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# 2019 Wage & Hour Developments: A Year in Review - Supreme & Federal Court Cases

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## INTRODUCTION

Federal and state laws regulating the payment of wages continue to develop at a rapid pace. States continue to increase their minimum wage, despite the federal minimum wage remaining stagnant at $7.25 per hour since 2009. Statewide, Washington now has the highest minimum wage in the country, at $13.50 per hour, although the District of Columbia bests it at $14.00 per hour. However, some counties and local jurisdictions have even higher rates, with Emeryville, California continuing to lead the pack at $16.30 per hour. The long-awaited federal overtime rule, raising the salary level for exempt white collar workers, also was finalized, increasing the minimum annual salary from $23,660 to $35,568. But several states have raised the bar there, too, requiring even higher salary levels. Currently, New York leads that group, requiring an annual salary as high as $58,500 (in New York City) to satisfy the white collar exemptions.

The federal Department of Labor has also been busy— finalizing rules addressing how to calculate the "regular rate of pay," a necessary prerequisite to determining the proper overtime rate; issuing a proposed regulation clarifying use of the fluctuating workweek method of pay; rescinding the so-called "80/20 Rule," a thorn in the side of hospitality employers; and revising the regulations defining who is a "joint employer."

So in case you missed it, here is a summary of some of the high (and low) lights of 2019.

### Supreme Court Upholds Auer Agency-Deference Doctrine

Two Supreme Court cases are noteworthy this year, although neither directly address wage and hour issues. In Kisor v. Wilkie, 139 S. Ct. 2400 (2019) and Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019), the Supreme Court addressed whether courts must continue to defer to agency interpretations of their own regulations—they do, but the circumstances in which such deference is required is now more limited. The decision, thus, reduces the ability of agencies, including the Department of Labor, to implement changes through informal guidance. In the second case, Lamps Plus, the Court continued its long line of cases upholding the enforceability of arbitration agreements under the Federal Arbitration Act, including class action waivers, often an issue in wage and hour litigation, holding classbased arbitrations cannot be implied, but expressly agreed to by the parties.

By the thinnest of margins, the U.S. Supreme Court declined to overrule the so-called Auer (or Seminole Rock) deference doctrine. Kisor v. Wilkie, 2019 U.S. 4397 (June 26, 2019).

Generally, under Auer, a court should defer to an agency's interpretation of its own ambiguous regulation, so long as that interpretation is reasonable, even if the court believes another reasonable reading of the regulation is the better reading. The doctrine was first established more than 20 years ago in Auer v. Robbins, 519 U.S. 452 (1997), although its roots can be traced back several decades earlier, to Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

The Auer doctrine has had a steady stream of critics who argue, among other things, that the doctrine violates separation of powers, as it permits an agency to implement a regulation, itself determine what the law means, and then demand that courts defer to its interpretation. Some also argue that the doctrine encourages agencies to issue vague regulations, and then use sub-regulatory guidance, not subject to the notice-and-comment requirements of the Administrative Procedure Act (APA), to expand upon those regulations.

The Auer doctrine has long been derided by those opposed to the growing size and role that federal agencies now play — the so-called administrative state.

With a swing vote from Chief Justice John Roberts, the Auer doctrine survives, albeit not unscathed and a shadow of its former self. The Court, in further defining the doctrine's application, has significantly limited it to the point where the Chief Justice noted in his separate concurrence that the "distance" between the plurality view (permitting deference in some circumstances) and that of Justice Neil Gorsuch, who would have overruled Auer in its entirety, is "not as great as would initially appear." Chief Justice Roberts did not join the plurality opinion, authored by Justice Elena Kagan and joined by Justices Stephen Breyer, Ruth Bader Ginsburg and Sonia Sotomayor. While the plurality upheld the Auer doctrine on its merits, Chief Justice Roberts instead refused to abandon the doctrine only because of stare decisis, resulting in what Justice Gorsuch described as a doctrine "maimed and enfeebled – in truth, zombified." Justice Gorsuch's opinion was joined in whole or in part by Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh. So, the Auer doctrine survives for now, albeit greatly weakened. One thing is guaranteed: Parties will be litigating whether the doctrine applies in a given case for years to come.

## Class-Based Arbitration Requires Express Consent of Parties

Class action arbitration is such a departure from ordinary, bilateral arbitration of individual disputes that courts may compel class action arbitration only where the parties expressly declare their intention to be bound by such actions in their arbitration agreement, the U.S. Supreme Court ruled in a 5-4 decision. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019). Thus, the Supreme Court concluded, "Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis."

Following the Court's decision, arbitration agreements must clearly and unmistakably state that the parties agree to resolve class and collective actions through arbitration. Without such a clear agreement, a party cannot be compelled to class arbitration.

## OTHER NOTABLE FEDERAL CASES

### Ninth Circuit Refuses to Expand California De Minimis Doctrine

In 2018, the California Supreme Court held that the de minimis doctrine as developed under federal law — allowing employers to forego paying tracking and paying employees for small amounts of work time — was inapplicable to claims under that state's labor laws, while noting that a more limited version of the doctrine might apply under some circumstances. Troester v. Starbucks Corp., 5 Cal. 5th 829 (2018). When do those circumstances exist?

Not very often, the U.S. Court of Appeals for the Ninth Circuit held in a June 2019 ruling. Rodriguez v. Nike Retail Servs., 2019 U.S. App. LEXIS 19475 (9th Cir. June 28, 2019). Rejecting the defendant-employers' arguments that a minute or less automatically constitutes a de minimis amount of time, and that an accumulation of such minutes still fails to constitute compensable time, the Court of Appeals concluded that such an interpretation of Troester not only would "read far too much into Troester's passing mention of 'minutes,' but it would also clash with Troester's reasoning, which emphasized the requirement under California labor laws that 'employee[s] must be paid for all hours worked or any work beyond eight hours a day.'"

The Ninth Circuit added, "We doubt that Troester would have been decided differently if the closing tasks at issue had taken only 59 seconds per day." "Instead," it continued, "we understand the rule in Troester as mandating compensation where employees are regularly required to work off the clock for more than 'minute' or 'brief' periods of time."

Thus, employers need not account for exceedingly brief periods of time (i.e., "split-second absurdities") or short periods of time that are so "irregular that it is unreasonable to expect the time to be recorded." But, "[a]fter Troester, an employer that requires its employees to work minutes off the clock on a regular basis or as a regular feature of the job may not evade the obligation to compensate the employee for that time by invoking the de minimis doctrine."

Therefore, in California the de minimis doctrine will rarely provide a defense to an employer's failure to compensate its employees for all time spent on work-related tasks, including pre- and post-shift inspections. Employers with operations in California need to ensure that their employee inspection, timekeeping, and other policies and procedures properly account for all such time.

**Third Circuit Addresses Bonuses as "Remuneration" for Overtime Purposes, Applies Supreme Court's "Fair Reading" Mandate to FLSA as a Whole**

When an employer permits its employees to participate in a bonus program offered by the employer's client, based on the work performed for that client, those bonuses do not always qualify as "remuneration for employment" that must be included in the employee's "regular rate" for purposes of calculating overtime pay due under the Fair Labor Standards Act (FLSA), the U.S. Court of Appeals for the Third Circuit Court held. Secretary, U.S. Dep't of Labor v. Bristol Excavating, Inc., 2019 U.S. App. LEXIS 24767 (3d Cir. Aug. 20, 2019).

Generally, the overtime provisions of the FLSA require employers to pay employees one-and-a-half times their "regular rate" of pay for all hours in excess of 40 per workweek. 29 U.S.C. § 207. With limited exceptions, the regular rate includes "all remuneration for employment paid to, or on behalf of, the employee." However, what constitutes "remuneration for employment" is not defined in the FLSA.

The Third Circuit rejecting the Department of Labor's (DOL) contention that the FLSA's silence on what constitutes "remuneration for employment" means that all compensation, from whatever source, must be included. It instead concluded that "the silence of the Act is better understood as evidence that Congress took it for granted that it was only regulating the employer-employee relationship, not re-writing that relationship to impose the effects of decisions made by third parties."

In reaching its conclusion, the Third Circuit held that "looking to the parties' agreement protects the employer from having to pay for a third party's generous actions," and that it would be unfair to force employers to include promised bonuses from third parties as remuneration in the regular rate of pay unless and until the evidence demonstrates that those bonuses have become part of the pay calculation agreed to in some fashion by the employer and employee.

While the DOL argued that its approach was consistent with the "broad remedial purpose" of the FLSA, the Third Circuit shot back, noting that this argument ignores another statement in the Congressional findings underlying the FLSA: that protecting the well-being of workers is to be done "without substantially curtailing employment or earning power" and that imposing unexpected costs on employer does not work to the long-term benefit of employees."

The Third Circuit cited to Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018), in which the Supreme Court rejected a "narrow interpretation" of the FLSA exemptions in favor of "fair reading" standard. Significantly, it extended the Supreme Court's reasoning to the FLSA as a whole, noting that a "fair reading of the FLSA, neither narrow nor broad, is what is called for."

The Third Circuit has jurisdiction over the federal courts in Pennsylvania, New Jersey, and Delaware.

**Second Circuit Sheers Cosmetology Student's Claims in Intern-or-Employee Case**

Concluding that a student at a for-profit cosmetology academy was the "primary beneficiary" of the hours he spent training at the academy's salon, the U.S. Court of Appeals for the Second Circuit upheld the district court's determination that the student was an intern, and not an employee entitled to minimum wage or overtime under the FLSA or the New York Labor Law. Velarde v. GW GJ, Inc., 2019 U.S. App. LEXIS 3536 (2d Cir. Feb. 5, 2019).

In upholding the district court's grant of judgment on the pleading to the defendants, the Second Circuit reviewed the "totality of the circumstances" of the plaintiff's training program against the multi-factor analysis it set in Glatt v. Fox Searchlight Pictures, Inc., 811 F.3d 528 (2d Cir. 2016).

In its analysis, the Second Circuit noted that some of these factors were less applicable in the vocational training context than in other internship programs (for example, the absence of an expectation of future employment with the institution). Nevertheless, the Court readily concluded that the plaintiff was the primary beneficiary of the school's program, including the time spent at the salon honing his practical skills, given that, without such a program, the plaintiff would not satisfy the state's requirements to obtain his cosmetology license. The mere fact that the academy derived some benefit from the practical training (i.e., any profits it received from the salon services provided to the public) did not necessarily mean the school was the primary beneficiary.

The Second Circuit has jurisdiction over the federal courts in New York, Connecticut, and Vermont.



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