FLSA DEVELOPMENTS: DOL AND THE COURTS

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OVERVIEW

For a statute witnessing the eightieth anniversary of its passage this June, the Fair Labor Standards Act[1] (the "FLSA") has undergone an extraordinary series of developments over the past twelve months. This paper begins by addressing the recent decision by the Wage and Hour Division ("WHD") of the U.S. Department of Labor ("DOL") to resume issuing opinion letters after a hiatus of more than nine years. Next, we provide an update on WHD's efforts to revise the salary requirements of the executive, administrative, and professional exemptions. We then turn to Congress's amendment of the FLSA's provisions relating to tips. We conclude with a discussion of two recent rulings by the Supreme Court that changed the standard for determining employee exempt status and upheld waivers of class and collective actions embodied in arbitration agreements.

I. FLSA OPINION LETTERS ARE BACK: THE BUSH 17

On June 27, 2017, the DOL announced that it has reinstated the issuance of Opinion Letters by WHD.[2] According to the DOL, an "opinion letter is an official, written opinion by the Wage and Hour Division (WHD) of how a particular law applies in specific circumstances presented by an employer, employee or other entity requesting the opinion."[3]

The DOL stopped using Opinion Letters in 2010, and instead began to issue "Administrator's Interpretations," which were more general than Opinion Letters, and meant to provide general interpretations of law and regulations for industries, categories of employees, or even all employees as a whole.[4] The Obama DOL issued seven Administrator's Interpretations between 2010 and 2016, two of which—relating to joint employment and independent contractors—were withdrawn on June 7, 2017.[5] Since the reinstatement, the Trump DOL has issued 19 Opinion Letters, 15 of which were holdovers from the President George W. Bush years.[6] It also elevated two non-administrator letters to official opinion letter status and issued all 17 on January 5, 2018.[7] The other two were issued on April 12, 2018.[8]

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1 29 U.S.C. §§ 201 *et seq.*

2 News Release, US DEPARTMENT OF LABOR REINSTATES WAGE AND HOUR OPINION LETTERS (June 27, 2017), https://www.dol.gov/newsroom/releases/whd/whd20170627.

3 *Id.*

4 *See generally* Wage and Hour Division, Administrator Interpretations Letter - Fair Labor Standards Act, https://www.dol.gov/WHD/opinion/adminIntrprtnFLSA.htm.

5 *Id.*

6 Wage and Hour Division, Opinion Letters - Fair Labor Standards Act https://www.dol.gov/whd/opinion/flsa.htm; Kate Tornone, *DOL Opinion Letters: Flawed, but the best option available?*, HR DIVE (Mar. 1, 2018) https://www.hrdive.com/news/dol-opinion-letters-flawed-but-the-best-option-available/517777/.

7 *Id.*

8 Wage and Hour Division, Opinion Letters - Fair Labor Standards Act https://www.dol.gov/whd/opinion/flsa.htm.

In March, Tammy McCutchen, a former WHD administrator revealed that in the days leading up to President Barack Obama's inauguration, then-acting WHD Administrator Alexander J. Passantino signed 18 opinion letters, but never mailed them.[9] Two were faxed to the parties that requested them, but the rest remained unseen.[10] Because they were never officially mailed, the Obama Administration withdrew them. The DOL database of opinion letters currently states that these letters were issued January 16, 2009, withdrawn on March 2, 2009, and re-issued in 2018.[11]

The letters cover a variety of topics, including overtime exemptions for construction supervisors, a collective bargaining agreement provision affecting firefighters, and salary deductions for absences. Notably, since almost a decade has passed since they were requested, their assistance to the employers that requested them is likely limited.

The Obama Administration created the shift towards Administrator's Interpretations to address issues on a broader scale and reach more people.[12]

Below are brief summaries of the reintroduced opinion letters:

1. **FLSA2018-1**: On-call hours are compensable time for ambulance personnel if they restrict or prevent the employee from using his or her time freely. To determine whether on-call conditions are restrictive, employers should apply a totality of circumstances in which the following factors are considered. Employers should consider whether employees: (1) are required to carry a pager; (2) must report to work within a reasonable time; (3) are disciplined if they fail to respond during the prescribed time; (4) receive a high number or frequency of callbacks during on-call hours; and/or (5) have to travel a great distance to report to work or before they can use their time freely.[13]

2. **FLSA2018-2**: This opinion letter is in reference to plumbing sales/service technicians or retail or service establishments. The FLSA provides an overtime exemption for any employee of a retail or service establishment, if (1) the regular rate of pay of such employee is in excess of one and one-half times the minimum wage, and (2) more than half of the employee's compensation for a representative period (not less than one month) represents commissions on goods or services. The retail concept applies to a business that provides drain cleaning and minor plumbing repair and replacement services if more than 75 % of its annual dollar volume of sales of goods and services is not for resale. Computing employee compensation based on a percentage of the charge to the customer, such as the charge for labor and/or the charge for service and parts used in repair, can represent commissions on goods and

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[9] Kate Tornone, *DOL Opinion Letters: Flawed, but the best option available?* HR DIVE (Mar. 1, 2018) https://www.hrdive.com/news/dol-opinion-letters-flawed-but-the-best-option-available/517777/.

[10] *Id.*

[11] WHD Opinion Letters, *supra*.

[12] *Id.*

[13] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_01_FLSA.pdf.

services. For the exemption to apply, the total amount of commission payments must be more than one-half the employee's total compensation for a representative period (not less than one month).[14]

3. **FLSA2018-3**: In general, helicopter pilots do not qualify for an administrative, executive or professional exemption under the FLSA. Aviation is not a field of science or learning, and the knowledge required to be a pilot is not customarily acquired by a prolonged course of specialized intellectual instruction.[15]

4. **FLSA2018-4**: This opinion letter addresses the FLSA status for commercial construction project superintendents. The learned professional exemption does not apply to occupations in which most employees have acquired their skill by experience rather than by advanced specialized intellectual instruction. The following primary duties fall within the scope of the administrative exemption: (1) overseeing a commercial construction project from start to finish; and (2) securing or hiring subcontractors and overseeing the work of subcontractors.[16]

5. **FLSA2018-5**: This opinion letter explains the regular rate calculation for fire fighters and alarm operators. Under the partial overtime exemption applicable to employees in fire protection activities, Section 7(k), 29 U.S.C. § 207(k), and 29 C.F.R. § 553.230, provide that such employees may be scheduled for a work period between seven and 28 days, as long as the ratio between maximum hours worked and days in the work period bears the same relationship as 28 days bears to 212 hours, as 159 hours in 21 days does, etc. The FLSA requires pay only for hours actually worked and not for holidays or vacation time. The FLSA does not dictate the method of regular rate calculation for non-overtime hours so long as the minimum wage is met for all hours.[17]

6. **FLSA2018-6**: This opinion letter addresses the FLSA status for coaches. Coaches qualify for the teacher exemption if their primary duty is teaching and imparting knowledge to students in an educational establishment. Coaches whose primary duties are not related to teaching—for example, performing general clerical or administrative tasks for the school unrelated to teaching, including the recruitment of students to play sports, or performing manual labor—do not qualify for the teacher exemption. There is no requirement that the employee possess a teaching certificate to qualify for the exemption. There is no minimum education or academic degree required under the regulations for the teacher exemption.[18]

7. **FSLA2018-7**: This opinion letter addresses the effect on an employee's FLSA status of employee salary deductions for full-day absences. An employee's exempt status is

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[14] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_02_FLSA.pdf.

[15] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_03_FLSA.pdf.

[16] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_04_FLSA.pdf.

[17] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_05_FLSA.pdf.

[18] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_06_FLSA.pdf.

not affected if an employer calculate a deduction for a full-day absence based on the number of hours actually missed. However, deductions are not permissible without losing the exempt status if the employee is absent for less than one full day of work.[19]

8. **FLSA2018-8**: This opinion letter clarifies that the following primary duties of client services managers fall within the scope of the administrative exemption: (1) comparing and evaluating possible courses of conduct and acting or making a decision after the various possibilities have been considered; (2) having the authority to execute insurance and finance contracts and legally bind the agency and its clients; (3) consulting with clients to identify risk and exposure, advising on determining proper values for the clients' assets, and then recommending solutions to manage the clients' risk and exposure; and (4) acting as an insurance advisor and consultant to the agency's clients, not selling an insurance product.[20]

9. **FLSA2018-9**: An employer need not include a non-discretionary bonus in the regular rate that is based on previous payments properly excluded from the regular rate. In this instance the year-end nondiscretionary bonus was based on a percentage of an employee's total straight-time and overtime earnings.[21]

10. **FLSA2018-10**: This opinion letter clarifies that the following primary duties of construction project supervisors fall within the scope of the administrative exemption: (1) evaluating the quality and efficiency of subcontractors' and suppliers' work; (2) having authority to stop subcontractor work to correct any observed deficiencies, and may require subcontractors to remove any of their employees from the worksite; (3) if necessary, recommending the dismissal of subcontractors and suppliers whose work is not satisfactory; (4) providing significant input as to who will be re-contracted for future services; (5) making sure there are no conflicts between the plans and the actual construction of the home; (6) negotiating the best solution for any issue that may arise with a building inspector, subcontractor or supplier; and (7) scheduling the subcontractors and suppliers and committing the homebuilding company to pay when appropriate.

    Ordinary inspection work generally does NOT meet the duties requirements for the administrative exemption. Ordinary inspection includes inspecting the work of subcontractors to ensure compliance with the builder's plans to schedule subcontractors and supplies to ensure they were both in place at the proper time. The fact that the work is important to the company, affecting its profitability and reputation, is not a factor in determining FLSA exempt/non-exempt status.[22]

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19 *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_07_FLSA.pdf.

20 *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_08_FLSA.pdf.

21 *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_09_FLSA.pdf.

22 *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_10_FLSA.pdf.

11. **FLSA2018-11**: All remuneration paid for employment must be included in the regular rate unless it is explicitly excluded under the law. This includes "job bonuses."[23]

12. **FLSA2018-12**: This opinion letter is in reference to the administrative exemption status for consultants, clinical coordinators, coordinators and business development managers. It clarifies that the following primary duties fall within the scope of the administrative exemption: (1) screening, interviewing, and recommending candidates for hiring; (2) supervising and counseling to resolve issues regarding housing complaints and timeliness of payroll; (3) addressing client facility concerns regarding problems directly; (4) working with client facilities to monitor performance; (5) serving as second-line supervisors to counsel and discipline employees regarding clinical and behavioral issues; (6) analyzing existing market conditions to determine needs, competitors' capabilities, and competitive billing and pay rates; (7) training consultants and other employees; and (8) analyzing client facilities' staffing needs, bill rate tolerance, and contract expectations.[24]

13. **FLSA2018-13**: This opinion letter clarifies that the following primary duties for fraud/theft analysts and agents fall within the scope of the administrative exemption: (1) managing the collection of intelligence information; (2) coordinating the collection efforts of area personnel; and (3) evaluating and approving information to ensure accuracy and relevancy.

    It also clarifies that the following primary duties do NOT fall within the scope of the administrative exemption: (1) conducting investigations; (2) collecting and analyzing data; and (3) producing analytical reports.[25]

14. **FLSA2018-14**: This opinion letter clarifies permissible and impermissible salary deductions for exempt, salaried employees' absences from work. When absences are caused for personal reasons, the FLSA allows employers to make full-day salary deductions for exempt employees. The FLSA, however, does not allow for salary deductions for partial-day absences. Deductions from salary caused by sickness or disability (including work-related accidents) must follow the rules set out by the employer's bona fide plan, policy or practice of providing compensation for loss of salary occasioned by sickness or disability.[26]

15. **FLSA2018-15**: This opinion letter clarifies that the following primary duties fall within the scope of the FLSA's administrative exemption for product demonstration coordinators: (1) developing and implementing strategies for recruiting and maintaining relationships with demonstrators; (2) deciding how much effort to devote to expanding the pool of demonstrators; (3) ensuring that a demonstrator executes a

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[23] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_11_FLSA.pdf.

[24] *See* https://www.dol.gov/whd/opinion/FLSA/2017/2017_12_18_12_FLSA.pdf.

[25] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_13_FLSA.pdf.

[26] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_14_FLSA.pdf.

contract before conducting an event; (4) receiving and resolving demonstrator complaints; (5) ensuring that the appropriate number of demonstrators staff events and are fully prepared for them; (6) determining the order in which to staff events, acting as liaison to managers of retail locations where events are scheduled; and (7) developing a contingency plan for demonstrator no-shows or late cancellations.[27]

16. **FLSA2018-16**: Individuals that work for pay as an employee of an employer cannot "volunteer" the same services for that employer, nor for any joint employer.[28]

17. **FLSA2018-17**: This opinion letter incorporates by reference FLSA2018-10, responding to a request that the WHD re-issue the opinion letter, formerly known as FLSA2009-29.[29]

Here are short summaries for the two opinion letters issued on April 12, 2018:

18. **FLSA2018-18**: This opinion letter addresses the compensability of travel time under the FLSA, considering the case of hourly-paid employees with irregular work hours who travel in company-provided vehicles to different locations each day and are occasionally required to travel on Sundays to the corporate office for Monday trainings. The Opinion Letter reaffirms the following guiding principles: First, as a general matter, time is compensable if it constitutes "work" (a term not defined by the FLSA). Second, "compensable worktime generally does not include time spent commuting to or from work." Third, travel away from the employee's home community is worktime if it cuts across the employee's regular workday. Fourth, "time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile" is not worktime.[30]

19. **FLSA2018-19**: This opinion letter addresses the compensability of 15-minute rest breaks required every hour by an employee's serious health condition (i.e., protected leave under the FMLA). Adopting the test articulated by the Supreme Court in the *Armour* decision[31]—whether the break primarily benefits the employer (compensable) or the employee (non-compensable)—the letter advises that short breaks required solely to accommodate the employee's serious health condition, unlike short, ordinary rest breaks, are not compensable because they predominantly benefit the employee. The letter cautions, however, that employers must provide employees who take FMLA-protected breaks with as many compensable rest breaks as their coworkers receive, if any.[32]

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[27] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_15_FLSA.pdf.

[28] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_16_FLSA.pdf.

[29] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_01_05_17_FLSA.pdf.

[30] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_04_12_01_FLSA.pdf.

[31] Armour & Co. v. Wantock, 323 U.S. 126 (1944).

[32] *See* https://www.dol.gov/whd/opinion/FLSA/2018/2018_04_12_02_FLSA.pdf.

II. THE STATUS OF THE DEPARTMENT'S OVERTIME REGULATION

On May 23, 2016, the Department of Labor published a Final Rule that would, among other things:

- Increase the minimum salary for the FLSA's executive, administrative, and professional exemptions from $455 to $913 per week, or from $23,660 to $47,476 per year;
- Allow non-discretionary bonuses, incentive payments, and commissions to satisfy up to 10% of the salary requirement if paid no less frequently than quarterly;
- Increase the minimum annual compensation threshold for the highly-compensated employee exemption standard from $100,000 to $134,004; and
- Automatically adjust the minimum salary and the highly-compensated employee annual compensation levels every three years beginning in 2020.[33]

The Final Rule stated that its effective date would be December 1, 2016.[34]

A coalition of 21 states challenged the Final Rule, however, and on November 22, 2016, just nine days before the regulation's scheduled effective date, a federal judge in Texas issued a preliminary injunction barring the implementation and enforcement of numerous portions of the Final Rule.[35] The Department appealed the injunction ruling to the Fifth Circuit, and the court scheduled oral argument for October 3, 2017. The varying positions that the Department took during the appeal reflect to some extent the policy differences between the Obama and Trump Administrations. The Department's opening brief, filed in December 2016, reflects a full-throated defense of the Final Rule.[36] In June 2017, after receiving three extensions of time to file, the Department submitted its reply brief, in which the Department defended only its authority to implement a salary standard for these exemptions, without attempting to defend the specific levels established in the Final Rule.[37]

On July 26, 2017, the Department published in the *Federal Register* a Request for Information seeking input on a number of topics, including:

- What methodology the Department should use in setting a salary threshold for the executive, administrative, and professional exemptions;

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[33] *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales, and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016), https://www.regulations.gov/contentStreamer?documentId=WHD-2015-0001-5791&contentType=pdf.

[34] *Id.* at 32,391.

[35] *See* Nev. v. U.S. Dep't of Labor, 218 F. Supp. 3d 520 (E.D. Tex. 2017). The court has consolidated that case with another case filed on the same date by a variety of business associations. *See* Order, Plano Chamber of Commerce v. Perez, No. 16-732 (E.D. Tex. Oct. 19, 2016), ECF No. 11.

[36] *See* Appellant's Brief, Nev. v. U.S. Dep't of Labor, No. 14-41606 (5th Cir. Dec. 15, 2016).

[37] *See* Appellant's Reply Brief, Nev. v. U.S. Dep't of Labor, No. 14-41606 (5th Cir. June 30, 2017).

- Whether the regulations should reflect various salary levels, as well as total annual compensation levels for highly-compensated employees, based on such factors as employer size, census division, or state;
- Whether different salary thresholds are appropriate for the different exemptions;
- The interplay between the salary threshold and the duties tests for the exemptions;
- How employers responded to the 2016 Final Rule, including what the economic impact has been;
- Whether to base exempt status on duties alone;
- The amount of non-exempt work employees in traditionally exempt occupations affected by the 2016 Final Rule perform;
- Whether to modify the amount of non-discretionary bonus and incentive compensation that can satisfy the salary threshold; and
- Whether and how to provide for automatic periodic updates to the salary threshold as well as the total annual compensation levels for highly-compensated employees.[38]

The Request for Information describes the pending litigation and notes that "[a]s stated in our reply brief filed with the Fifth Circuit, the Department has decided not to advocate for the specific salary level ($913 per week) set in the 2016 Final Rule at this time and intends to undertake further rulemaking to determine what the salary level should be."[39] Thus, "the Department has decided to issue this RFI rather than proceed immediately to a notice of proposed rulemaking[.]"[40] The Department received more than 214,000 comments during the comment period, though the vast majority appear to be identical submissions by different commenters, not an unusual occurrence for this type of comment process.[41]

On August 31, 2017, the district court in Texas issued a decision granting the plaintiffs' motion for summary judgment and holding that the 2016 Final Rule is invalid.[42] In short, the court determined that the regulations are inconsistent with congressional intent insofar as they raised the salary threshold to such an extent that large numbers of people performing exempt duties would nevertheless be non-exempt based solely on their salary.[43] Clarifying language from the preliminary injunction ruling, the court stated that the Department has the authority to impose a salary-level requirement, and that the only thing the court was considering in its ruling

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[38] *See* Request for Information; Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 82 Fed. Reg. 34,616 (July 26, 2017), https://www.regulations.gov/contentStreamer?documentId=WHD-2017-0002-0001&contentType=pdf.

[39] *Id.* at 34,617.

[40] *Id.*

[41] *See* www.regulations.gov, RIN 1235-AA20.

[42] *See* Nev. v. U.S. Dep't of Labor, 2017 U.S. Dist. LEXIS 140522 (E.D. Tex. Aug. 31, 2017).

[43] *See id.* at *21-28.

was the specific salary level set in the 2016 rulemaking.[44] Shortly thereafter, the Department voluntarily dismissed its appeal of the preliminary injunction order as moot. On October 30, 2017, the Department appealed the summary judgment ruling and then promptly asked the Fifth Circuit to stay all action on the appeal pending the outcome of the rulemaking process. The Fifth Circuit granted the stay.

With the litigation regarding the 2016 Final Rule on hold and the comment period for the RFI closed, the next anticipated step is for the Department to issue a new Notice of Proposed Rulemaking ("NPRM") proposing the Trump Administration's version of an updated test for exempt status. The current regulatory agenda anticipates an NPRM in January 2019[45], though that date may change. Based on Secretary of Labor Acosta's publicly stated views, it appears likely that the NPRM will propose a salary threshold in the range of $32,000 to $37,000.

III. SAUSAGE-MAKING 101: THE 2018 AMENDMENT TO THE FLSA'S TIP-POOLING PROVISIONS.

The FLSA is a famously durable statute, seemingly impervious to significant congressional intervention, particularly in this era of closely divided government, except under the most unusual of political circumstances.[46] March 2018, however, witnessed an amendment to the FLSA pass Congress with bipartisan support, with little or no public awareness of its terms until after the President signed the omnibus appropriations bill. Here is the story of how that came to be.

A. FLSA Section 3(m) and tips

Under Section 3(m) of the FLSA,[47] employers may credit a portion of employee tips against the employer's minimum wage obligation under certain circumstances. Specifically, until earlier this year, the final three sentences of this portion of the statute provided:

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[44] *See id.* at *9 n.1, *22 n.5.

[45] *See* Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, Department of Labor, RIN 1235-AA20, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1235-AA20.

[46] As of June 2018, the political balance in the Senate is 49 Democrats (including two Independents who caucus with them) to 51 Republicans, the House has 194 Democrats to 241 Republicans, and the President identifies as Republican. By contrast, in years where there has been significant congressional action involving the FLSA, the partisan balance has tended to be much more one-sided. In 1938, for example, when Congress enacted the FLSA, the Senate had 75 Democrats to just 17 Republicans, the House had 333 Democrats to just 89 Republicans, and Democrat Franklin Delano Roosevelt was in the White House. In 1961, when Congress greatly expanded the reach of the FLSA by, among other things, creating enterprise coverage, the Senate had 64 Democrats to 36 Republicans, the House had 262 Democrats to 175 Republicans, and Democrat John F. Kennedy was president. In 1966, when Congress further expanded the FLSA by, among other things, significantly reducing the dollar threshold for enterprise coverage, the Senate had 68 Democrats to 32 Republicans, the House had 295 Democrats to 140 Republicans, and Democrat Lyndon B. Johnson resided at 1600 Pennsylvania Avenue.

[47] 29 U.S.C. § 203(m).

> In determining the wage an employer is required to pay a tipped employee, the amount paid such employee by the employee's employer shall be an amount equal to—
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> (1) the cash wage paid such employee which for purposes of such determination shall be not less than the cash wage required to be paid such an employee on August 20, 1996[48]; and
>
> (2) an additional amount on account of the tips received by such employee which amount is equal to the difference between the wage specified in paragraph (1) and the wage in effect under section 206(a)(1) of this title.
>
> The additional amount on account of tips may not exceed the value of the tips actually received by an employee. **The preceding 2 sentences shall not apply with respect to any tipped employee unless** such employee has been informed by the employer of the provisions of this subsection, and **all tips received by such employee have been retained by the employee, except that this subsection shall not be construed to prohibit the pooling of tips among employees who customarily and regularly receive tips**.[49]

From the time of the 1974 FLSA amendments that gave the tip credit provision its current structure, subject to minor revisions in the intervening years, the Department of Labor took the position that employers may not require tipped employees to share or to pool their tips with non-tipped employees, whether or not the employer takes a tip credit. In other words, although the statute describes the requirement that employees retain their tips except for tip pools among other tipped employees as a condition on taking the tip credit, the Department consistently maintained that this requirement operates independently of the tip credit and thus applies even where an employer pays all of its employees a cash wage equal to or greater than minimum wage.

B. *Cumbie v. Woody Woo* and the Department's 2011 regulations

In 2010, the Ninth Circuit decided *Cumbie v. Woody Woo, Inc.*[50], in which the court rejected the Department's interpretation, concluding instead that the plain language of the FLSA permits an employer that pays all of its employees at or above the federal minimum wage to require tipped employees to share their tips with kitchen staff. The court held that the provisions of Section 3(m) do not apply to employers that do not take a tip credit. The following year, the Department issued a Final Rule incorporating into the FLSA regulations several provisions

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[48] This portion of the statute refers to the minimum cash wage for tipped employees when the statute provided for the tipped cash wage to be 50% of the federal minimum wage, which on the specified date was $4.25 per hour, thus producing the tipped minimum cash wage of $2.13 per hour that remains in effect today.

[49] 29 U.S.C. § 203(m) (emphases added).

[50] 596 F.3d 577 (9th Cir. 2010).

embodying the Department's longstanding enforcement position, expressly rejecting the Ninth Circuit's decision.[51]

Several restaurant associations challenged the Department's 2011 Final Rule, and in June 2013 a federal judge in Oregon granted the associations' motion for summary judgment and denied the government's cross-motion, concluding that the 2011 Final Rule is contrary to the plain language of the FLSA.[52] In February 2016, the Ninth Circuit reversed the district court in a 2-1 ruling concluding that the absence of language in the FLSA specifically addressing the application of the tip credit limitations to employers that do not create a tip credit is a "gap" that the Department properly filled via regulation, with a dissent authored by one of the judges who was part of the *Cumbie* panel.[53] In September 2016, the Ninth Circuit denied panel and en banc rehearing, with ten judges dissenting and observing that the panel majority's decision creates two distinct circuit splits.[54] The author of the lengthy and vigorous dissent was the author of *Cumbie*.

In June of 2017, the Tenth Circuit addressed the validity of the 2011 Final Rule and expressly rejected the Ninth Circuit's position. In *Marlow v. New Food Guy, Inc.*[55], the court considered the Department's argument that Section 3(m) "is 'silent' on the question of employers who do not take the tip credit, and that this silence is a 'gap' the DOL was authorized to fill with its regulations."[56] Noting that the Ninth Circuit has accepted that argument, the Tenth Circuit "respectfully disagree[d]."[57]

There are currently two petitions pending before the Supreme Court challenging the Ninth Circuit's ruling.[58] It took the Department fifteen months and nine extensions to prepare its response, which it filed on May 22, 2018.[59] In its long-awaited statement on the issue, the Department took the position that "the amended regulations exceed the Department's statutory authority" and argued that "the decision below is incorrect, important, and the subject of a circuit

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[51] Final Rule, Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832 (Apr. 5, 2011), https://www.regulations.gov/contentStreamer?documentId=DOL_FRDOC_0001-0040&contentType=pdf.

[52] *See* Or. Rest. & Lodging Ass'n v. Solis, 948 F. Supp. 2d 1217 (D. Or. 2013), *rev'd sub nom.* Or. Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080 (9th Cir.), *reh'g denied*, 843 F.3d 355 (9th Cir. 2016), *petition for cert. filed* (U.S. Jan. 19, 2017) (No. 16-920).

[53] *See* Or. Rest. & Lodging Ass'n v. Perez, 816 F.3d 1080 (9th Cir.), *reh'g denied*, 843 F.3d 355 (9th Cir. 2016), *petition for cert. filed* (U.S. Jan. 19, 2017) (No. 16-920).

[54] *See* Or. Rest. & Lodging Ass'n v. Perez, 843 F.3d 355 (9th Cir. 2016).

[55] 861 F.3d 1157 (10th Cir. 2017).

[56] *Id.* at 1162.

[57] *Id.*

[58] The Ninth Circuit consolidated for argument and decision the appeal from the declaratory judgment in Oregon along with the appeal from a district court in Nevada of the grant of an employer's motion to dismiss based on the invalidity of the same regulation in a private lawsuit by a putative class of employees. *See* Cesarz v. Wynn Las Vegas, LLC, 2014 WL 117579 (D. Nev. Jan. 10, 2014), *rev'd*, 816 F.3d 1080 (9th Cir.), *reh'g denied*, 843 F.3d 355 (9th Cir. 2016), *petition for cert. filed* (U.S. Aug. 1, 2016) (No. 16-163).

[59] *See* Br. for the Respondents, Nat'l Rest. Ass'n v. U.S. Dep't of Labor, No. 16-920 (U.S. May 22, 2018), http://www.supremecourt.gov/DocketPDF/16/16-920/47748/20180522151633179_16-920%20Natl%20Rest%20Assn.pdf.

split[.]"[60] The Department stated that "the Court should grant certiorari, vacate the Ninth Circuit's judgment, and remand for further proceedings[.]"[61]

C. The Trump Administration takes a different approach.

To make matters more interesting, on July 20, 2017, the Trump Administration issued its first semiannual regulatory agenda. That agenda contains two items for the Department's Wage and Hour Division, one of which is a statement of intent to undo the 2011 Final Rule. "In this Notice of Proposed Rulemaking, the Department will propose to rescind the current restrictions on tip pooling by employers that pay tipped employees the full minimum wage directly."[62] The Department issued that NPRM on December 5, 2017, proposing, as indicated in the regulatory agenda, to rescind the portions of the 2011 Final Rule affecting tip pooling.[63] The NPRM specifically noted that "[t]he Department has serious concerns that it incorrectly construed the statute in promulgating its current regulations . . . . The Department also has independent and serious concerns about those regulations as a policy matter."[64]

The NPRM, however, resulted in the submission of approximately 376,000 comments, the vast majority of which opposed the proposed change on the ground that allowing restaurants and other employers of tipped employees to require pooling of tips with non-tipped employees would enable employers to steal employee tips.[65] Further muddying the waters, it appears that the Department conducted an economic impact analysis for this potential change to the regulations but decided not to publish it with the NPRM.[66] The Department states that the analysis was too unreliable to use, while worker advocates have argued that the Department's political leadership simply did not like the results of the economic analysis and as a result chose to bury the study. On February 5, 2018, the Department's Inspector General informed the Wage and Hour Division that it will be investigating the rulemaking process, and Democrat lawmakers have pressed for oversight in Congress.[67]

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[60] Br. for the Respondents, Nat'l Rest. Ass'n v. U.S. Dep't of Labor, No. 16-920, at 13, 23 (U.S. May 22, 2018).

[61] *Id.* at 23. As of this writing, it appears that the Justices will consider both petitions during their June 21, 2018 conference. *See* Docket, Nat'l Rest. Ass'n v. U.S. Dep't of Labor, No. 16-920 (U.S.), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-920.html; Docket, Wynn Las Vegas, LLC v. Cesarz (U.S.) (No. 16-163), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/16-163.html.

[62] *See* www.reginfo.gov, RIN 1235-AA21.

[63] Tip Regulations Under The Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57,395 (Dec. 5, 2017).

[64] *Id.* at 57,399 (emphasis added).

[65] *See* www.reginfo.gov, RIN 1235-AA21.

[66] *See* Ben Penn, *Mulvaney, Acosta Override Regulatory Office to Hide Tips Rule Data*, DAILY LABOR REPORT, Mar. 21, 2018.

[67] *See id.*; Ben Penn, *Democrats Still Want Oversight on "Botched" Tip Pool Process*, DAILY LABOR REPORT, Mar. 22, 2018.

D. Congress amends the FLSA.

To alleviate the political pressure and the bad optics surrounding the NPRM, on March 6, 2018, Secretary Acosta testified in Congress that he would support an amendment to the FLSA that would prevent employers from keeping tips.[68] The next day, Democrat representatives from Connecticut and Massachusetts proposed legislation that would, among other things, ban employers from keeping any portion of tips.[69]

At the same time, Congress and the Administration were facing yet another deadline to reach a deal on appropriations in order to avoid yet another government shutdown. After a flurry of negotiations that happened largely outside the view of the public and stakeholders, Congress found itself with a gigantic spending bill two days before the federal government would run out of money. Congress publicly released H.R. 1625, a 2,232-page omnibus spending bill, on March 21, 2018, with the House passing the bill the next day. The Senate passed the bill after midnight on March 23, 2018, and later that day the President signed into law the Consolidated Appropriations Act, 2018.

The omnibus spending bill has 22 divisions, denoted by letters. Within Division S, the nineteenth division, Title XII bears the title "Tipped Employees." This portion of the omnibus, which appears at pages 2,025 to 2,027 of the legislation, accomplishes at least two significant changes to the FLSA's treatment of tips. First, the law adds a new provision to the FLSA, numbered as Section 3(m)(2)(B), which provides as follows:

> An employer may not keep tips received by its employees for any purposes, including allowing managers or supervisors to keep any portion of employees' tips, regardless of whether or not the employer takes a tip credit.[70]

This verbiage appears to accomplish some, if not all, of what the opponents of the Department's 2017 NPRM criticized about the regulatory proposal. At the same time, the ambiguity in the statutory language may lead to further litigation, and it is likely that the Department will issue regulations or other guidance explaining this new statutory provision in the near future.

Second, the law addresses the 2011 Final Rule, though in a way that will almost certainly lead to confusion and litigation:

> EFFECT ON REGULATIONS.—The portions of the final rule promulgated by the Department of Labor entitled "Updating Regulations Issued Under the Fair Labor Standards Act" (76 Fed. Reg. 18832 (April 5, 2011)) that revised sections 531.52, 531.54, and 531.59 of title 29, Code of Federal Regulations (76 Fed. Reg. 18854-18856) and that are not addressed by section 3(m) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(m))

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[68] *See* Tyrone Richardson, *Democrats Introduce Bill to Stop Tip Skimming*, DAILY LABOR REPORT, Mar. 7, 2018.

[69] *See id.*

[70] Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. S, Tit. XII, § 1201(a).

> (as such section was in effect on April 5, 2011), shall have no further force or effect until any future action taken by the Administrator of the Wage and Hour Division of the Department of Labor.[71]

The intent behind this provision seems to be to nullify the 2011 Final Rule, though it is not difficult to envision various arguments arising regarding how to construe this language. In the meantime, WHD has issued a Field Assistance Bulletin stating 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."[72] The Department has indicated that it will issue regulations implementing these statutory changes, estimating a publication date of August 2018.[73]

IV. *ENCINO MOTORCARS, LLC V. NAVARRO*: THE SUPREME COURT REJECTS THE RULE THAT COURTS CONSTRUE FLSA EXEMPTIONS NARROWLY.

For more than 70 years, the Supreme Court has construed FLSA exemptions narrowly. In *A.H. Phillips, Inc. v. Walling*, for example, the Court stated that "any exemption from such humanitarian and remedial legislation must . . . be narrowly construed . . . . To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."[74] The Supreme Court has restated this rule many times in the intervening years, and the lower courts have followed, citing this principle in virtually every significant case involving overtime exemptions.

On April 2, 2018, the Supreme Court issued its highly anticipated ruling in *Encino Motorcars, LLC v. Navarro*[75]. Marking the second time that the case has gone to the high court, the ruling held that the specific employees at issue—service advisors at an automobile dealership—are exempt from the FLSA's overtime requirement. What people will long remember the 5-4 ruling for, however, is not the exempt status of the particular plaintiffs in that case, but rather the Court's rejection of the principle that courts construe FLSA exemptions narrowly. By removing a heavy judicial thumb from the workers' side of the scales in FLSA exemption litigation, *Encino Motorcars* is likely to figure prominently in many pending and future exemption cases as employers will argue that this changes how certain exemptions should be applied. Plaintiffs' attorneys, however, believe that the "narrowly construed" had only a negligible impact on the impact of most exemption determinations in the past and will have a limited impact on future exemption cases.

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[71] *Id.* § 1201(c).

[72] U.S. Department of Labor, Wage & Hour Division, Field Assistance Bulletin 2018-3, at 1 (Apr. 6, 2018), https://www.dol.gov/whd/FieldBulletins/fab2018_3.pdf.

[73] *See* Spring 2018 Unified Agenda of Regulatory and Deregulatory Actions, Department of Labor, RIN 1235-AA21, https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201804&RIN=1235-AA21.

[74] 324 U.S. 490, 493 (1945).

[75] No. 16-1362 (U.S. Apr. 2, 2018), https://www.supremecourt.gov/opinions/17pdf/16-1362_gfbh.pdf.

A. Background

In one of the law's lesser-known subsections, FLSA Section 13(b)(10)(A) exempts from the federal overtime requirement "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements, if he is employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers[.]"[76] In the early 1970s, the U.S. Department of Labor originally interpreted this language as not applying to so-called "service advisors," whom the Court described as "employees at car dealerships who consult with customers about their servicing needs and sell them servicing solutions."[77] Courts took a different view, and from 1978 to 2011 the Department accepted the proposition that service advisors are exempt.[78] In 2011, the Department changed course again, issuing a regulation stating that service advisors are not "salesmen" and thus are not within the scope of the exemption.[79]

In 2012, current and former service advisors sued a California car dealership, asserting that they are non-exempt and entitled to overtime. The dealership moved to dismiss the complaint, arguing that the Section 13(b)(10)(A) exemption applies. The district court agreed and dismissed the case, but on appeal the U.S. Court of Appeals for the Ninth Circuit reversed. In April 2016, the Supreme Court reversed the Ninth Circuit, concluding in a 6-2 ruling that the Department's 2011 regulation is invalid and entitled to no deference, and remanding the matter to the Ninth Circuit to consider the meaning of the statutory language without the regulation.[80] On remand, the Ninth Circuit again held that the service advisors are not exempt, and the case went back up to the Supreme Court.

B. The Supreme Court's ruling

i. The meaning of the words in the statute

Noting the parties' agreement that certain language in the exemption either does not apply or is not at issue, Justice Thomas, writing for the Court, distilled the legal question to whether service advisors are "salesm[e]n . . . primarily engaged in . . . servicing automobiles" for purposes of the statute's overtime exemption.[81] The Court began its analysis by observing that "[a] service advisor is obviously a 'salesman.'"[82] The Court looked to dictionary definitions of

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76 29 U.S.C. § 213(b)(10)(A).

77 Slip op. at 1-2.

78 *Id.* at 2.

79 *Id.* at 3.

80 *Id.* at 3-4 (discussing *Encino Motorcars, LLC v. Navarro*, 579 U.S. — (2016)).

81 *Id.* at 5.

82 *Id.* at 6.

"salesman," concluding that the term means "someone who sells goods or services."[83] The Court stated that "[s]ervice advisors do precisely that."[84]

The Court then held that "[s]ervice advisors are also 'primarily engaged in . . . servicing automobiles.'"[85] Once again turning to dictionaries, the Court observed that [t]he word 'servicing' in this context can mean either 'the action of maintaining or repairing a motor vehicle' or '[t]he action of providing a service.'"[86] To the Court, "[s]ervice advisors satisfy both definitions. Service advisors are integral to the servicing process."[87] Although they "do not spend most of their time physically repairing automobiles[,]" neither do "partsmen," another category of employees whom "[a]ll agree . . . are primarily engaged in . . . servicing automobiles."[88] Thus, "the phrase 'primarily engage in . . . servicing automobiles' must include some individuals who do not physically repair automobiles themselves"; and the verbiage "applies to partsmen and service advisors alike."[89]

ii. The inapplicability of an arcane rule of statutory construction

The Court then rejected the Ninth Circuit's use of the so-called "distributive canon," a principle of statutory construction whereby courts may interpret a statute in a manner other than indicated by its plain language, and instead relate certain words back only to particular words appearing earlier in the statute. Here, the exemption uses the expansive, disjunctive word "or" three times, but the Ninth Circuit declined to read "or" in its usual sense, instead interpreting "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements" as meaning "any salesman . . . primarily engaged in selling" and "any . . . partsman[] or mechanic primarily engaged in . . . servicing[.]"[90] The Court gave three reasons for declining to apply the distributive canon to FLSA Section 13(b)(10)(A): (1) the absence of one-to-one matching, as the Ninth Circuit's reading requires pairing one category of employees with "selling" but two categories of employees with "servicing"; (2) the possibility, and indeed reasonableness, of construing the statute as written; and (3) the inconsistency of using the narrowing canon in light of the exemption's overall broad language.[91]

iii. Rejection of the narrow construction rule

The most significant aspect of the Court's ruling is its rejection of the Ninth Circuit's use of the "narrow construction" principle for FLSA exemptions:

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83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.*

88 *Id.*

89 *Id.*

90 *Id.* at 4, 7.

91 *Id.* at 8.

> The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. ***We reject this principle as a useful guidepost for interpreting the FLSA.***[92]

The Court observed that "[b]ecause the FLSA gives no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a "narrow") interpretation.'"[93] The Court remarked that "exemptions are as much a part of the FLSA's purpose as the overtime-pay requirement. We thus have no license to give the exemption anything but a fair reading."[94]

The Court also rejected the Ninth Circuit's reliance on a 1966-67 Handbook from the Department, as well as legislative history that was silent on the issue of service advisors.[95]

C. The Dissent

Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. They disagreed with the Court's linguistic construction of the exemption, while arguing that the regular schedules worked by service advisors render overtime exemption unnecessary.[96] The dissent rejected the car dealership's asserted reliance interest and concern for retroactive liability, noting the potential availability of the FLSA's good faith defense.[97] Finally, the dissent criticized the Court for rejecting the narrow construction principle for FLSA exemptions "[i]n a single paragraph . . . without even acknowledging that it unsettles more than half a century of our precedent."[98]

D. What the decision means for the future

Most immediately, *Encino Motorcars* affects car dealerships by concluding that service advisors are exempt from the federal overtime requirement. The decision, however, may reach far more broadly than just this one industry. Since the 1940s, courts grappling with the meaning of ambiguously-worded FLSA exemptions have invoked the narrow construction rule as an often outcome-determinative facet of their decisions. It created a strong presumption of non-exempt status unless an employer could demonstrate that an exemption "plainly and unmistakably" applies. In light of *Encino Motorcars*, that rule no longer applies in interpreting FLSA exemptions.

Employers' attorneys generally read the decision to mean that it should now be easier than before for employers to persuade courts that employees fall within overtime exemptions.

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92 *Id.* at 9 (emphasis added, citation omitted).

93 *Id.* (citation omitted).

94 *Id.* (citation omitted).

95 *Id.* at 9-11.

96 Ginsburg, J., dissenting, at 3-7.

97 *Id.* at 7-8.

98 *Id.* at 9 n.7.

Now, employers must merely show that their reading of the exemption is more consistent with the statutory and regulatory text than the employees' reading, rather than showing that there is little or no doubt about the matter.

Employees' attorneys, however, believe that the new "fair reading" standard may now actually lead to more employees being covered by the Act. For example, the so-called "executive exemption" under 29 U.S.C. § 213(a)(1) has, in their view, been interpreted well beyond any possible fair reading of that term by courts so as to provide that Burger King supervisors who flip burgers and work the cashier are somehow construed as "executives." Further, employee attorneys believe that the "narrowly construed" principle, though often quoted in support of decisions finding employees to be covered by the Act, in reality, made little difference in the ultimate outcome of the courts' decisions.

At the same time, courts may find themselves tempted to resist this development, especially when construing exemptions under state law. It would not be surprising, for example, to see some courts begin to construe state-law exemptions differently from their FLSA counterparts, even when the wording of the exemptions is identical.

V. *EPIC SYSTEMS CORP. V. LEWIS*: THE SUPREME COURT UPHOLDS CLASS AND COLLECTIVE ACTION WAIVERS CONTAINED IN ARBITRATION AGREEMENTS.

In the first case argued in the Supreme Court's most recent Term, the Court considered three cases consolidated for argument— *Epic Systems Corp. v. Lewis*[99], *Ernst & Young LLP v. Morris*[100], and *NLRB v. Murphy Oil USA, Inc.*[101]—presenting the issue of whether Sections 7 and 8(a)(1) of the National Labor Relations Act (the "NLRA")[102] bar the enforcement of class and collective action waivers contained in an arbitration agreement with employees. The issue first achieved national prominence in January 2012, when in *D.R. Horton, Inc.*,[103] the National Labor Relations Board held for the first time that such class waivers violate the NLRA's protection for employees engaging in "concerted activities for the purpose of . . . mutual aid or protection,"[104] as well as the prohibition on employer actions that "interfere with, restrain, or coerce employees in the exercise of" Section 7 rights.[105] The Board took the position that including class waivers in an arbitration agreement did not change the outcome, because the violation of NLRA Sections 7 and 8(a)(1) takes the agreements outside the scope of the savings clause of the Federal Arbitration Act (the "FAA"), which provides for the enforcement of agreements to arbitrate "save upon such grounds as exist at law or in equity for the revocation of any contract."[106]

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99 No. 16-285 (U.S.).

100 No. 16-300 (U.S.).

101 No. 16-307 (U.S.).

102 29 U.S.C. §§ 157, 158(a)(1).

103 357 N.L.R.B. 2277 (2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013).

104 29 U.S.C. § 157.

105 *Id.* § 158(a)(1).

106 9 U.S.C. § 2.

The federal courts initially did not share the NLRB's view, with the first three circuits that considered the issue concluding in 2013 that the congressional policy reflected in the FAA favoring enforcing arbitration agreements takes precedence over NLRA concerns regarding protected concerted activity, and that nothing in the NLRA reflects a contrary purpose because that law predates modern class action procedures. The Eighth Circuit rejected *D.R. Horton* in *Owen v. Bristol Care, Inc.*[107], the Second Circuit followed suit in *Sutherland v. Ernst & Young LLP*[108], and in December 2013 in *D.R. Horton, Inc. v. NLRB*[109] a divided panel of the Fifth Circuit denied enforcement of the NLRB's original ruling.

In May 2016, however, the Seventh Circuit decided in *Lewis v. Epic Systems Corp.*[110] to go in a different direction, embracing *D.R. Horton* and the position that class waivers violate the NLRA and that an NLRA violation is a basis for revoking a contract under the FAA's savings clause. The Ninth Circuit agreed with this view in *Morris v. Ernst & Young LLP*[111], and in May of 2017 a divided panel of the Sixth Circuit likewise sided with the Board in *NLRB v. Alternative Entertainment, Inc.*[112]

On May 21, 2018, the Court handed down its 5-4 decision in *Epic Systems Corp. v. Lewis*[113] upholding class and collective action waivers in arbitration agreements. Writing for the majority, Justice Gorsuch remarked that "[t]he NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum."[114] To the Court, "the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting that it did so in the NLRA . . . ."[115]

The Court first rejected the argument that the FAA's savings clause provides a basis for requiring class or collective action litigation, emphasizing that the statutory language allowing courts not to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract" refers to "only defenses that apply to 'any' contract."[116] This is because "the savings clause does not save defenses that target arbitration either by name or by more subtle methods, such as by 'interfer[ing] with fundamental attributes of arbitration.'"[117] As

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[107] 702 F.3d 1050 (8th Cir. 2013).

[108] 726 F.3d 290 (2d Cir. 2013).

[109] 737 F.3d 344 (5th Cir. 2013).

[110] 823 F.3d 1147 (7th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (No. 16-285).

[111] 834 F.3d 975 (9th Cir. 2016), *cert. granted*, 137 S. Ct. 809 (2017) (No. 16-300).

[112] 858 F.3d 393 (6th Cir. 2017).

[113] No. 16-285 (U.S. May 21, 2018), https://www.supremecourt.gov/opinions/17pdf/16-285_q8l1.pdf.

[114] Slip op. at 2.

[115] *Id.* at 25.

[116] *Id.* at 7 (citation omitted).

[117] *Id.*

the Court saw it, "by attacking (only) the individualized nature of the arbitration proceedings, the employees' argument seeks to interfere with one of arbitration's fundamental attributes."[118]

The Court then turned to the argument that the NLRA overrides the FAA with respect to class and collective action waivers. Noting that NLRA Section 7 "may permit unions to bargain to prohibit arbitration[,]" the Court explained that "it does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand."[119]

The Court concluded by declining to defer to the NLRB's position that the NLRA trumps the FAA with respect to class waivers. "Here . . . the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act."[120] The Court rejected the view "that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer."[121]

In addition to joining the majority opinion, Justice Thomas wrote a separate concurring opinion expressing the view that the FAA's statement in Section 2 that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" applies only to issues relating to "'the formation of the arbitration agreement.'"[122] The employees' argument "that the class waivers in their arbitration agreements are unenforceable because the National Labor Relations Act makes those waivers illegal" amounts to "a public policy defense"; and "'[r]efusal to enforce a contract for public-policy reasons does not concern whether the contract was properly made[.]'"[123]

In a dissent that is several pages longer than the majority opinion, Justice Ginsburg, joined by Justices Breyer, Sotomayor, and Kagan, disagreed with the Court on virtually every aspect of the decision.[124] In short, the dissent contends that the Court has gotten most or all of its major arbitration rulings wrong over the years, culminating in an erroneous outcome in this case. The dissent concludes as follows:

> If these untoward consequences stemmed from legislative choices, I would be obliged to accede to them. But the edict that employees with wage and hours claims may seek relief only one-by-one does not come from Congress. It is the result of take-it-or-leave-it labor contracts harking back to the type called "yellow dog," and of the readiness of this Court to

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[118] *Id.*

[119] *Id.* at 11.

[120] *Id.* at 19-20.

[121] *Id.* at 20.

[122] Thomas, J., concurring, at 1 (citation omitted).

[123] *Id.* at 2 (citation omitted).

[124] Ginsburg, J., dissenting, at 1-30.

> enforce those unbargained-for agreements. The FAA demands no such suppression of the right of workers to take concerted action for their "mutual aid or protection." Accordingly, I would reverse the judgment of the Fifth Circuit in No. 16-307 and affirm the judgments of the Seventh and Ninth Circuits in Nos. 16-285 and 16-300.[125]

It will be very interesting to see how workers, employers, and their counsel adapt their practices and strategies to this ruling in the coming years.

Submitted: June 21, 2018

[125] *Id.* at 30.