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NEWS & PUBLICATIONS

A Look Back on Wage and Hour Developments in 2018: Blockbuster Cases, FLSA Amendments, and More

Take 5 Newsletter
September 2018

Arguably, the very first workplace regulation, dating back thousands of years, was one involving wage and hour issues—the mandatory day of rest. While much has changed over the great many years since then, the centrality of work in our economy, and indeed our daily lives, has not. Today, more than ever, understanding and adhering to the rules governing workers' hours and pay is a key responsibility of every employer.

In 2018, roughly a century into the modern era of wage and hour law, we are still seeing significant legal developments involving both the rules that employers must follow to pay workers correctly and the procedures by which workers can vindicate their rights. For example, this year has witnessed high-profile and controversial 5-4 rulings from the U.S. Supreme Court involving class action waivers and exempt status determinations. The California Supreme Court has weighed in on the ever-thorny issue of differentiating employees from independent contractors. Congress has revised the standards governing tipped employees. And the Wage and Hour Division of the U.S. Department of Labor ("DOL") has resumed issuing opinion letters after a nine-year hiatus. In one way or another, at least one of these issues, if not more, potentially affects every employer in the country.

We have invited five Epstein Becker Green attorneys to reflect on the most significant wage and hour developments of the year, providing practical insights to enable employers to enhance their wage and hour compliance and to manage more effectively their risks in this area.

Opinion Letters: They're Back
Paul DeCamp

"Few governmental guidance documents are as useful and helpful for clarifying employer compliance obligations as opinion letters from the DOL's Wage and Hour Division. After taking a pause during the Obama administration, the DOL has once again begun issuing these letters, which provide answers to compliance questions that arise under the federal wage and hour laws, including the Fair Labor Standards Act and several other statutes. After reissuing 17 previously withdrawn letters, the DOL has begun releasing new letters drafted during the current administration. Employers and workers now have an avenue to ask for the DOL's views, and compliance will likely increase as a result."

Arbitration Agreements with Class Action Waivers: They Can Be Enforceable
Michael S. Kun

"In the past decade, in an effort to combat the onslaught of class and collective actions nationwide, more than a few employers turned to a similar device—arbitration agreements with class action waivers that would require employees to arbitrate their claims individually. Calendar year 2018 will likely be remembered by some as the year that the

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U.S. Supreme Court approved the enforceability of such agreements in *Epic Systems Corp. v. Lewis*—and that the U.S. Court of Appeals for the Sixth Circuit subsequently confirmed that they are enforceable as to claims under the Fair Labor Standards Act in *Gaffers v. Kelly Services, Inc*. These decisions will have a tremendous impact upon pending wage and hour class and collective actions. And they are likely to lead many more employers to implement arbitration agreements with class action waivers, if only to avoid the *in terrorem* effect of those types of actions."

California Companies Revisit Independent Contractor Relationships After *Dynamex*
Kevin Sullivan

"After the California Supreme Court's decision in *Dynamex Operations West, Inc. v. Superior Court*, which adopted a new 'ABC test' for determining whether a worker is either an employee or an independent contractor for purposes of most wage and hour laws, companies doing business in California must review their independent contractor relationships to determine whether to reclassify workers as employees. Those decisions are difficult and complex, particularly where the threat of litigation looms and the potential penalties are significant."

New Laws and Developments Concerning Tipped Employees
Jeffrey H. Ruzal

"Tips and tipped employees have been a subject of much debate over the last couple of years, and there is no indication that interest with respect to this provocative issue will be waning anytime soon. The Consolidated Appropriations Act of 2018 effectively prohibits owner-operators from requiring workers to cede their tips to management. Certain state legislators are now taking aim at tip credit laws, which allow owner-operators to take an allowance against the wages paid to tip-earning employees. Following several other states, Michigan will be phasing out tip credits, and New York may soon follow suit as Governor Andrew Cuomo has been aggressively campaigning for elimination of a tip credit. Elimination of the tip credit has significant business and legal ramifications. From a business perspective, many restaurant owners rely on tip credits to survive. From a legal perspective, however, elimination of the tip credit may result in fewer legal challenges brought by tip-earning employees against their employers."

No More Narrow Reviews of Overtime Exemptions
Maxine Adams

"The U.S. Supreme Court in *Encino Motorcars, LLC v. Navarro* held that service advisors at an automobile dealership are exempt from the Fair Labor Standards Act's overtime exemption. While having a direct impact on the automobile industry, the Supreme Court's decision to reject the long-standing principle of reviewing exemptions narrowly and to instead only give the exemptions a 'fair reading' stands to have a far-reaching impact for employers across the board."

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Insight and Commentary on Wage and Hour Law Developments Affecting Employers

California Supreme Court Adopts "ABC Test" for Independent Contractors

By Michael S. Kun & Kevin D. Sullivan on April 30, 2018

POSTED IN CALIFORNIA WAGE-HOUR LAW, WAGE AND HOUR POLICIES

On April 30, 2018, the California Supreme Court issued its long-awaited opinion in ***Dynamex Operations West, Inc. v. Superior Court***, clarifying the standard for determining whether workers in California should be classified as employees or as independent contractors for purposes of the wage orders adopted by California's Industrial Welfare Commission ("IWC"). In so doing, the Court held that there is a presumption that

individuals are employees, and that an entity classifying an individual as an independent contractor bears the burden of establishing that such a classification is proper under the "ABC test" used in some other jurisdictions.

Depending on the applicable statute or regulation, California has a number of different definitions for whether an individual is considered an entity's employee. In *Dynamex*, the Court concluded that one of these definitions – "suffer or permit to work" – may be relied upon in evaluating whether a worker is an employee for purposes of the obligations imposed by the wage order. But the Court held that the Court of Appeal had gone too far in providing a literal interpretation of "suffer or permit to work" that would encompass virtually anyone who provided services.

The Court held that it is the burden of the hiring entity to establish that a worker is an independent contractor who was not intended to be included within the applicable wage order's coverage.

To meet this burden, the hiring entity must establish *each* of the following three factors, commonly known as the "ABC test":

> (A) that the worker is free from the control and direction of the hiring entity in connection with the performance of the work, both under the contract for the performance of the work and in fact; *and*
>
> (B) that the worker performs work that is outside the usual course of the hiring entity's business; *and*
>
> (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed.

The Court concluded that the "suffer or permit to work definition is a term of art that cannot be interpreted literally in a manner that would encompass within the employee category the type of individual workers . . . who have traditionally been viewed as *genuine* independent contractors who are working only in their own independent business."

Following *Dynamex*, entities doing business in California that treat some workers as independent contractors will want to review their relationship under the "ABC test" to determine whether any or all such workers should be reclassified.

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DOL Issues Field Assistance Bulletin Providing Guidance on Classification of Home Care, Nurse, or Caregiver Registries Under the FLSA

By Jeffrey H. Ruzal & Carly Baratt on July 19, 2018

POSTED IN DOL ENFORCEMENT, WAGE AND HOUR POLICIES

Last Friday, the Department of Labor ("DOL") issued **Field Assistance Bulletin No. 2018-4** to help guide the DOL Wage and Hour Division field staff as to the correct classification of home care, nurse, or caregiver registries under the Fair Labor Standards Act ("FLSA"). This is the most recent piece of guidance on a topic first addressed by the DOL in a 1975 Opinion Letter. The bulletin is noteworthy in two respects. First, it confirms that the DOL continues to view a registry that simply refers caregivers to clients but controls no terms or conditions of the caregiver's employment activities as outside the purview of the FLSA. Second, and most helpfully, the bulletin provides specific examples of common registry business practices that may establish the existence of an employment relationship under the FLSA.

The following chart summarizes the DOL's position on a number of common registry business practices, with the caveat that no one factor is dispositive to determining whether a registry is an employer of a caregiver under the FLSA.

	Indicative of Employment Relationship	**Not Indicative of Employment Relationship**
Background Checks	Interviewing the prospective caregiver or the caregiver's references to evaluate subjective criteria of interest to the registry	Performing basic background checks of caregivers (*e.g.*, collecting the caregiver's criminal history, credit report, licensing, and other credentials)

Hiring and Firing	Controlling hiring and firing decisions by, *e.g.*, interviewing or selecting the caregiver or firing the caregiver for failing to meet the standards of the registry or industry	Inability to hire or fire employees
Scheduling/ Assigning Work	Scheduling and assigning work to specific caregivers (*i.e.*, a subset of qualified caregivers) based on the registry's own discretion and judgment rather than the client's	Providing client access to vetted caregivers who meet client's stated criteria; requesting all qualified caregivers contact a particular client if they are interested in working for the client
Scope of Caregiver's Work	Controlling the caregiver's services/behavior, including but not limited to restricting a caregiver's ability to work with other referral services or work directly with clients outside the registry	Seeking information concerning the type of care needed by the client for matching purposes
Caregiver's Pay Rate	Receiving fees from a client on an on-going basis based on the numbers of hours that a caregiver works for the client or some other arrangement	Receiving a one-time referral fee
Fees for Caregiver Services	Directly setting the caregiver's pay rate	Communicating general market/typical pay rates or relaying offers/counteroffers to the client
Caregiver Wages	Paying the caregiver directly	Performing payroll services, *provided that* the client provides funds directly or via an escrow account
Tracking of Caregiver Hours	Actively creating and verifying time records	Performing payroll services after client/caregiver submits time records
Caregiver Equipment/ Supplies	Investing in equipment or supplies for a caregiver or the caregiver's training or licenses	Investing in office space, payroll software, timekeeping systems, and other products to operate a registry business; providing caregivers the option to purchase discounted equipment or supplies from either the registry or a third party
Receipt of EINs or 1099s	N/A	Requiring an Employment Identification Number or issuing a caregiver an IRS 1099 form

The issuance of this field assistance bulletin indicates a commitment by the DOL to clarify the employment relationship between caregivers and home care, nurse, or caregiver registries, which is a positive development from the perspective of the registries. However, registries should promptly review their business practices, as the Wage and Hour Division, now armed with this guidance, may be more inclined to fight misclassification in this industry.

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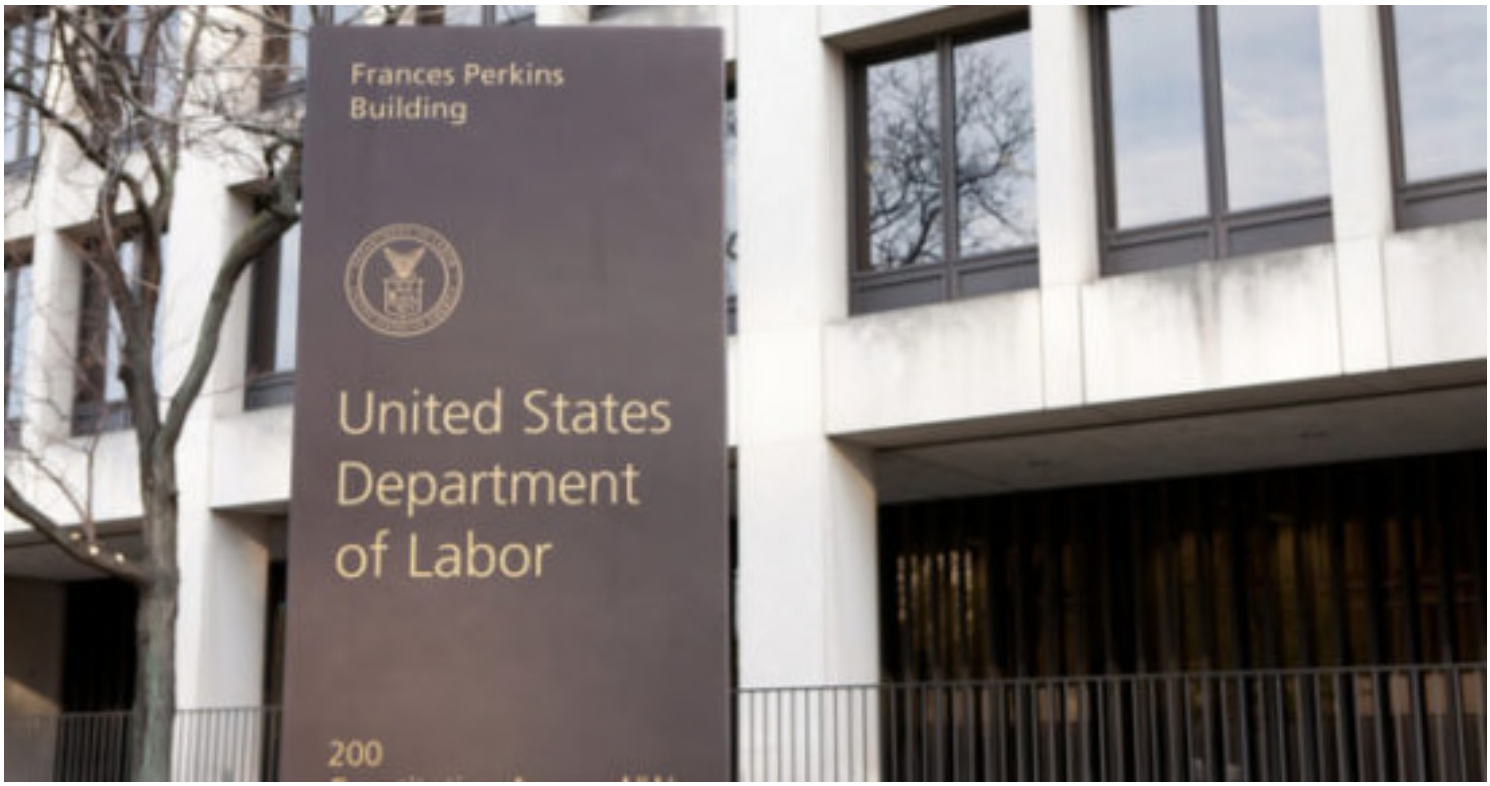
Insight and Commentary on Wage and Hour Law Developments Affecting Employers

U.S. DOL Issues Three Opinion Letters After Nine-Year Hiatus

By Jeffrey H. Ruzal & Carly Baratt on April 16, 2018

POSTED IN DOL ENFORCEMENT, WAGE AND HOUR POLICIES, WHITE COLLAR EXEMPTIONS (GENERAL)



On April 12, 2018, the Wage and Hour Division of the U.S. Department of Labor ("DOL") issued the first Opinion Letters since the Bush administration, as well as a new Fact Sheet. The Obama administration formally abandoned Opinion Letters in 2010, but Secretary of Labor Alexander Acosta has restored the practice of issuing these guidance documents. Opinion Letters, as Secretary Acosta states in the DOL's April 12 press release, are meant to explain "how an agency will apply the law to a particular set of facts," with the goal of increasing employer compliance with the Fair Labor Standards Act ("FLSA") and other laws. Not only do Opinion Letters clarify the law, but pursuant to Section 10 of the Portal-to-

Portal Act, they provide a *complete affirmative defense* to all monetary liability if an employer can plead and prove it acted "in good faith in conformity with and in reliance on" an Opinion Letter. 29 U.S.C. § 259; *see* also 29 C.F.R. Part 790. For these reasons, employers should study these and all forthcoming Opinion Letters closely.

Opinion Letter FLSA2018-18 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.

With these principles in mind, this letter provides two non-exclusive methods to reasonably determine normal work hours for employees with irregular schedules in order to make an ultimate judgment call on the compensability of travel time. Under the first method, if a review of an employee's hours during the most recent month of regular employment reveals typical work hours, the employer can consider those the normal hours going forward. Under the second method, if an employee's records do not show typical work hours, the employer can select the average start and end times for the employee's work days. Alternatively, where "employees truly have no normal work hours, the employer and employee … may negotiate … a reasonable amount of time or timeframe in which travel outside the employees' home communities is compensable." Crucially, an employer that uses any of these methods to determine compensable travel time is entitled to limit such time to that accrued during normal work hours.

Opinion Letter FLSA2018-19 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—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 breakers as their coworkers, if any.

Opinion Letter **CCPA2018-1NA** addresses whether certain lump-sum payments from employers to employees are considered "earnings" for garnishment purposes under Title III of the Consumer Credit Protection Act (the "CCPA"). The letter articulates the central inquiry as whether the lump-sum payment is compensation "for the employee's services." The letter then analyzes 18 types of lump-sum payments, concluding that commissions, bonuses, incentive payments, retroactive merit increases, termination pay, and severance pay, inter alia, are earnings under the CPA, butlump-sum payments for workers' compensation, insurance settlements for wrongful termination, and buybacks of company shares are not.

Finally, **Fact Sheet #17S** addresses the FLSA's minimum wage and overtime requirement exemptions for employees who perform bona fide executive, administrative, professional, and outside sales duties (known as the "white collar exemptions") in the context of higher education institutions. Specifically, the letter provides guidance as to the exempt status of faculty members, including coaches, non-teacher learned professionals (e.g., CPAs, psychologists, certified athletic trainers, librarians, and postdoctoral fellows), administrative employees (e.g., admissions counselors and student financial aid officers), executive employees (e.g., department heads, deans, and directors), and student-employees (i.e., graduate teaching assistants, research assistants, and student residential assistants). Of note, the letter confirms that the DOL is undertaking rulemaking to revise the regulations that govern the white collar exemptions.