WAGE AND OVERTIME QUARTERLY

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TRUMP ADMINISTRATION'S JOINT EMPLOYMENT AND INDEPENDENT CONTRACTOR REGULATIONS ARE "ON THE ROPES"

As we've discussed in past articles, administrative regulations play a big role in defining workers' wage rights under the federal Fair Labor Standards Act ("FLSA"). Unfortunately, even for seasoned wage and hour lawyers, its hard to keep up with the ever-changing regulatory environment. This is especially true in the years immediately following a new political party's takeover of the Executive Branch.

In this article, we attempt to summarize the complicated saga behind the Trump Administration's attempts to modify the FLSA rules applicable to determining: (1) whether a business should be treated as a worker's "joint employer" and (ii) whether a worker should be considered a non-employee "independent contractor."

As discussed, the Trump Administration (like previous Administrations) made a big mistake by waiting until the final year of the administration to roll-out consequential regulations. Such procrastination is risky because if you (in the case of Trump) or your political party (in the case of Obama) lose the White House, your successor can easily dismantle the eleventh-hour regulations before they can "take hold." The more prudent approach would be to implement regulations in the first-half of the Administration. Early implementation increases the chances that legal challenges to the regulations can be fully litigated during the Administration and that the substantive aspects of the regulations will have sufficient time to impact FLSA jurisprudence.

Having bestowed some free advise aspiring Presidents, we turn our attention to the less-ambitious task of explaining what's going on with the joint employment and independent contractor regulations:

Joint Employment

In January 2020, the USDOL published an interpretive regulation entitled "Joint Employer Status Under the Fair Labor Standards Act." *See* 85 FR 2820 (Jan. 16, 2020). The regulation was scheduled to become effective in March 2020 and was widely considered to make it easier for big business to shift FLSA liability to contractors, subcontractors, and other business entities that "directly" employ the aggrieved workers. Under the new regulation, determining a business' "employer" status would depend on whether it: "(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. Many workers' rights advocates – including our law firm – complained that the regulation ignored well-established Supreme Court and Circuit Court decisions defining "employer" status.

John Milton wrote: "O fairest flower no sooner blown but blasted." So it was with Trump's joint employment regulation. In January 2021, the incoming Biden Administration announced plans to "rescind" the regulation. The rulemaking process ensued, and, in July 2021, Biden's USDOL published a final rule "rescinding" the Trump regulation. *See* 86 FR 40939 (July 30, 2021). In addition, a federal judge in New York – ruling in a lawsuit filed by seventeen states and the District of Columbia – invalidated most of the Trump regulation on grounds that it violated the federal Administrative Procedure Act. *See New York v. Scalia,* 490 F. Supp. 3d 748 (S.D.N.Y. 2020).

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ANDY SANTILLO ADMITTED TO AMERICAN ARBITRATION ASSOCIATION'S ROSTER OF EMPLOYMENT ARBITRATORS

Andy Santillo was recently admitted to the AAA's roster of employment arbitrators and already has presided over several arbitrations concerning wage and hour issues. This admission follows his prior certification as an arbitrator by the United States District Court for the Eastern District of Pennsylvania in 2017.

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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 JOINT EMPLOYMENT AND INDEPENDENT CONTRACTOR REGULATIONS ARE "ON THE ROPES"

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So it's safe to say that Trump's joint employment regulation, having been rescinded by Biden and invalidated by a New York federal judge, is dead.

Going forward, it remains to be seen whether the Biden Administration will commence a new round of rulemaking in the hope of finalizing a fresh joint employment regulation. It is presumed that any such regulation will be more employee-friendly than the rescinded Trump regulation. But time is running short.

"Independent Contractor" Status

Determining whether workers are employees entitled to the FLSA's wage and hour protections or unprotected "independent contractors" is one of the most important and hotly-contested issues in wage and hour law. In January 2021, in the closing days of the Trump Administration, the USDOL published a final rule entitled "Independent Contractor Status Under the Fair Labor Standards Act." *See* 86 FR 1168 (Jan. 7, 2021). This proposed rule, which we'll call the "Trump IC Rule," was widely considered to be quite business-friendly. Many worker's rights advocates complained that the rule contradicted binding Supreme Court and Circuit Court decisions requiring that a worker's employment status be based on a holistic consideration of six "economic reality" factors.

In May 2021, the Biden Administration published a final rule "withdrawing" the Trump IC Rule. 86 FR 24303 (May 5, 2021). However, in March 2022, a federal district court in Texas ruled that Biden's "withdrawal" of the Trump IC Rule violated the Administrative Procedure Act. *See Coalition for Workforce Innovation v. Walsh*, 2022 WL 1073346, 2022 U.S. Dist. LEXIS 68401 (E.D. Tx. Mar. 14, 2022). The Biden Administration has appealed this ruling to the Fifth Circuit.

But there's more. In October 2022, Biden's USDOL announced a proposed rule that, if finalized, will replace the Trump IC Rule. *See* 87 FR 62218 (Oc. 13, 2022). This proposed rule, which we'll call the "Biden IC Rule," purports to "focus on the economic realities of the workers' relationship with the employer and whether the workers are either economically dependent on the employer for work or in business for themselves." *Id.* at 62274 (proposed language for 29 C.F.R. § 795.105). The Biden IC Rule then describes six "economic reality" factors that should be used as "tools or guides to conduct a totality-of-the-circumstances analysis." *Id.* (proposed language for 29 C.F.R. § 795.105). These six factors, which "are not exhaustive," include:

- Whether the worker's "**managerial skill**" impacts the economic success of his/her work;
- Whether the worker has made any "**investments**" that are capital or entrepreneurial in nature;
- The "**permanence**" of the work relationship;
- The nature and degree of "**control**" exerted over the over the worker;
- The extent to which the work performed is **integral** to the purported employer's business; and
- Whether the worker uses "**specialized skills**" that contribute to a "business-like initiative."

The above rule has not been finalized and is still going through the rulemaking process required by the Administrative Procedure Act. Any final rule presumably will be finalized in the first-half of 2023. Then, if history is any guide, we can expect ample litigation over the legality of any final rule. –PW

[1] John Milton, *On the Death of a Fair Infant Dying of a Cough.*

TWO TAKEAWAYS FROM PENNSYLVANIA'S AUGUST 2022 PMWA REGULATIONS

In August 2022, new Pennsylvania Minimum Wage Act ("PMWA") regulations drafted by Pennsylvania Department of Labor & Industry's ("PAL&I's") became effective. Two aspects of these regulations are highlighted below:

Service Charges

Federal and state law generally prevent management from confiscating "***tips***" paid by customers. Unfortunately, over the years, some restaurants and banquet halls have circumvented this rule by characterizing certain customer payments as "service charges" rather than "tips."

The new regulation requires more transparency regarding the distinction between tips paid to the workers and service charges retained by management. Specifically, where a service charge is sought, the underlying contract, agreement, or menu must notify the customer that the extra charge "does not include a tip to be distributed to the employee who provided service to the guests." 34 Pa. Code § 231.114(b). In addition, where a service charge exists, the bill presented to the customer "must contain separate lines for service charges and tips." *Id.* at § 231.114(c).

Calculating Salaried Employees' Overtime Pay

As previously reported in this Newsletter, the Pennsylvania

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TWO TAKEAWAYS FROM PENNSYLVANIA'S AUGUST 2022 PMWA REGULATIONS

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Supreme Court held in *Chevalier v. General Nutrition Centers, Inc.*, 220 A.3d. 1038 (Pa. 2019), that overtime-eligible salaried employees who work over 40 hours per week are entitled to extra overtime pay for each overtime hour calculated at 150% of the "regular rate" of pay. However, the Court did not decide how the "regular rate" should be determined.

The new regulations resolve the open question by clarifying that an overtime-eligible salaried employee's regular rate is determined by dividing the employee's weekly salary (plus any other remuneration) by 40. This is excellent news for Pennsylvania's salaried workforce, since the alternative approach would have been to divide the weekly salary by the total hours worked.

Assume, for example that an employee earning an $800 weekly salary works 50 hours and, as a result, is owed 10 hours of overtime pay. Under the new regulation, the employee's "regular rate" is $20 ($800 *divided by* 40) and the overtime wages total $300 ($20 X 1.5 X 10 hours). If the "regular rate" had been determined by dividing the salary by all hours worked, then the employee's "regular rate" would be $16 ($800 *divided by* 50) and the overtime wages would total only $240 ($16 X 1.5 X 10 hours). –PW

CLUELESS IN HARRISBURG – PENNSYLVANIA GENERAL ASSEMBLY INEXPLICABLY "ABROGATES" THE PMWA'S "WHITE-COLLAR" EXEMPTIONS

The Pennsylvania Minimum Wage Act ("PMWA") – like the FLSA – exempts from the overtime pay mandate "bona fide executive, administrative, and professional" employees. See 43 P.S. § 333.105. These are called the "white-collar" exemptions to the overtime law.

Because the terms "executive," "administrative," and "professional" are not defined in the PMWA's statutory text, the Pennsylvania Department of Labor & Industry ("PAL&I") implemented regulations in an effort to clarify the scope of the PMWA's white-collar exemptions. These regulations were codified at 34 Pa. Code. §§ 231.81-84.

In a bizarre turn of events, however, PAL&I reports that the Pennsylvania General Assembly "abrogated" the white-collar exemption in passing the most recent budget package. Thus, going forward, Pennsylvania judges and lawyers handling PMWA white-collar exemption cases presumably must operate on a "clean slate" in interpreting the terms "executive," "administrative," and "professional." Moreover, because Pennsylvania's rulemaking process is especially slow-moving, it will be a long time before a replacement set of regulations will be implemented.

It will be interesting to see how courts interpret the PMWA's white-collar exemptions in the absence of any regulatory guidance. –PW

Winebrake & Santillo, LLC is pleased to welcome

DEIRDRE AARON

Deirdre joins the firm as a partner. Deirdre is an experienced litigator who has dedicated her career to representing employees. She has extensive experience representing workers in wage and hour matters in many industries, including retail chains, banks, restaurants, and home health agencies. Deirdre has litigated and settled class and collective action cases on behalf of workers nationwide who were denied overtime, misclassified as independent contractors, and denied minimum wages. At the firm, Deirdre will continue her work fighting on behalf of workers who have been denied fair wages and overtime.

Prior to joining the firm, Deirdre worked as a trial attorney at the U.S. Department of Labor, and as a partner at the plaintiff-side employment firm of Outten & Golden LLP. Upon graduating law school, Deirdre served as a Staff Attorney for the United States Court of Appeals for the Eighth Circuit. She is licensed in Pennsylvania and New York.

QUARTERLY QUOTE

"I had the privilege to concede this race to J.D. Vance. Because the way this country operates is that you lose an election, you concede. You respect the will of the people. We can't have a system where if you win, it's a legitimate election, and if you lose, someone stole it. That is not how we can move forward in the United States."

- Concession Speech of Congressman Tim Ryan (D-Ohio) After Losing His Race for the United State Senate (Nov. 8, 2022)