WAGE AND OVERTIME QUARTERLY

Published by Winebrake & Santillo, LLC

"Fighting For Fair Wages"

Winter 2020

PENNSYLVANIA POISED TO PROVIDE SALARIED WORKERS WITH OVERTIME PROTECTIONS THAT EXCEED FEDERAL LAW

Both the federal Fair Labor Standards Act ("FLSA") and the Pennsylvania Minimum Wage Act ("PMWA") exempt "executives," "administrators," and "professionals" from the statutes' overtime pay mandates. These are generally referred to as the "white collar exemptions."

Employees falling under the white-collar exemptions generally are paid on a "salary basis." Both the FLSA and PMWA have historically set the minimum salary at especially low levels. As discussed below, however, progress is being made:

The FLSA's Increase to $35,308

With respect to the FLSA, the federal Department of Labor has published a regulation that became effective on January 1, 2020 and increases the annual salary requirement from $23,660 to $35,308. *See* 84 FR 51230. This increase by the Trump Administration is disappointing because it undercuts the Obama Administration's proposed regulation raising the salary requirement to $47,476. Unfortunately, Obama's $47,476 proposal was enjoined by a Texas district court judge. Instead of fighting for the $47,476 at the Fifth Circuit Court of Appeals, Trump settled for a more modest increase.

The PMWA's Eventual Increase to $45,500

But, here in Pennsylvania, the Trump Administration's modest increase is not the end of the story. That's because, on January 31, 2020, the Pennsylvania Independent Regulatory Review Commission ("IRRC") approved the Wolf Administration's proposed regulation increasing the annual salary requirement to $35,568 when the regulation becomes effective later this year, to $40,560 one year later, and to $45,500 two years later.

We currently expect the new Pennsylvania regulation to become effective this Spring. If this happens, the PMWA's minimum salary requirement will exceed the FLSA's requirement in Spring 2021 and substantially exceed the FLSA's requirement in Spring 2022. (Of course, this assumes the FLSA's salary requirement will not be increased in the first year of a post-Trump presidency).

Although our law firm has advocated for an even larger increase to the PMWA's salary threshold, we are delighted that the Wolf Administration is fighting for Pennsylvania's salaried workers. Hopefully, the excellent results achieved at the IRRC will encourage the Governor and his Department of Labor & Industry to continue to update Pennsylvania's overtime regulations and extend overtime rights beyond the federal floor.

One final note: Workers and employers must always remember that, under both the FLSA and the PMWA, payment of the minimum salary is only one of several *independent* requirements that must be satisfied in order for workers to fall within one of the white-collar exemptions. All three exemptions also require that the employee actually perform "executive," "administrative," or "professional" job duties. – PW

OUR NEW OFFICE IN "THE ELECTRIC CITY"

After many years of representing workers throughout Northeastern Pennsylvania, we finally have opened a permanent office in **Scranton, PA**. The new office is located downtown at **201 Franklin Avenue** (on the corner of Spruce Street) and is only a few blocks away from the federal and state courthouses. We are subletting the space from our good friends at O'Malley & Langan, PC.

Now that Scranton native Joe Biden is running for President, Scranton definitely is "Hot." Also, did you know that Scranton is known as the "The Electric City" because, in the late-1800's, it was the first city in the Nation to operate an electric trolley system? – PW

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

WAGE AND OVERTIME QUARTERLY

Published by Winebrake & Santillo, LLC

"Fighting For Fair Wages"

In This Edition . . .

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

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.***

TRUMP ADMINISTRATION'S NEW FLSA "JOINT EMPLOYMENT" REGULATION CONTRADICTS BINDING COURT DECISIONS AND LEAVES US ALL VERY CONFUSED

The federal Department of Labor ("DOL") is empowered to publish regulations that interpret different provisions of the Fair Labor Standards Act ("FLSA"). These types of *interpretive regulations* are published in the Code of Federal Regulations ("the CFR"). A long time ago, in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), the Supreme Court explained that whether or not an interpretive regulation is entitled to judicial deference "will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

In recent years, some legal thinkers have questioned the continued viability of "*Skidmore* deference." But that topic is far too heavy for the *Wage and Overtime Quarterly*.

Anyway, on January 16, 2020, the DOL published an interpretive regulation that becomes effective on March 16, 2020 and is entitled "Joint Employer Status Under the Fair Labor Standards Act." *See* 85 FR 2820-2862 (Jan. 16, 2020). As discussed below, this new joint employment regulation is misguided.

Why Is "Joint Employment" Important in FLSA Lawsuits?

The American workplace is becoming increasingly "fissured." Millions of workers who used to be paid directly by big companies now find themselves working for contractors, subcontractors, and even sub-subcontractors. For example, the janitors who clean your local big-box store probably are not directly paid by the store. Instead, they may be paid by a janitorial services company that contracts with the store. Or they might work for a very small business (*e.g.* "Little Frankie's Cleaning LLC") that contracts with a janitorial services company that, in turn, contracts with the store's owner.

Let's say the janitors in the above example are cheated out of overtime pay. Under the FLSA, they certainly can sue the business that directly pays them. But such a lawsuit is pointless if the business is small, undercapitalized, and unable to satisfy a judgment. So, as a practical matter, the janitors must sue "up the chain" and prove that the small business and the store's owner are *jointly* liable under the FLSA for the unpaid overtime.

So "joint employment" principles are pretty important. When it becomes too difficult for workers to prove joint employment, it becomes too easy for big companies to cheat workers by hiding behind contractors and subcontractors.

The FLSA's Expansive View of "Employment."

Historically, the FLSA has been understood to define "employment" very broadly. For example, in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), the Supreme Court observed that the FLSA is "comprehensive enough to require its application to many persons and working relationships which, prior to this Act, were not deemed to fall within an employer-employee category." *Id.* at 150-51. Likewise, in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992), the Court explained that the FLSA "stretches the meaning of 'employee' to cover some parties who might not qualify as such under a strict application of traditional agency law principles." *Id.* at 326.

Here in the Third Circuit, our Court of Appeals has observed:

> the FLSA defines employer "expansively," and with "striking breadth." The Supreme Court has even gone so far as to acknowledge that the FLSA's definition of an employer is "the broadest definition that has ever been included in any one act."

In re Enterprise Rent-A-Car Wage & Hour Employment Practices Litig., 683 F.3d 462, 467-68 (3d Cir. 2012) (internal citations omitted).

Bonnette and Other Conflicting "Joint Employment" Tests.

The Supreme Court has never established a specific test for deciding whether two companies can be liable as joint employers under the FLSA. However, federal Courts of Appeals have issued opinions establishing various multi-factor tests. These tests differ from circuit to circuit. However, as any first-year law student knows, a circuit court decision is *binding precedent* within the circuit.

In *Bonnette v. California Health & Welfare Agency*, 704 F.2d 1465 (9th Cir. 1983), the Ninth Circuit Court of Appeals – which covers the federal courts in California and other western states – weighed the following four factors in determining whether a purported joint employer could be liable under the FLSA: "whether the alleged employer (1) had the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* at 1470. We will refer to these factors as the "*Bonnette* Factors."

QUARTERLY QUOTE

> "The layman's constitutional view is that what he likes is constitutional and that which he doesn't like is unconstitutional."
>
> - Hugo Black

Crucially, other circuit courts disagree with the Ninth Circuit's *Bonnette* Factors. For example, in *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125 (4th Cir. 2017), the Fourth Circuit Court of Appeals – which covers the federal courts in the Carolinas, Maryland, Virginia, and West Virginia – endorsed a six-factor test, *see id.* at 141-42, and specifically instructed: "district courts ***should not follow Bonnette and its progeny*** in determining whether two or more persons or entities constitute joint employers for purposes of the FLSA," *id.* at 139 (emphasis supplied).

Likewise, in *Zheng v. Liberty Apparel Co.*, 355 F.3d 61 (2d Cir. 2003), the Second Circuit Court of Appeals – which covers the federal courts in New York, Connecticut, and Vermont – endorsed its own six-factor test that differs significantly from the *Bonnette* Factors. *See id.* at 72. And, here in the Third Circuit – which covers Pennsylvania, New Jersey, and Delaware – our Court of Appeals has endorsed a four-factor test that is much less stringent than the *Bonnette* Factors. *See Enterprise*, 683 F.3d at 469.

The New Joint Employment Regulation: *Bonnette* with a Twist.

This brings us to the DOL's new joint employment regulation. In the Executive Summary accompanying the regulation, the DOL asserts that it is "adopting a four-factor balancing test derived from *Bonnette* []." 85 FR 2820. Then, in the regulation, DOL describes the four factors as whether the alleged employer "(1) Hires or fires the employee; (2) Supervises and controls the employee's work schedule or conditions of employment; (3) Determines the employee's rate and method of payment; and (4) Maintains the employee's employment records." *Id.* at 2859 (to be codified at 29 C.F.R. §791.2(a)(1)).

We'll get to DOL's decision to select *Bonnette* over other circuit court authority in a moment. In the meantime, however, we pause to briefly note that DOL has watered down the first *Bonnette* Factor to benefit business. Specifically, while the Ninth Circuit's first *Bonnette* Factor asks whether the purported employer "had the power to hire and fire the employees," *Bonnette*, 704 F.2d at 1470, the DOL's first factor omits the phrase "had the power to." 85 FR 2859.

What Gives DOL the Right to Select *Bonnette* Over Other Judicially Endorsed Tests?

All of this brings us to the fundamental problem with the new joint employment regulation. The DOL is not ***interpreting*** anything. Rather, it is ***selecting*** a variation of the Ninth Circuit's *Bonnette* test over the joint employment tests endorsed by other Courts of Appeals. This practice – attempting to "nationalize" one circuit's decisional law at the expense of other circuits' decisional law – is very troubling to me. But the practice should be even more troubling to "conservatives" who purport to oppose such administrative overreach.

We all should be concerned. The Secretary of Labor is not some jurisprudential "Grand Wizard" empowered to rummage through conflicting circuit court authority and then enshrine – through "interpretive regulations" – the court decision that he likes best.

Under our judicial system, "circuit splits" are resolved by the Supreme Court, not the DOL. So, if the Trump Administration wants to nationalize the *Bonnette* joint employment test, it should either (i) pass legislation codifying the test or (ii) advocate for the test in the litigation arena. Writing a new "interpretive regulation" is a cheap end-run around these proper legislative and judicial channels. It is destined to fail.

So Now We're All Confused.

DOL asserts that the new joint employment regulation is intended "to offer guidance explaining how to determine joint employer status." 85 FR 2823. But, in reality, DOL has just spawned confusion.

Imagine being an employer in North Carolina. The Fourth Circuit Court of Appeals has held that "district courts should not follow *Bonnette* and its progeny in determining whether two or more persons or entities constitute joint employers for purposes of the FLSA." *Salinas*, 848 F.3d at 139. Yet, DOL says *Bonnette* is just fine.

Imagine being a corporate employment lawyer in Virginia. Are you really going to advise your client to follow the *Bonnette* test over the *Salinas* test?

And what about the worker in Maryland who is relying on DOL to investigate her complaint against a putative joint employer. Is the DOL investigator really going to follow *Bonnette* instead of *Salinas*? Can the investigator even do that?

Well, that's all for now. It looks like DOL's "guidance" will keep us all busy for years to come. – PW