Reflections Upon USDOL "Tip Retention" Enforcement

Insights
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We recently wrote about two federal appellate decisions holding that tipped employees for whom no federal Fair Labor Standards Act Section 3(m) "tip credit" has been taken, and to whom all FLSA minimum wages and overtime compensation due have been paid, may not sue under that law to recover tips that their employers allegedly unlawfully retained.

The plaintiffs in those cases based their claims solely upon a 2011 U.S. Department of Labor regulation at 29 C.F.R. § 531.52. This provision says in relevant part:

Tips are the property of the employee whether or not the employer has taken a tip credit . . . under the FLSA. The employer is prohibited from using an employee's tips, whether or not it has taken a tip credit, for any reason other than that which is statutorily permitted in [the FLSA]: As a credit against its minimum wage obligations to the employee, or in furtherance of a valid tip pool.

The courts determined that FLSA Section 16(b) provides no private right of action to file tip-recovery lawsuits in the absence of allegations that the employees had not received FLSA-required minimum-wage or overtime compensation. In the courts' view, this provision allows one or more individuals to bring claims only for violations of FLSA Section 6 (minimum wage) or Section 7 (overtime). Both courts saw USDOL friend-of-the-court briefs as supporting their rulings.

However, the courts' comments suggested that, while *individuals* may not sue under the FLSA to enforce the 2011 regulation in these circumstances, *USDOL* is permitted to pursue those claims. This appears to be incorrect.

USDOL Enforcement Avenues Are No Broader

There are two ways for USDOL to bring substantive civil enforcement lawsuits under the FLSA.

One is through FLSA Section 16(c), which authorizes USDOL to supervise an employer's payment of "the unpaid minimum wages or the unpaid overtime compensation owing" under Section 6 or Section 7, and which further says that USDOL may "bring an action . . . to recover the amount of unpaid minimum wages or overtime compensation . . .." Nothing in Section 16(c) grants USDOL any free-floating power to seek court enforcement of the tip-retention regulation in the absence of unpaid sums of one such kind or the other.

USDOL may also sue under FLSA Section 17, which in pertinent part authorizes federal courts to restrain employers from "withholding of payment of minimum wages or overtime compensation found by the court to be due" under FLSA Section 6 or Section 7. But again, Section 17 confers no generalized authority upon USDOL to use the provision in an effort to "enforce" its 2011 regulation where no such FLSA-required sums are due.

The Bottom Line

The rationales used to decide both of these cases lead to the conclusion that, in the situations they involved, *neither* an individual *nor* USDOL is permitted to file an FLSA lawsuit based simply upon the "tips are the employee's property" statements in 29 C.F.R. § 531.52. Moreover, by taking the position that there is no individual right to sue in these circumstances, USDOL has essentially acknowledged that neither may *it* file such claims.

Of course, the more-fundamental question is still whether the agency's Section 531.52 is legally unfounded in the first place insofar as it purports to regulate the tip-related conduct of an employer that does not take the FLSA tip-credit (see our update here). If the regulation *is* beyond USDOL's authority in that respect, then naturally there is no need to consider whether or as to whom there is any related cause of action.