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WAGE AND HOUR UPDATE

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I. Construction of FLSA Exemptions: *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134 (2018)

In *Encino Motorcars*, the Supreme Court in a 5-4 decision discarded the often cited principle, established more than 70 years ago, that FLSA exemptions must be narrowly construed.[1]

The dispositive question in the case was whether service advisors—employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions—fall within the FLSA exemption for "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles." 29 U.S.C. § 213(b)(10)(A).

The Ninth Circuit had held that service advisors were not exempt, applying the distributive canon of interpretation to the ambiguous language—that is, the exemption would only apply to *salesmen* who *sell* automobiles, and *partsmen* and *mechanics* who *service* automobiles. The services advisors in question sold only the services of the partsmen and mechanics, not automobiles.

The Supreme Court reversed, finding that the "context favors the ordinary disjunctive meaning of 'or'." 138 S.Ct. at 1141. The Court reasoned that "the distributive canon has the most force when the statute allows for one-to-one matching" and the language in question contains three nouns and only two gerunds.

More noteworthy than a single exemption or grammatical quibble is the Court's rejection of the principle of narrow construction of FLSA exemptions. The Court held that "the FLSA gives no 'textual indication' that its exemptions should be construed narrowly," and "[t]he narrow-construction principle relies on the flawed premise that the FLSA pursues its remedial purpose at all costs." *Id.* at 1142 (internal quotation marks omitted). "We thus have no license to give the exemption anything but a fair reading." *Id.* Justice Ginsburg, writing for the dissent, noted that "[i]n a single paragraph, the Court 'reject[s]' this longstanding principle as applied to the FLSA, without even acknowledging that it unsettles more than half a century of our precedent." *Id.* at 1148, n. 7.

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[1] *See, e.g., A. H. Phillips, Inc., v. Walling*, 324 U.S. 490, 493 (1945) ("Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed"); *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960) ("[E]xemptions are to be narrowly construed against the employers seeking to assert them and their application limited to those [cases] plainly and unmistakably within their terms and spirit").

II. FLSA Amendment – Tipped Employees

Tipped employees may be paid less than minimum wage—as little as $2.13 per hour—so long as their tips are sufficient to make up the "tip credit" of up to $5.12 hour. 29 U.S.C. § 203(m). Employers may also require that employees pool their tips with their co-workers but cannot require tip pooling with the employer, supervisors, management, or employees who do not customarily and regularly receive more than $30 per month in tips. *Id.*; 29 C.F.R. §531.56.

Prior to 2018, there was disagreement amongst circuit courts and the Department of Labor about whether employers that did not take a "tip credit" could force employees to share tips with the employer or non-tipped employees.[2] The March 23, 2018 FLSA amendment[3] resolved this disagreement; employers—even employers that *do not* take a "tip-credit"—may not require its employees to share their tips with the employer, including its managers or supervisors. 29 U.S.C. §203(m)(2)(B).[4] The Amendment also provides the DOL with discretion to impose civil monetary penalties not to exceed $1,100 when the employer unlawfully retains its employees' tips.

On April 16, 2018, the DOL issued a Field Assistance Bulletin ("FAB") providing guidance related to the amendment.[5] In the FAB, the DOL stated that it would be using the duties test from the FLSA's executive exemption to determine whether an employee is a manager or supervisor for purposes of section 3(m).[6]

III. Department of Labor Rulemaking

A. Joint Employer Guidance

On April 9, 2019, the Department of Labor ("DOL") published a Notice of Proposed Rulemaking ("NPRM") that would significantly alter its interpretive guidance to narrow the circumstances the DOL would consider to indicate an individual's or company's status as a joint employer under the FLSA.[7] The Notice observes that, under existing DOL interpretive guidance more than 60 years old, multiple persons can be joint employers of an employee if they are "not completely disassociated" with respect to the employment of the employee. However, the Notice states that "the real question is not whether they are associated but whether the other person's

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[2] *Cf.* 29 C.F.R. § 531.52 (2011) (prohibiting forced tip-sharing with non-tipped employees even if the employer does not take a "tip-credit") and *Oregon Restaurant & Lodging Assn. v. Perez*, 843 F.3d 355 (9th Cir. 2016) (reh'g and reh'g en banc denied) (same) with *Marlow v. New Food Guy, Inc.*, 861 F.3d 1157 (10th Cir. 2017) (holding that an employer could force the sharing of tips with non-tipped employees if the employer had not taken a "tip-credit").

[3] Part of the Consolidated Appropriations Act, 2018 H.R. 1625.

[4] It appears, however, that for employers that pay the full minimum wage, forced tip-sharing with non-tipped employees is permissible so long as those individuals are not supervisors or managers.

[5] FIELD ASSISTANCE BULLETIN NO. 2018–3 (April 6, 2018) https://www.dol.gov/whd/FieldBulletins/fab2018_3.pdf.

[6] Under the FAB, the DOL's position is now that "employers who pay the full FLSA minimum wage are no longer prohibited from allowing employees who are not customarily and regularly tipped—such as cooks and dishwashers—to participate in tip pools." *Id.*

[7] https://www.dol.gov/whd/flsa/jointemployment2019/; https://www.federalregister.gov/documents/2019/04/09/2019-06500/joint-employer-status-under-the-fair-labor-standards-act

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