2021–22 Wage and Hour Update

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Before moving on—a special thanks to my colleague Michael Drab for his contributions to this paper.

REGULATORY DEVELOPMENTS

It has been over a year since President Biden took office and the Department of Labor's ("DOL") Wage and Hour Division is still without its lead enforcer. President Biden nominated former division head, David Weil, in June 2021 and his nomination was finally put to a vote on March 30, 2022. He failed to garner the support of Democratic Senators Joe Manchin (West Virginia), Kyrsten Sinema (Arizona), and Mark Kelly (Arizona), however, and his nomination was rejected.

As discussed last year, the DOL published a final rule during the Trump Administration clarifying the standard for classification of independent contractors under the FLSA.[1] When President Biden took office, the DOL took steps that ultimately culminated in withdrawing the rule entirely.[2] Private interest groups sued to have the withdrawal rule set aside on the grounds that the DOL violated the Administrative Procedure Act.[3] A district court agreed and vacated the withdrawal because the DOL rescinded the rule without considering ways in which the Trump-era rule could be modified or changed.[4] Where exactly this leaves us is not entirely clear. The DOL may take additional regulatory action to formalize the withdrawal and issue a new rule.

MINIMUM WAGE DEVELOPMENTS

As noted last year, the Biden Administration is set on encouraging a raise to the minimum wage. To that end, President Biden signed an Executive Order on April 27, 2021, raising the hourly minimum wage for employees working under a federal contract to $15.00 (or $10.50 for tipped workers).[5] That new minimum wage took effect on January 30, 2022. Similarly, the Office of Personnel Management announced that all federal civilian employees would be paid at least $15.00 an hour.[6] While neither of these developments directly impact private employers, the indirect effect may encourage higher wages for private sector employees.

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[1] *See* Independent Contractor Status Under the Fair Labor Standards Act, 86 Fed. Reg. 1,168 (Jan. 7, 2021). The rule was scheduled to take effect on March 8, 2021.

[2] *See* Independent Contractor Rule Under the Fair Labor Standards Act: Withdrawal, 86 Fed. Reg. 24,303 (May 6, 2021).

[3] *See Coalition for Workforce Innovation v. Walsh*, 1:21-cv-130 (E.D. Tex.).

[4] *See id.* (docket entry 32).

[5] EO 14026; *see also* Michael A. Drab, *What Federal Contractors Need to Know About the New Minimum Wage Requirements* (January 17, 2022), *available at* https://www.jw.com/news/insights-federal-contractors-minimum-wage/.

[6] Office of Personnel Management, Memorandum for Heads of Executive Departments and Agencies (Jan. 21, 2022).

CASE LAW UPDATE

As always, the courts have been active in issuing interesting and important decisions in this field of law. We discuss some highlights below with a primary focus on the Fifth Circuit.

A. *SWALES* UPDATE

Last year, the Fifth Circuit changed the way FLSA collective actions are managed at the district court level.[7] Rather than splitting the certification decision in two stages, the Fifth Circuit held that the certification decision should be made once and at the outset of the case. Early on, the district court should assess the claims, determine what facts and legal considerations are relevant to deciding whether employees are "similarly situated," and then authorize discovery accordingly. The district court must then "consider all of the available evidence" and decide whether the "similarly situated" standard has been met. In a notable deviation from *Lusardi* (the prevailing case management tool prior to *Swales*),[8] the Fifth Circuit expressly noted that a consideration of the merits of the claim at issue may also be appropriate in making that determination. Since *Swales*, there have been two published opinions by district courts in the Fifth Circuit discussing a motion for certification of a collective action.[9]

T.S. v. Burke Found., 521 F. Supp. 3d 691 (W.D. Tex. 2021) – Notice Sent to Residents at Treatment Facility who Allegedly Worked without Pay

The plaintiffs in this case were current and former residents of Pathfinders Ranch, a residential treatment center for minor boys with mental health issues. While living at the Pathfinders Ranch, the plaintiffs alleged they were required to perform various work assignments, including cleaning, landscaping, cooking, and various other tasks. The plaintiffs alleged these projects were not part of any programming, training, or treatment plan and that they were never paid for any of the work performed.[10] They moved to certify a collective action.

The court addressed the propriety of sending notice consistent with the framework set forth in *Swales*. First, it determined what facts and legal considerations would be material to determining whether the proposed group of employees are "similarly situated." The defendant argued that two factual considerations prevented certification: (1) not all the proposed plaintiffs engaged in manual labor and (2) the proposed plaintiffs did not work the same number of hours per week. The court held that neither of these considerations were relevant in determining whether the plaintiffs were similarly situated. The court reasoned that the first was unsupported by case law and that the second was a question of damages, not similarity.

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[7] *See Swales v. KLLM Transport Services*, 985 F.3d 430 (5th Cir. 2021).

[8] *Lusardi v. Xerox Corp.*, 118 F.R.D. 351 (D.N.J. 2011).

[9] *See Young v. Energy Drilling Co.*, 534 F. Supp. 3d 720 (S.D. Tex. 2021); *T.S. v. Burke Found.*, 521 F. Supp. 3d 691 (W.D. Tex. 2021).

[10] *T.S. v. Burke Found.*, 521 F. Supp. 3d 691, 696 (W.D. Tex. 2021). The plaintiffs alleged they were occasionally awarded "Burke Bucks" that could only be used at a store located on Pathfinders Ranch.

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