considered whether paid time off (PT) is part of an employee's salary for purposes of the regulations implementing the FLSA's executive, administrative, and professional exemptions. In *Higgins v. Bayada Home Health Care, Inc.*, a class of registered nurses claimed that deductions from their PTO bank for failing to meet productivity targets were effectively deductions from their salaries made in violation of the FLSA.[157] The Third Circuit held that PTO is not part of an employee's salary and determined that such deductions from an exempt employee's PTO bank do not undermine the salary basis of the employee's pay.[158] Although the FLSA does not explicitly define "salary," the court reasoned that there "appears to be a clear distinction between salary and fringe benefits" and when an "employer docks an employee's PTO, but not her base pay, the predetermined amount that the employee receives at the end of a pay period does not change."[159]

Notes

1 The views expressed in this paper are those of the authors in their individual capacity and do not necessarily represent the views of any other individual or entity, including their partners, associates, firms, clients, or anyone else. This paper draws in part on earlier papers, including Paul DeCamp, Wage and Hour Update (American Employment Law Council, October 2022).

2 Updating the Davis-Bacon and Related Acts Regulations, 87 Fed. Reg. 15,698 (Mar. 18, 2022).

3 https://www.federalregister.gov/documents/2023/08/23/2023-17221/updating-the-davis-bacon-and-related-acts-regulations.

4 See 29 CFR §§ 1 1.2 and 1.7.

5 See id. at §§ 1.3 and 5.5.

6 See id. at § 1.6(c)(1).

7 See id. at § 5.5(a)(11) and (b)(5); § 5.18.

8 Nondisplacement of Qualified Workers Under Service Contracts, 87 Fed. Reg. 42,552 (July 15, 2022).

9 See id. at 42,584-96 (proposed regulatory text).

10 See https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1235-AA42.

11 Independent Contractor Status Under the Fair Labor Standards Act, 85 Fed. Reg. 60,600 (Sept. 25, 2020).

12 See id. at 60,600-10.

13 Id. at 60,605.

14 Id. at 60,606.

15 Id. at 60,607.

16 See id. at 60,610-22.

17 See id. at 60,616-18.

18 Id. at 60,639 (proposed 29 C.F.R. § 795.105(b)).

19 Id.

20 Id. (proposed 29 C.F.R. § 795.105(c)).

21 Id.

22 Id.

23 Id. (proposed 29 C.F.R. § 795.105(d)(1)(i) (emphasis omitted)).

24 Id. (proposed 29 C.F.R. § 795.105(d)(1)(ii) (emphasis omitted)).

25 Id. (proposed 29 C.F.R. § 795.105(d)(2)(i) (emphasis omitted)).

26 Id. (proposed 29 C.F.R. § 795.105(d)(2)(ii) (emphasis omitted)).

27 Id. (proposed 29 C.F.R. § 795.105(d)(2)(iii) (emphasis omitted)).

28 Id. (proposed 29 C.F.R. § 795.110).

29 Id.

30 Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1,168 (Jan. 7, 2021).

31 Independent Contractor Status Under the Fair Labor Standards Act (FLSA): Withdrawal, 86 Fed. Reg. 24,303 (May 6, 2021).

32 See Coalition for Workforce Innovation v. Walsh, No. 1:21-CV-130, 2022 WL 1073346 (E.D. Tex. Mar. 14, 2022).

33 See id. at *3-11.

34 See id. at *11-19.

35 See Order, Coalition for Workforce Innovation v. Walsh, No. 22-40316 (5th Cir. June 10, 2022).

36 Independent Contractor Status Under the Fair Labor Standards Act, 87 Fed. Reg. 62,218 (Oct. 13, 2022).

37 See Order, Coalition for Workforce Innovation v. Walsh, No. 22-40316 (5th Cir. June 9, 2023).

38 See https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1235-AA39.

39 See https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202304&RIN=1235-AA36.

40 Hoffman-La Roche Inc. v. Sperling, 493 U.S. 165, 170 (1989) (quoting 29 U.S.C. § 216(b)). Hoffman-La Roche was actually an age-discrimination case brought under the Age Discrimination in Employment Act of 1967 (the "ADEA"). That statute, however, incorporates 29 U.S.C. § 216(b), the FLSA's collective action provision. See 29 U.S.C. § 626(b) ("The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section [] ... 216 ... of this title[.]").

41 See, e.g., Swales v. KLLM Transport Services, LLC, 985 F.3d 430, 435 (5th Cir. 2021) (explaining that the "trial court's notice-giving role is pivotal to advancing the goals and evading the dangers of collective actions."). Some FLSA actions with multiple plaintiffs do not require notice such as actions in which unions or other organizations support the action. Although court-approved notice is not sought in these cases, there may be a finding of similarly situated at some point in the litigation. E.g., Foster v. City of New York, 2021 U.S. Dist. Lexis 60979, 2021 WL 1191810 (S.D.N.Y. Mar. 30, 2021).

42 Hoffman-LaRoche, 493 U.S. at 169-70 (emphasis added).

43 Id. at 170-71.

44 Campbell v. City of Los Angeles, 903 F.3d 1090, 1110 (9th Cir. 2018).

45 Hoffman-La Roche, 493 U.S. at 170-71.

46 See Clark v. A&L Homecare and Training Center, LLC, __F.4th__, 2023 WL 3559657, at *1 (6th Cir. 2023) (citing Lusardi v. Xerox Corp., 118 F.R.D. 351, 361 (D.N.J. 1987)).

47 Although some courts will find plaintiffs to be similarly situated even without a common decision, policy, practice, or plan, it is generally accepted that, at this stage, a sufficient showing that one existed is enough to establish that workers are similarly situated. See, e.g., Barron v. Henry Cnty. School Sys., 242 F. Supp. 2d 1096, 1103 (M.D. Ala. 2003) (holding that, while not necessary, evidence of uniform practice supports conditional certification); Myers v. Hertz Corp., 624 F.3d 537, 555 (2d Cir. 2010) (quoting Hoffman v. Sbarro, Inc., 982 F. Supp. 249, 261 (S.D.N.Y. 1997)).

48 See, e.g., Fasanelli v. Heartland Brewery, Inc., 516 F. Supp. 2d 317, 311 (S.D.N.Y. 2008); Trezvant v. Fidelity Emp. Servs. Corp, 434 F. Supp. 2d 40, 48 (D. Mass. 2006).

49 Clark, 2023 WL 3559657, at *1.

50 See, e.g., Trezvant, 434 F. Supp. 2d at 45; Clark, 2023 WL 3559657, at *1.

51 The exact standard to be applied differs by circuit. The Third Circuit, for example, applies a preponderance of the evidence standard. See, e.g., Zavala v. Walmart Stores, Inc., 691 F.3d 527, 537 (3d Cir. 2012). In various other jurisdictions, absent guidance from the circuit courts, district courts have "gradually tended to coalesce around" a substantial evidence standard. Campbell v. City of Los Angeles, 903 F.3d 1090, 1118 (9th Cir. 2018). And the Ninth Circuit itself in Campbell described the standard as akin to the standard applied to a motion for summary judgment, at least where a decertification decision "overlaps" with the merits of the underlying claims. Id. at 1119.

52 Campbell, 903 F.3d at 1114. Notably, the Ninth Circuit in Campbell eventually did not adopt this test, instead holding that "plaintiffs are similarly situated ... to the extent they share a similar question of law or fact material to the disposition of their FLSA claims." Id. at 1118. The Second Circuit has similarly rejected the three-prong test in favor of an inquiry into whether the plaintiffs "share one or more similar questions of law or fact material to the disposition of their FLSA claims." Scott v. Chipotle Mexican Grill, Inc., 954 F.3d 502, 517 (2d Cir. 2020).

53 Campbell, 903 F.3d at 1108-09; Clark, 2023 WL 3559657, at *8 (White, J., concurring in part and dissenting in part).

54 See, e.g., White v. Baptist Memorial Health Care Corp., 699 F.3d 869, 877 (6th Cir. 2012) ("District courts determine whether plaintiffs are similarly situated in a two-step process.").

55 985 F.3d 430, 441 (5th Cir. 2021).

56 Id. at 434 (emphasis added).

57 See Clark, 2023 WL 3559657 (explaining that the Swales "actually similar" standard "apparently [requires] that the district court must find by a preponderance of the evidence" that the putative plaintiffs are similarly-situated).

58 Clark, 2023 WL 3559657, at *4.

59 Id. at *4 (citing Memphis A. Philip Randolph Institute v. Hargett, 2 F.4th 548, 554 (6th Cir. 2021)).

60 Id.

61 Clark, 2023 WL 3559657, at *4; Swales, 985 F.3d at 440-42; Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165, 174 (1989).

62 Swales, 985 F.3d at 434, 441-42; Clark, 2023 WL 3559657, at *4.

63 Clark, 2023 WL 3559657, at *4.

64 Swales, 985 F.3d at 441-42; see also id. at 441 ("The fact that a threshold question is intertwined with a merits question does not itself justify deferring those questions until after notice is sent out.").

65 Clark, 2023 WL 3559657, at *5.

66 Id. (citing Pierce v. Wyndham Vacation Resorts, Inc., 922 F.3d 741, 744 (6th Cir. 2019)).

67 143 S. Ct. 677 (2023).

68 See Fact Sheet #17G: Salary Basis Requirement and the Part 541 Exemptions Under the Fair Labor Standards Act (FLSA), U.S. Dep't of Labor, Wage and Hour Division (Revised Sept. 2019), https://www.dol.gov/agencies/whd/fact-sheets/17g-overtime-salary.

69 29 C.F.R. § 541.602(a).

70 29 C.F.R. § 541.602(b); see also Helix Energy Solutions v. Hewitt, 143 S. Ct. at 684.

71 Hewitt v. Helix Energy Sols. Grp., Inc., 15 F.4th 289 (5th Cir. 2021) (en banc); see also Hewitt v. Helix Energy Solutions Group, Inc., 956 F.3d 341 (5th Cir. 2020).

72 Helix, 143 S. Ct. at 682.

73 Id. at 685-87 (denying employer's argument that the word "receives" in § 541.602(a) changes the meaning of "salary basis" to be determined by when an employee receives a paycheck rather than how employee's pay was calculated).

74 Id. at 687 (determining that since § 541.602(b) explicitly applies to workers who are paid hourly or daily, § 541.602(b) is a continuation of § 541.602(a) and daily rate workers are excluded from the salary basis test of § 541.602(a)).

75 1 F.3d 1537, 1539 (9th Cir. 1993).

76 Id.

77 Avalos v. United States, 54 F.4th 1343, 1349-50 (Fed. Cir. 2022) (internal quotation marks omitted) (surveying cases).

78 Avalos 54 F.4th at 1349 (involving claims for working without any pay during shutdown from December 28, 2018, through January 24, 2019); Martin v. United States, 54 F.4th 1325, 1327-28 (Fed. Cir. 2022) (involving claims for work performed during shutdown from October 1, 2013, through October 16, 2013).

79 Avalos, 54 F.4th at 1349.

80 Id. at 1348 (quoting 31 U.S.C. § 1341(a)(1)) (alterations omitted).

81 Id. at 1351-52.

82 Id. at 1350-51 (quoting Epic Sys. Corp. v. Lewis, __ U.S. __ , 138 S. Ct. 1612, 1624 (2018); Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940)).

83 Id. at 1350 (quoting Walling v. Harnischfeger Corp., 325 U.S. 427, 432-33 (1945)).

84 Avalos, 54 F.4th at 1350.

85 Id. at 1347.

86 Ventura v. Bebo Foods, Inc., 738 F. Supp. 2d 8, 21-22 (D.D.C. 2010).

87 See, e.g., Lambirth v. Advanced Auto, Inc., 140 F. Supp. 3d 108, 109 (D. Mass. 2015) (bringing a claim for unpaid overtime under the FLSA but bringing a claim for late payment under the Massachusetts pay law).

88 Rogers v. City of Troy, 148 F.3d 52, 57 (2d Cir. 1998).

89 Id. at 58.

90 Id. at 60.

91 Lunch v. City of New York, 291 F. Supp. 3d 537, 548 (S.D.N.Y. 2018) (quoting Conzo v. City of New York, 667 F. Supp. 2d 279, 288 (S.D.N.Y. 2009).

92 Coley v. Vannguard Urban Improvement Ass'n, Inc., No. 12-CV-5565 (PKC) (RER), [2018 BL 105283], 2018 U.S. Dist. LEXIS 50787, [2018 BL 105283], 2018 WL 1513628, at *13 (E.D.N.Y. Mar. 29, 2018).

93 Brooks v. Village of Ridgefield Park, 185 F.3d 130, 135 (3d Cir. 1999) (quoting 29 C.F.R. § 778.106).

94 Roland Elec. Co. v. Black, 163 F.2d 417, 421 (4th Cir. 1947); Rogers v. Savings First Mortgage, LLC, 362 F. Supp. 2d 624, 631 (D. Md. 2005).

95 Atlantic Co. v. Broughton, 146 F.3d 480, 482 (5th Cir. 1944) ("[I]f an employer on any regular payment date fails to pay the full amount of the minimum wages and overtime compensation due an employee, there immediately arises an obligation upon the employer to pay the employee . . . liquidated damages.").

96 Herman v. Fabri-Centers of America, Inc., 308 F.3d 580, 591 (6th Cir. 2002) (quoting 29 C.F.R. § 778.106).

97 999 F.2d 1101, 1107 (7th Cir. 1993).

98 Calderon, 999 F.2d at 1107 (citing Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 707 (1945)).

99 Futrell v. Cargill, Inc., __ F. Supp. 3d __, 2023 WL 2529227, at *3 (D. Minn. Mar. 15, 2023).

100 Id.

101 Id. (citing Biggs v. Wilson, 1 F.3d 1537, 1539 (9th Cir. 1993)).

102 1 F.3d at 1539.

103 Id.

104 322 Fed.Appx. 746, 747 (11th Cir. 2009) (per curiam) (citing Atlantic Co. v. Broughton, 146 F.2d 480, 482 (5th Cir. 1945)).

105 Id.

106 Id.

107 Tip Regulations Under the Fair Labor Standards Act (FLSA); Partial Withdrawal, 86 Fed. Reg. 60,114 (Oct. 29, 2021).

108 See id. at 60,157-58.

109 See id. (29 C.F.R. § 531.56(f)).

110 See id. at 60,158 (29 C.F.R. § 531.56(f)(4)(ii)).

111 Rest. Law Ctr. v. United States Dep't of Lab., No. 1:21-CV-1106-RP, 2022 WL 526243 (W.D. Tex. Feb. 22, 2022), rev'd and remanded, 66 F.4th 593 (5th Cir. 2023). One of the authors of this paper is counsel of record for the plaintiffs in this litigation.

112 Rest. Law Ctr. v. United States Dep't of Lab., 66 F.4th 593, 597 (5th Cir. 2023).

113 Id. at 600.

114 See Order (U.S. May 1, 2023) (No. 22-451) (granting certiorari).

115 See https://www.supremecourt.gov/docket/docketfiles/html/qp/22-00451qp.pdf (question presented; citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

116 Loper Bright Enterprises, Inc., 544 F. Supp. 3d 82, 104 (D.D.C. 2021).

117 Id. at 106.

118 Id. at 106–07 (quoting Pls.' Mot., ECF No. 18-1 at 31).

119 Id. at 107.

120 Loper Bright Enterprises, Inc. v. Raimondo, 45 F.4th 359 (D.C. Cir. 2022).

121 Id. at 366.

122 625 F. Supp. 3d 676 (N.D. Ohio 2022).

123 Id. at 681-84.

124 See Docket, Allstates Refractory Contractors, LLC v. Walsh, No. 22-3772 (6th Cir.).

125 The complaint in Mayfield v. U.S. Department of Labor, No. 1:22-cv-00792, filed in August 2022 in in the Western District of Texas, challenges the U.S. Department of Labor's authority to define overtime exemptions pursuant to the non-delegation doctrine.

126 67 F.4th 550 (3d Cir. 2023), as amended (May 4, 2023).

127 Cunningham v. Lyft, Inc., 17 F.4th 244 (1st Cir. 2021).

128 Capriole v. Uber Technologies, Inc., 7 F.4th 854 (9th Cir. 2021).

129 9 U.S.C. § 1.

130 Singh, 67 F.4th at 559.

131 Id.

132 Singh, 67 F.4th at 560.

133 137 S. Ct. 1773, 1780 (2017).

134 Id. at 1780 (quoting Daimler AG v. Bauman, 571 U.S. 117, 118 (2014)).

135 Id. at 1775.

136 Id. at 1784.

137 9 F.4th 392 (6th Cir. 2021).

138 Id. at 397.

139 Id.

140 Id.

141 9 F.4th 861, 863 (8th Cir. 2021).

142 Id. at 864.

143 Id. at 865.

144 Id. (quoting Bristol-Myers Squibb, 137 S. Ct. at 1781 (emphasis added) (internal quotation omitted)).

145 23 F.4th 84 (1st Cir.), cert. denied, 2022 WL 1914117 (U.S. June 6, 2022) (No. 21-1192).

146 Id. at 92.

147 Id. (quoting United Elec. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1085 (1st Cir. 1992)).

148 Id. (noting that the FLSA does not authorize nationwide service of process).

149 Id. at 93.

150 Id.

151 Id. at 94.

152 Id. at 96-97 (quoting Hoffman-LaRoche, Inc. v. Sperling, 493 U.S. 165, 173 (1989)).

153 142 S. Ct. 2777 (2022).

154 42 F.4th 366 (3d Cir. 2022).

155 Id. at 370.

156 143 S. Ct. 1001 (Mar. 6, 2023) (No. 22-396) (order denying certiorari).

157 62 F.4th 755 (3d Cir. 2023).

158 Id. at 760-63.

159 Id. (construing 29 C.F.R. § 541.602(a)(1)).