WAGE AND OVERTIME QUARTERLY

Published by Winebrake & Santillo, LLC

"Fighting For Fair Wages"

Spring 2018

NEW OMNIBUS BUDGET BILL OFFERS MIXED BAG FOR RESTAURANT EMPLOYEES

In late-March, Congress passed the big $1.3 trillion budget bill. The bill is over 2,000 pages long, was passed within hours of its introduction, and is loaded with legislative "riders" that have no apparent connection to governmental spending. One of these riders addresses the circumstances in which restaurants can keep servers' tips.

The FLSA's tip rules have been a hot topic lately. And there's a lot of misinformation floating around out there. Here's an explanation of what Congress just did and how we got to this place:

The Basic "Tip Credit" and Tip Sharing Rules: The FLSA sets the minimum wage at $7.25/hour. Yet, many servers, bartenders, bussers, runners, and other customer service employees are paid an hourly wage of less than $7.25. That's because, under the FLSA, restaurants can pay these "tipped employees" as little as $2.13/hour plus customer tips. When a restaurant does this, it is taking a "tip credit." In other words, the restaurant is using customer tips as a "credit" against its minimum wage obligation to the tipped employee.

As you can see, the tip credit provides a big benefit to American restaurants. The customers primarily pay the workers. That's a sweet deal for the boss. And it really only happens here in the USA. (In Europe, by contrast, tipping is not expected because the server receives almost all her pay directly from the restaurant).

Traditionally, restaurants must follow certain rules if they want to take the "tip credit." One important rule requires that that tips may only be shared among restaurant employees who "customarily and regularly" receive tips. In other words, tips cannot be shared with restaurant owners, managers, supervisors, or kitchen staff.

The 9th Circuit's Cumbie v. Woody Woo Decision: In 2010, the Ninth Circuit Court of Appeals issued an opinion in a case called *Cumbie v. Woody Woo, Inc.*, 596 F.3d 577 (9th Cir. 2010). In *Cumbie*, the restaurant did not take advantage of the tip credit. In other words, the restaurant paid the servers a minimum wage of over $7.25/hour. The restaurant also required the servers to share some of their tips with kitchen staff.

The servers filed a lawsuit, arguing that the restaurant violated the rule that tips not be shared with kitchen staff. The restaurant disagreed, arguing that this rule applied *only if* it was taking advantage of the tip credit. The Ninth Circuit agreed with the restaurant. According to the Ninth Circuit, a restaurant that pays servers the full minimum wage could do whatever it wanted with customer tips.

The Obama Administration's 2011 Regulation Disagreeing with Cumbie: In response to *Cumbie*, the Department of Labor implemented a regulation (found at 29 C.F.R. § 531.52) in 2011 that disagreed with the Ninth Circuit's *Cumbie* decision. Under the 2011 regulation, tips could never be shared with managers or kitchen staff, *even if* the restaurant paid the servers the full minimum wage and did not take advantage of the tip credit.

The Ninth Circuit Upholds the 2011 Regulation: In response to the DOL's 2011 regulation, a trade association representing the restaurant industry started a lawsuit asserting that the DOL exceeded its regulatory authority by implementing the regulation. This

Continued on Page 2

CONGRATULATIONS TO MARK GOTTESFELD

Winebrake & Santillo, LLC is very pleased to announce that Mark Gottesfeld has been made a Partner at the firm. This is a well-deserved promotion for Mark, who has done a great job since joining the firm in August 2010. Prior to joining the firm, Mark worked at the Philadelphia firm of Saltz, Mongeluzzi, Barrett & Bendesky, P.C. He is a is a 2006 *magna cum laude* graduate of Lehigh University and a 2009 *cum laude* graduate of the inaugural class of Drexel School of Law. At Drexel, Mark served as an editor on the *Drexel Law Review*.

Mark has represented our clients with earnestness, intelligence, and, most importantly, empathy. Many of our clients have commented on how much they appreciate the attention Mark pays to their cases. Mark has tried several cases to verdict, including a federal court trial in the District of New Mexico that resulted in a plaintiff's recovery and a lengthy court opinion addressing some very important issues of federal and New Mexico overtime law.

So congratulations to Mark Gottesfeld! We are lucky to have him working at our firm.

WINEBRAKE & SANTILLO, LLC

www.winebrakelaw.com

Home Office:

Twining Office Center, Suite 211

715 Twining Road, Dresher, PA 19025

Phone: (215) 884-2491

Fax: (215) 884-2492

Email: pwinebrake@winebrakelaw.com

NEW OMNIBUS BUDGET BILL OFFERS MIXED BAG FOR RESTAURANT EMPLOYEES

Continued from Page 1

lawsuit made its way to the Ninth Circuit. In 2016, the Ninth Circuit upheld the regulation in an opinion entitled *Oregon Restaurant and Lodging Assoc. v. Perez*, 816 F.3d 1080 (9th Cir. 2016).

So then, in the wake of the Ninth Circuit's *Oregon Restaurant* opinion, the law of the land was finally clear: Even restaurants that pay the full minimum wage to servers may not require tips to be shared with managers or kitchen staff.

The Trump Administration's Proposed Regulation: Not so fast. In December 2017, the Trump Administration's DOL started an administrative rulemaking process aimed at reversing the Obama Administration's 2011 regulation and returning the law to the *Crumbie*-world in which a restaurant paying the full minimum wage can do whatever it wants with customer tips. This proposed regulation was met with some stiff resistance from workers' rights groups.

The 2018 Omnibus Budget Bill Settles the Dispute with a Compromise: All of this history brings us to the 2,232-page Omnibus Budget Bill passed in late-March 2018. Turning to pages 2,025-2,027, we find a section of the Bill headed "Tipped Employees."

In a nutshell, the new legislation does the following: (1) it generally revokes the 2011 Obama regulation; (2) it allows tips to be shared with non-supervisory kitchen staff *only if* the restaurant pays servers the full minimum wage and does not take a tip credit; (3) it strictly prohibits tips from being shared with restaurant owners, managers, or supervisors *under any circumstances*; (4) it clarifies that a restaurant allowing tips to be shared with owners, managers, or supervisors must pay the aggrieved servers *both* the amount of the tip credit (if any) taken and the amount of the diverted tips; (5) it makes liquidated damaged (a.k.a. "double damages") mandatory if the restaurant allows tips to be shared with owners, managers, or supervisors; and (6) it provides for a $1,100-per-violation-penalty where the restaurant allows tips to be shared with owners, managers, or supervisors.

My Takeaway: In my view, the 8-year saga described above demonstrates a big problem with the current state of affairs: Throughout the past three Administrations, the DOL's Wage and Hour Division has sometimes been treated like a pawn in an ongoing chess match between workers' rights advocates and the employer community. The regulations and guidance from one administration to another often seem irreconcilable, with one administration reversing the previous administration's rules. All of this must be very demoralizing to the DOL investigators who are working in the field and probably would like to be guided by a consistent set of rules that do not change with every Presidential election. And fair-minded lawyers surely would prefer a set *sensible* and *moderate* rules that can withstand the test of time and foster a sense of consistency and predictability.

THIRD CIRCUIT CONTINUES TO FOCUS ON FLSA "BREAK TIME" ISSUES

In each of the past three years, the Third Circuit Court of Appeals (which is the appellate court for all the U.S. District Courts in Pennsylvania, New Jersey, and Delaware) has issued an opinion addressing the rules for deciding when workers should be paid for "breaks." All three cases interpret the Fair Labor Standards Act (FLSA) and its detailed regulations. Since the Third Circuit only issues a handful of precedential FLSA opinions each year, it's a little unusual so see three decisions addressing a common topic.

Here's a quick summary of the three "break" cases:

First, in ***Babcock v, Butler County*, 860 F.3d 153 (3d Cir. Nov. 24, 2015)**, a group of County correctional officers claimed that the prison violated their FLSA rights by failing to pay them for 15 minutes of their one-hour meal break. The officers claimed they should be paid for the full hour because, during the break, they were not allowed to leave the prison and were required to remain in uniform. The Circuit Court disagreed, explaining that time spent during meal breaks must be paid only if the workers' activities during the break are for the "predominant benefit" of the employer. The
Court then observed that the restrictions on the officers' time (requiring the officers to remain at the prison and remain in uniform) were not very onerous in the law enforcement context and, as such, did not "predominantly benefit" the prison.

Next, in ***Smiley v. E.I DuPont De Nemours & Co.*, 839 F.3d 325 (3d Cir. Oct. 7, 2016)**, workers at a manufacturing plant in Towanda, PA sought pay for time spent before and after their shifts "donning and doffing their uniforms and protective

QUARTERLY QUOTE

"[Law] is a lot like jazz . . . it's best when you improvise."

- George Gershwin
(as revised by a plaintiffs' lawyer)

THIRD CIRCUIT CONTINUES TO FOCUS ON FLSA "BREAK TIME" ISSUES

Continued from Page 2

gear." The company argued that, even if the workers were entitled to be paid for these pre-shift and post-shift activities, such unpaid time could be "offset" by the time the workers spent in *paid* meal breaks. The Circuit Court disagreed with the company based on a detailed analysis of the FLSA's statutory and regulatory language addressing wage "offsets." This is an extremely complicated and technical opinion. But the resulting legal rule is clear: employers who provide workers with paid meal breaks may not use such compensation to offset unpaid time during other parts of the workday.

Finally, in ***Secretary of the U.S. Dept. of Labor v. American Future Systems, Inc.*, 873 F.3d 420 (3d Cir. Oct. 13, 2017)**, the Third Circuit issued the most far-reaching of the three break-time opinions. There, the Court endorsed and adopted the bright-line rule that breaks of under 20 minutes must be paid under the FLSA. The U.S. Department of Labor previously adopted this rule in an interpretive regulation described at 29 C.F.R. § 785.18. Now, the Circuit Court has formally endorsed the "20-minute rule," making it the unambiguous law of the land in Pennsylvania, New Jersey, and Delaware. This is very good news for both employees (whose FLSA rights have been solidified) and employers (who benefit from easy-to-understand and administer FLSA rules). One final observation: the Circuit Court flatly rejected the employers' argument that the 20-minute rule did not apply because the unpaid time was "flex-time" rather than a "break." As in so many other FLSA cases, the judges decided the case based on FLSA *principles* rather than "labels" created by the employer.

All lawyers can be pleased with the above opinions because they provide clarity on some "break time" issues that had gone unresolved for a long time.

PENNSYLVANIA SUPERIOR COURT REJECTS "HALF-TIME" METHOD OF OVERTIME CALCULATION FOR SALARIED EMPLOYEES

Here is some great news for Pennsylvania workers and their advocates: The Pennsylvania Superior Court recently issued a scholarly 44-page opinion explaining that, under the Pennsylvania Minimum Wage Act ("PMWA"), Pennsylvania employers may ***not*** use the dreaded "half-time" method in determining the amount of extra overtime pay owed to salaried workers. The opinion is entitled *Chevalier v. General Nutrition Centers, Inc.*, 177 A.2d 280 (Pa. Super. 2017), and was written by former Superior Court Judge Jeffrey Moulton (who, tragically, is no longer on the bench due to Pennsylvania's absurd system of electing appellate judges even though most voters have no understanding of judicial candidates' actual qualifications).

Here is why *Chevalier* is a very important opinion: Under the federal overtime pay law (known as the Fair Labor Standards Act or the "FLSA" for short), employers who must provide extra overtime pay to salaried employees usually can get away with calculating the extra pay based on a "half-time" methodology. I won't bore you with too many details, but this method has its genesis in the U.S. Supreme Court's 1942 decision in *Overnight Motor Transportation Co. v. Missel*, 316 U.S. 572 (1942), and was later codified by the U.S. Department of Labor at 29 CFR §778.114. The FLSA's half-time method is sometimes referred to as the "Missel" method or the "fluctuating workweek" method.

Regardless of the nomenclature, the FLSA's half-time method is terrible for salaried workers. Here's an example how the half-time method works: Ann is an Assistant Manager at a convenience store and is paid a salary of $500 per week. On a particular week, she works a total of 50 hours. So now the boss needs to determine how much extra overtime pay is owed to Ann. Under the half-time method, the boss first divides Ann's $500 salary by her 50 hours of work to convert her salary to a regular pay rate of $10/hour. Then, the boss is allowed to assume that Ann *already* received $10 for each of her 10 overtime hours. Thus, the boss is merely required to provide Ann with extra half-time pay for her 10 overtime hours. In other words, Ann receives an extra $50 ($5 X 10 hours) for her 10 hours of overtime work.

The Superior Court's new *Chevalier* opinion addresses whether the above half-time approach is allowed under the PMWA. This gets a little complicated, but, when Judge Moulton's lead opinion is combined with the concurring and dissenting opinions, we are left with two important holdings:

First, a majority of the panel endorsed the FLSA's practice of converting the salary to a regular hourly rate by dividing the salary by all hours worked. In taking this approach, the Superior Court rejected the worker's argument that the regular rate should be determined by dividing the salary by 40 hours.

Second, a majority of the panel rejected the company's argument that a worker's extra overtime pay should be limited to a mere half-time rate for the overtime hours. Instead, the worker must receive extra overtime pay calculated at 150% (or "time and one-half") of the regular rate. This second holding represents an excellent result for Pennsylvania workers.

Let's go back to Ann, our convenience store Assistant Manager who, under the half-time method, was entitled to an extra $50 for her 10 overtime hours. Under the PMWA's *Chevalier* method, Ann's $500 salary would still translate to a $10/hour regular pay rate. But, she is now entitled to $15 (150% of $10) for every overtime hour, bringing her total extra overtime pay to ***$150*** ($15 X 10 hours) rather than the $50 she was entitled to under the FLSA's half-time method.

So Pennsylvania workers have good reason to thank former Superior Court Judge Jeffrey Moulton for his extensive and scholarly opinion in *Chevalier*.

ABOUT WINEBRAKE & SANTILLO, LLC

Workers deserve to get paid for ***all time spent working***, and most workers are entitled to valuable ***overtime pay*** when they work over 40 hours in a workweek. Unfortunately, millions of American workers are cheated out of their full pay because they do not understand their rights under the Nation's complex wage and overtime laws.

Wage and overtime violations hurt working families. When a company violates the law, it should be held accountable. ***No one is above the law.***

Winebrake & Santillo, LLC believes workers pursuing their wage and overtime rights are entitled to the same high quality legal representation enjoyed by big corporations. We also understand that workers have a right to be treated with the same level of professionalism, courtesy, and respect accorded to corporate CEOs.

Winebrake & Santillo, LLC goes to Court to fight for workers who have been deprived of full regular pay and overtime pay in violation of the federal Fair Labor Standards Act ("FLSA") and similar state laws. Our attorneys have negotiated settlements in federal wage and overtime lawsuits worth many millions of dollars to workers and their families.

The wage and overtime laws are complicated. Don't hesitate to contact ***Winebrake & Santillo, LLC*** for a ***free consultation*** if you believe the wage and overtime rights of you or one of your clients may have been violated. Your clients never pay a fee unless they recover, and ***we always pay a fair referral fee.***

Winebrake & Santillo, LLC
Twining Office Center, Suite 211
715 Twining Road
Dresher, PA 19025

WAGE AND OVERTIME QUARTERLY

Published by Winebrake & Santillo, LLC
"Fighting For Fair Wages"

In This Edition . . .