WAGE AND OVERTIME QUARTERLY

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"Fighting For Fair Wages"

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IT SEEMS LIKE COMMON SENSE: OVERTIME-EXEMPT "EXECUTIVES" SHOULD EARN MORE THAN $23,660 PER YEAR

The federal Fair Labor Standards Act ("FLSA") generally requires that employees who work over 40 hours in a week receive extra overtime pay calculated at 150% of their regular pay rate. However, the FLSA exempts from this requirement employees who perform "executive," "administrative," or "professional" work. These exemptions are known as the "white collar" exemptions.

Under the current law, a salaried worker making as little as ***$23,660 per year*** can be classified as an overtime-exempt "executive," "administrator," or "professional." You read that correctly: someone making only $23,660 per year can be treated like the type of corporate "executive" who does not need the protections of our Nation's overtime law.

Before going any further, we should take a moment to contemplate the real-world meaning of a $23,660 annual salary. In Pennsylvania, a salaried worker trying to raise a family of four on $23,660 per year is eligible for many social "safety net" programs. For example, the worker's children will easily qualify for free school meals and for Medicaid. And the family will easily qualify for food stamps and Section 8 housing vouchers.

How many lawyers or politicians reading this *Newsletter* could survive on $23,660 per year? Hint: The answer to this question is "NONE."

Let's get real. Low-wage salaried workers whose families qualify for free school lunch, Medicaid, food stamps, and subsidized housing are not types of "executive," "administrative," or "professional" employees who should be exempt from the overtime pay laws. That's just common sense.

Seeking to address this problem and after years of inaction, the U.S. Department of Labor finally updated the overtime regulations so that salaried workers classified as overtime-exempt under the white collar exemptions would be required to make at least ***$47,476 per year***. *See generally* 81 Federal Register 32391 (May 23, 2016). As importantly, the new salary requirement would be automatically updated every three years to keep up with wage inflation. *See id*.

The proposed $47,476 salary requirement is not too high. A salary of $47,476 per year merely places a worker at the 40th percentile of full-time salaried workers in the Nation's lowest-wage Census Region (e.g., Alabama or Mississippi). Moreover, $47,476 falls well below the Nation's median household income of $56,516. Yet, many big business advocacy groups seem shocked by the $47,476 salary threshold. The National Retail Federation, for example, calls the higher salary limit a "career killer" and says the new regulations are "full of false promises." House Speaker Paul Ryan, meanwhile, calls the new salary requirement an "absolute disaster."

The $47,476 salary requirement was supposed take effect on December 1,

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WELCOME CORPORATE LAWYERS

Over the years, this Newsletter has mostly been mailed to our Brothers and Sisters in the workers' rights community. Going forward, however, we have decided to expand the mailing list to include hundreds of corporate defense lawyers. Why would we do such a thing? Well, it seems that we lawyers – like the non-lawyer population – are increasingly engulfed in informational "cocoons." We tend to join organizations populated by like-minded people and to read publications put out by these same organizations. This is not a healthy trend. So, as a public service, we have decided to send this unabashedly "liberal" Newsletter to our friends in the defense bar.

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In This Edition . . .

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.***

IT SEEMS LIKE COMMON SENSE: OVERTIME-EXEMPT "EXECUTIVES" SHOULD EARN MORE THAN $23,660 PER YEAR *Continued from Page 1*

2016. Unfortunately for millions of working families, that will not happen because, in September, a coalition of Chamber of Commerce groups and "Red-state" Attorneys General filed federal court lawsuits in Sherman, Texas seeking to overturn the regulations for alleged violations of the Administrative Procedure Act. Texas has become the "go-to" jurisdiction for Big Business challenges to Obama Administration regulations because appeals from Texas district courts proceed to the Fifth Circuit Court of Appeals, a court with a penchant for conservative judicial activism.

On November 22, 2016, the Sherman, Texas Judge "preliminarily enjoined" the $47,476 salary threshold from going into effect. Even though the federal regulations interpreting the white collar exemptions have included a salary requirement for over 60 years, the Texas Judge reasoned that the Department of Labor lacks the authority to establish a salary threshold that is high enough to automatically entitle millions workers to overtime pay. *See State of Nevada v. U.S. Department of Labor*, 2016 U.S. Dist. LEXIS 162048 (E.D. Tx. Nov. 22, 2016). Such an impactful salary threshold, the Judge reasoned, "creates essentially a de facto salary-only test" that would conflict with the statutory language and purpose of the FLSA's white collar exemptions. *See id.* at *25.

The above ruling is only "preliminary." However, given the Judge's reasoning, it is almost certain that a permanent injunction lies around the corner. Next, the case will make its way to the Fifth Circuit Court of Appeals and, after that, the losing party will almost certainly appeal to the Supreme Court.

It will be very interesting to see how all of this turns out. Will the "conservative" Fifth Circuit embrace "judicial activism" by striking down a federal regulation that was years in the making? Will the Supreme Court weigh in? Will Congress intervene? Will President Trump – who spent the last year telling us how much he cares about "the working class" – defend the $47,476 salary threshold? Can we progressives get our act together enough to put up an effective fight?

Meanwhile, far removed from the Ivory Tower, it will continue to be possible for the Assistant Manager at the local fast food restaurant to receive no overtime pay even though he only makes $25,000 a year and receives food stamps. It will still be possible for the Department Manager at the local retail store to be classified as an "overtime-exempt Executive" even though her family qualifies for public housing and Medicaid. And it will still be the responsibility of the hundreds of Trial Lawyers who read this *Newsletter* to bring lawsuits on behalf low-wage salaried workers who deserve overtime pay.

HIGHER MINIMUM WAGE WINS IN A "LANDSLIDE"

The November 8 election resulted in big wins for low wage workers in Arizona, Colorado, Maine, and Washington. In all four states, voters approved referenda to increase the minimum wage. The minimum wage in Arizona, Colorado, and Maine will rise to $12.00 by 2020. In Washington, it will rise to $13.50.

In Arizona, the minimum wage increase was supported by **58.9%** of voters. This is especially significant, since Arizona is a "Red" state that Donald Trump won by over 4%. Similarly, in each of the other three states, the minimum wage increase received significantly more support than the winning Presidential candidate: Colorado – **54.7%**; Maine – **55.5%**; and Washington – **58.1%**.

Such election outcomes demonstrate that Americans of all political stripes embrace the common sense notion that workers cannot survive of the current federal minimum wage of $7.25/hour. Unlike our two presidential candidates, a higher minimum wage something the whole country can rally around.

QUARTERLY QUOTE

> "[E]motions like disgust don't do justice to the complexity of Donald Trump's supporters. The disgusted posture risks turning politics into a Manichaean civil war between the alleged children of light and the alleged children of darkness – between us enlightened, college-educated tolerant people and the supposed primitive horde driven by dark fears and prejudices. That crude and ignorant condescension is what feeds the Trump phenomenon in the first place."
>
> - David Brooks, *New York Times*, November 11, 2016

LEGALITY OF "CLASS WAIVERS" IN EMPLOYMENT ARBITRATION AGREEMENTS REMAINS UNCLEAR

Companies are increasingly requiring workers to sign arbitration agreements that prevent workers from suing the company in court. Instead, under these agreements, employment disputes must be resolved through private arbitration.

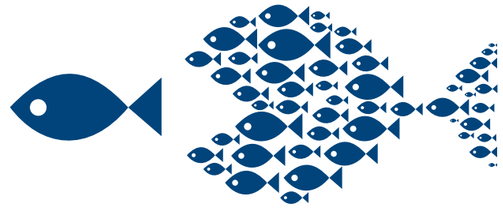
Mandatory arbitration agreements frequently are criticized because private arbitration proceedings are not open to the public and do not allow for jury trials. These criticisms recently got some publicity when the sexual harassment claims of Fox News celebrity Gretchen Carlson were compelled to arbitration. The news media and women's rights groups complained that private arbitration would prevent the public from learning about outrageous behavior tolerated at one of the nation's biggest media empires.

A less-discussed criticism of private arbitration is that most arbitration agreements contain "class waiver" provisions. Under these provisions, the worker must agree that any arbitration will be limited to his/her individual dispute. In other words, companies are using arbitration agreements to prevent workers from bringing class action lawsuits on behalf of fellow employees.

Here is why workers' rights advocates and policymakers should be very concerned about class action waivers. In many employment rights cases – especially those arising under wage and overtime laws – the damages stemming from an individual employee's legal claim might only amount to a few hundred or a few thousand dollars. However, in the aggregate, the damages owed to ***all employees*** for the same legal violation might total millions of dollars.

Put in economic terms, class actions enable workers to achieve the "economies of scale" necessary to go up against the big boss. As observed by the Supreme Court: "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 617 (1997).

Here is an image captures the essence of the class action lawsuit:



Employment rights class actions recently received a big boost when the U.S. Courts of Appeal for the Seventh Circuit (covering Illinois, Indiana, and Wisconsin) and the Ninth Circuit (covering Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington) ruled that class waivers in arbitration agreements are illegal because they violate the right of workers to engage in "concerted activity" under the National Labor Relations Act ("NLRA").[1] Meanwhile, the U.S. Courts of Appeal for the Fifth Circuit (covering Texas, Louisiana, and Mississippi), the Eighth Circuit (covering Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota), and the Second Circuit (covering Connecticut, New York, and Vermont) have held that such class waivers do not violate the NLRA.[2] These conflicting decisions are irreconcilable. So whether or not the NLRA prohibits class waivers in arbitration agreements is almost certainly destined for the Supreme Court. In the meantime, here in Pennsylvania, employment lawyers are anxiously waiting for the U.S. Court of Appeals for the Third Circuit (covering Delaware, New Jersey, and Pennsylvania) to decide this issue in an appeal entitled *The Rose Group v. NLRB*, 15-4092. The Court heard oral argument on October 5 and should issue a decision in the next several months.

In the absence of Supreme Court guidance, employment lawyers will continue to fight over the legality of class waivers in arbitration agreements. Although this "procedural" issue does not get much attention in the news media, it is extraordinarily important to the vindication of workers' wage, overtime, and other employment rights.

[1] *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young*, LLP, 834 F.3d 975 (9th Cir. Aug. 22, 2016).

[2] *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).