Serenity Now – Looking Back On USDOL's Actions Mid-Year, And A Sneak Peek At What Might Be Coming (Updated 06 26 18)

Insights
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UPDATED 06 26 18: The U.S. Supreme Court has opted not to hear the challenges to the USDOL's 2011 rule regarding tips. While an opinion from the high court might seem unnecessary given the recent amendment, discussed below, you can expect courts to continue grappling with pre-amendment cases and, presumably, for the USDOL to submit arguments consistent with its recent brief.

We are almost half way through 2018, and this year has been filled with fast and furious changes at USDOL. Proposed tip credit changes (Check, including a reaction from Congress and more tip credit changes on the horizon). Voluntary compliance programs (Check). Supreme Court cases that perhaps change the way we look at all FLSA exemption cases (Check). All of this, in less than six months of time. Well, I think you get the point. We will try to unpack these changes a little, and tell you what you might expect before trading in your 2018 calendar for the new year.

Tipped Over

First and foremost, tip credit changes have been abound in 2018. In December 2017, USDOL published a proposal to revise its 2011 tip regulation and explicitly permit mandatory tip pooling arrangements that include non-customarily tipped employees, provided that the employer does not take the tip credit. In other words, USDOL was about to clarify that, if employees are paid at least minimum wage, employers can mandate whatever tip pooling arrangements they would like without violating the FLSA.

This change, as we wrote here, was just a correction given that the 2011 regulation stating otherwise lacked statutory authority. Nonetheless, it was highly controversial. Employee advocates (and the media) claimed that this regulation would lead to employers "stealing" tips from employees. In March Congress acted suddenly and fairly decisively. As part of a budget reconciliation bill, Congress amended the FLSA to provide that an *employer* (as well as "managers and supervisors") cannot keep tips for itself for any purpose, regardless of whether it takes the tip credit. Congress further noted that the 2011 regulation from USDOL "shall have no further force or effect" to the extent that portions do not address Section 3(m) as it existed at the time. (That's perfectly clear, right?) Since then, USDOL has told the Supreme Court (in its brief in *National Restaurant Association*

right?) Since then, USDOL has told the Supreme Court (in its brief in *National Restaurant Association v. Department of Labor*) that the 2011 position was invalid, and that it should not be relied upon by courts.

So what does that leave us with? USDOL announced last month that it intends to engage in rulemaking regarding Congress' change to the FLSA and, thus, the tip credit rules, later this summer. In the meantime, we are left with somewhat unclear legislation, though at least we have some non-regulatory guidance from USDOL, particularly with respect to how it will determine which employees are akin to an employer.

Getting Paid

USDOL firmly established that they are focused on achieving compliance (perhaps more so than enforcement) when USDOL announced in March that it was rolling out its Payroll Audit Independent Determination (PAID) program. We are now a few months into the 6 month pilot program, so it is not yet clear whether anyone is taking advantage of this program, or even if there are clear advantages to using this program. Interestingly, state governments have had the most to say on the subject, and it has not been favorable. With all due respect, it seems that these representatives and others who might oppose the program do not fully grasp how wage-hour matters are resolved. The USDOL has resolved *federal* wage-hour claims for decades without regard to similar claims based on the requirements of other jurisdictions. Moreover, employers often resolve *state* wage-hour claims on their own without *any* supervision from any government agency. Our conclusion on the PAID program – a laudable goal, but the jury is still out…check back at the end of the year.

Standard Of Living

In *Encino Motorcars, LLC v. Navarro*, the Supreme Court sided with Fisher Phillips attorneys (shameless plug, I know) and found that Service Advisors could meet the exemption specific to certain dealership employees at Section 213(b)(10) of the FLSA. You can read more about that here.

BUT, they also did something groundbreaking. To understand the importance of the statements in this Supreme Court decision, some background may be necessary. Almost every federal circuit court nationwide has some version of the same principle that "exemptions to the FLSA should be construed narrowly." As a result, courts have been hesitant to find that an exemption applies. Apparently, that entire approach was unfounded. According to Justice Thomas' opinion, "the FLSA gives no 'textual indication' that its exemptions should be construed narrowly," so "'there is no reason to give [them] anything other than a fair (rather than a "narrow") interpretation.'" Following *Encino Motorcars*, courts can no longer simply rely on the familiar narrowly-construing crutch to deny an employee's exempt status. Rather, courts must "give the exemption . . . a fair reading" under the law.

This could be a real game-changer. Moving forward, every single employer defending an employee's exempt status likely will cite to *Encino* in seeking to achieve fair and neutral readings on the application of exemptions. So will it have any impact? A great question…that we do not know the answer to yet. But one thing is for certain – we have a new weapon to use in defending misclassification cases, and we hope it is a strong one.

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But Wait Sports Fans, There's More...

With everything happening at USDOL in the last 6 months, it's hard to believe that we have a lot more to come before 2018 is over. Buckle your seatbelts, because the table below shows what the USDOL has on its calendar for the rest of the year (and January of next year).

Agency / Division	Anticipated NPRM	Title of Proposed Rulemaking	RIN
DOL/WHD	August 2018	Tip Regulations Under the Fair Labor Standards Act (FLSA)	1235-AA21
DOL/WHD	September 2018	Regular Rate Under the Fair Labor Standards Act	1235-AA24
DOL/WHD	October 2018	Expanding Apprenticeship and Employment Opportunities for 16 and 17-Year Olds Under the FLSA	1235-AA22
DOL/WHD	January 2019	Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees	1235-AA20

The Bottom Line

Tip regulations, regular rate regulations, employing minor regulations, and the long awaited new overtime rule. Whew, I'm exhausted just typing all of this in one sentence. That is a lot to get done in a small amount of time. I could sit back and further pontificate about the potential content of the proposed regulations, but we are all better served by waiting to see what they actually say. So instead, for those who caught the Seinfeld reference in the title, you can wait until our post after the proposed regulations come out and then ask, "Haven't we already had this conversation before?"

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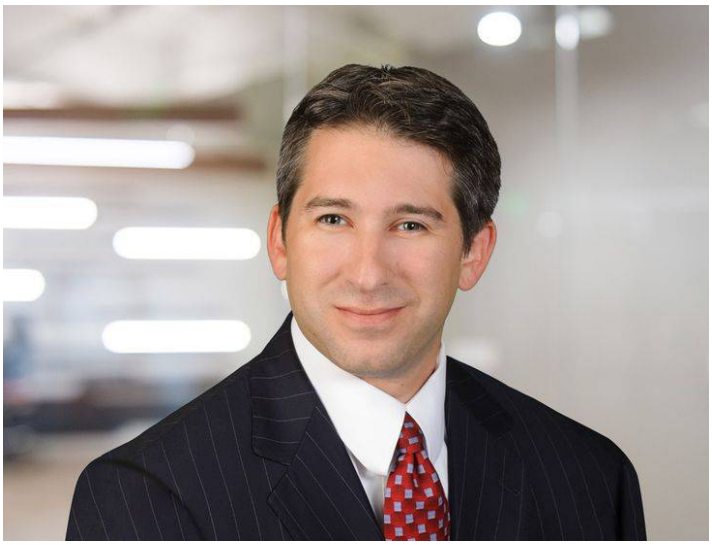

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