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Employment Law This Week - October 2, 2017: Special “Wage and Hour” Edition

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We invite you to view *Employment Law This Week* - a weekly rundown of the latest news in the field. We look at the latest trends, important court decisions, and new developments that could impact your work.

This week’s stories include ...

(1) DOL Overtime Exemption Thresholds

The Department of Labor’s (DOL’s) 2016 overtime rule has been permanently enjoined and appears to be dead in the water. With the comment period for the DOL’s new Request for Information ending last week, there will probably be a new overtime rule issued in the near future. Secretary of Labor Alexander Acosta has said that he believes the salary threshold for overtime exemptions should be around $33,000. Paul DeCamp, a former Administrator of the DOL’s Wage and Hour Division, now with Epstein Becker Green, gives us some context:

> “The summary judgment ruling was actually pretty interesting, because it reaffirmed that the Department has the authority under the Fair Labor Standards Act to require some measure of a salary payment as a condition of an employee being exempt under the executive, administrative, or professional exemptions. But what the Department does not have the authority to do, in light of the court's ruling, is to set a level for the salary that is so high that it excludes a large number of people otherwise performing exempt duties. The Department has already been on record with the Fifth Circuit saying that it is not defending the salary level set in the 2016 regulation. However, the Department may still want to challenge the district court's ruling that the Department exceeded its authority when it issued the 2016 rule.”

For more, read "The Status of the Department of Labor's 2016 Overtime Rule."

(2) Recent Developments on Tip Pooling

The DOL has taken a hardline position that employers cannot dictate the distribution of customers' tips. But the circuits are split on the issue. Under the new administration, the DOL has announced that it plans to rescind its controversial regulation restricting tip pooling and distribution. But even without a regulation from the DOL, states can still regulate the practice, and employees can still pursue private lawsuits. Until the DOL acts, employers should exercise caution, review applicable state law, and look at whether their circuit has taken a position on the existing regulations.

For more, read this story in our recent *Take 5 Newsletter.*

(3) SCOTUS Hears Arguments on Class Action Waivers

The Supreme Court is kicking off its fall term with oral arguments in three related cases. The National Labor Relations Board (NLRB) has found that mandatory arbitration and class action waivers violate employees' rights under the National Labor Relations Act (NLRA). The circuits are split on the issue and have disagreed as to whether the Federal Arbitration Act trumps the NLRA or vice versa. While the High Court has been highly supportive of mandatory arbitration in recent years, it has not yet ruled on class action waivers in an employment context.

For more, read "Mandatory Class Action Waivers in Employment Agreements: Is a Final Answer Forthcoming?"

(4) "Time Rounding": The Next Wave of Class and Collective Actions

Looking ahead to the *next* wave of class and collective actions, we're seeing a surge in lawsuits that focus on time-rounding policies. While rounding an employee's time up or down is lawful as long as it's evenhanded, the plaintiffs in these cases argue that employees are regularly disadvantaged by the practice. Facing increasing scrutiny over time-rounding policies and how they're executed, it won't be a surprise to see employers weighing the value of time rounding against the risk of litigation.

For more, read this story in our recent *Take 5 Newsletter.*

(5) Authorities Wrestle with the Definition of "Employee"

Under the Obama administration, we saw significant attempts to expand the definition of "employee" to workers who previously had been treated as independent contractors. The Wage and Hour Division issued an Administrator's Interpretation establishing a presumption that almost anyone doing work for an employer was an "employee." But the White House and Republicans in Congress are working to reverse this trend under the Fair Labor Standards Act and the NLRA. The DOL has withdrawn the Administrator's Interpretation and Congress is considering several options on the issue. Steve Swirsky tells us what's on the horizon:

> “In terms of the definition of ‘employer,’ ‘employee,’ ‘independent contractor,’ and ‘joint employer,’ all of which really fit together, we're watching several pieces of key ... litigation and legislation. In the courts, we are watching, waiting for the D.C. Circuit's decision in *Browning-Ferris*, which was the case where the NLRB redefined ‘joint employer’ and redefined the test. I think that there is a good chance the court will not agree with the Board’s standard. We have seen Congress try to use the power of the budget to limit the NLRB's ability to enforce ... the *Browning-Ferris* standard [and] apply that for the broader joint employer. We have seen now the Save Local Business Act that was introduced in the House earlier this year, hearings took place in September. That would add a definition of ‘joint employer’ to both the Fair Labor Standards Act and the National Labor Relations Act.”

For more, read "The Department of Labor, Congress, and the Courts Wrestle with the Definition of 'Employee.'"

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