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37th Annual Workforce Management Briefing
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Your Workforce. Our Business.SM

Wage and Hour Compliance:

Working Overtime to Keep Up with a Changing Legal Landscape

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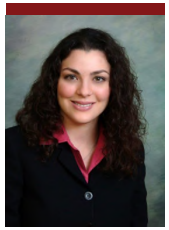

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Agenda

Exemptions to the FLSA

The Impact of *Encino Motorcars, LLC v. Navarro*

Class Action Waivers in Arbitration Agreements

The Supreme Court Weighs In

Independent Contractor Classification Disputes

Developments and Expectations

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DOL Resumes Issuing Opinion Letters

Tip Pools

Passage of the Consolidated Appropriation Act

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Exemptions to the FLSA: The Impact of *Encino Motorcars, LLC v. Navarro*

U.S. Supreme Court Rejects Longstanding "Narrow Construction" Rule for FLSA Exemptions

***Encino Motorcars, LLC v. Navarro*, No. 16-1362**

***Issue Presented*:**

Whether service advisors at an automobile dealership are exempt from the Fair Labor Standards Act (FLSA) overtime requirement under FLSA section 13(b)(10(a) as "salesman … primarily engaged in … servicing automobiles [and] … employed by a nonmanufacturing establishment primarily engaged in the business of selling such vehicles or implements to ultimate purchasers[.]"

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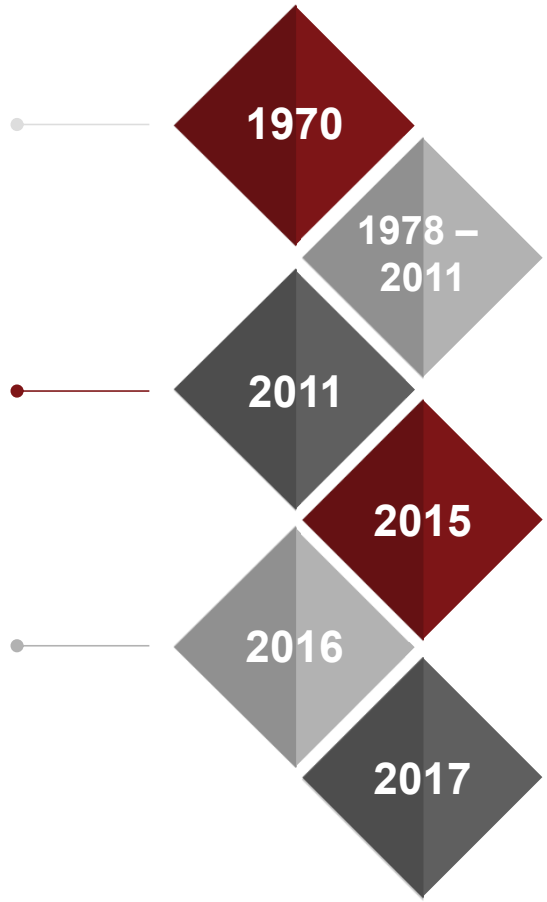
U.S. Supreme Court Rejects Longstanding "Narrow Construction" Rule for FLSA Exemptions *(continued)*



U.S. Department of Labor (DOL) interprets statute as inapplicable to service advisors.

DOL changes position in light of court opinions; service advisors are exempt.

DOL issues regulation stating that service advisors are not "salesmen" and are therefore not exempt.

Deferring to 2011 DOL regulation, Ninth Circuit finds that service advisors are not exempt.

Supreme Court finds 2011 DOL regulation invalid; reverses and remands to Ninth Circuit for consideration of the statutory language.

Ninth Circuit again holds that service advisors are not exempt.

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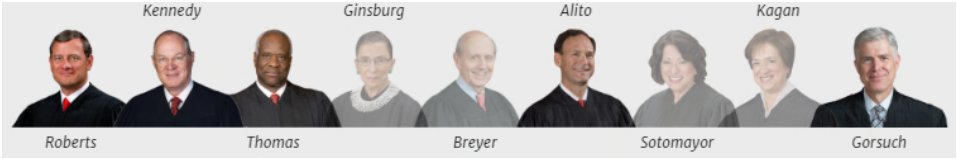
U.S. Supreme Court Rejects Longstanding "Narrow Construction" Rule for FLSA Exemptions *(continued)*



Holding: Service advisers are covered by the FLSA overtime exemption for salesmen engaged in servicing cars.

Rationale:

- ***Meaning of the words in the statue***
  - Dictionary definition of "salesman" is "someone who sells goods or services." "Service advisors do precisely that."
  - Relevant dictionary definition of "servicing" is "the action of maintaining or repairing a motor vehicle" or "[t]he action of providing a service." "Service advisors satisfy both definitions."
- ***Rejection of "distributive canon"***
- ***Departure from "narrow construction" principle***
  - "Because 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. The narrow-construction principle relies on the flawed premise that the FLSA 'pursues' its remedial purpose 'at all costs.' But the FLSA has over two dozen exemptions in § 213(b) alone, including the one at issue here. Those 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."

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U.S. Supreme Court Rejects Longstanding "Narrow Construction" Rule for FLSA Exemptions *(continued)*

Impact on Employers

1. Clarity for franchised car dealerships and service advisors

2. Easier to persuade courts that employees fall within overtime exemptions
   - Old Test: Requires little to no doubt that exemption is consistent with statutory and regulatory test
   - New Test: Employers' reading of the exemption must be more consistent with the statutory and regulatory text

3. Potential divergence between judicial interpretation of state-law exemptions and FLSA counterparts

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Class Action Waivers in Arbitration Agreements: The Supreme Court Weighs In

U.S. Supreme Court Upholds Use of Class Action Waivers in Arbitration Agreements

Epic Systems Corp. v. Lewis

Issue Presented:

- Are arbitration agreements containing class and collective action waivers of wage and hour disputes enforceable?

Circuit Split:

- Sixth, Seventh, and Ninth Circuits: Arbitration agreements with provisions restricting employees' rights to pursue class and collective actions violate Section 7 of the National Labor Relations Act (NLRA) and are therefore unenforceable under the Federal Arbitration Act (FAA).

- Second, Fifth, and Eighth Circuits: Such provisions are enforceable pursuant to the FAA.

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U.S. Supreme Court Upholds Use of Class Action Waivers in Arbitration Agreements *(continued)*

Epic Systems Corp. v. Lewis

Holding:

- Class action waivers are enforceable under the FAA and are not prohibited by the NLRA.

Rationale:

- FAA expression of "liberal federal policy favoring arbitration agreement."
- FAA's "savings clause" is not implicated.
- No evidence that Congress meant to displace the FAA when it passed the NLRA 10 years later, and it is possible to give effect to both statutes.
- NLRB's interpretation of the FAA in *D.R. Horton, Inc.* is not entitled to deference.

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U.S. Supreme Court Upholds Use of Class Action Waivers in Arbitration Agreements *(continued)*

Sixth Circuit Extends *Epic*

Three months after *Epic*, the Sixth Circuit in ***Gaffers v. Kelly Services, Inc.***, held that the FLSA does not bar the use of arbitration agreements with class and collective action waivers covered by the FAA.

Rationale

1. Plaintiffs' NLRA-based challenges fail under *Epic*.

2. Per *Epic*, the FLSA's collective action provision does not conflict with the FAA because it does not require similarly situated employees to bring their claims together.

3. The FLSA's collective action provision falls outside the FAA's savings clause because the sole ground for attack is that it is one involving arbitration, which the Supreme Court rejected in *Epic*.

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U.S. Supreme Court Upholds Use of Class Action Waivers in Arbitration Agreements *(continued)*

Implications

1) Likely rise in the use of arbitration agreements with class and collective action waivers.

2) Anticipated use of such programs in union organization efforts.

3) More Private Attorney General Act (PAGA) lawsuits in California. In *Iskanian v. CLS Transp. Los Angeles, LLC,* the California Supreme Court held that representative actions seeking civil penalties under PAGA are not subject to mandatory arbitration.

   However, *Epic* may provide grounds for arguing that class action waivers in arbitration agreements extend to PAGA lawsuits or, at a minimum, require an employee to arbitrate his or her individual PAGA claims before accessing the courts.

4) While *Epic*'s applicability may extend beyond wage and hour claims, employers should take note of recent state legislation prohibiting mandatory arbitration clauses from applying to particular types of claims, such as sexual harassment.

5) Notwithstanding *Epic*, employees can still challenge arbitration agreements under generally available contract defenses, such as fraud, duress, or unconscionability.

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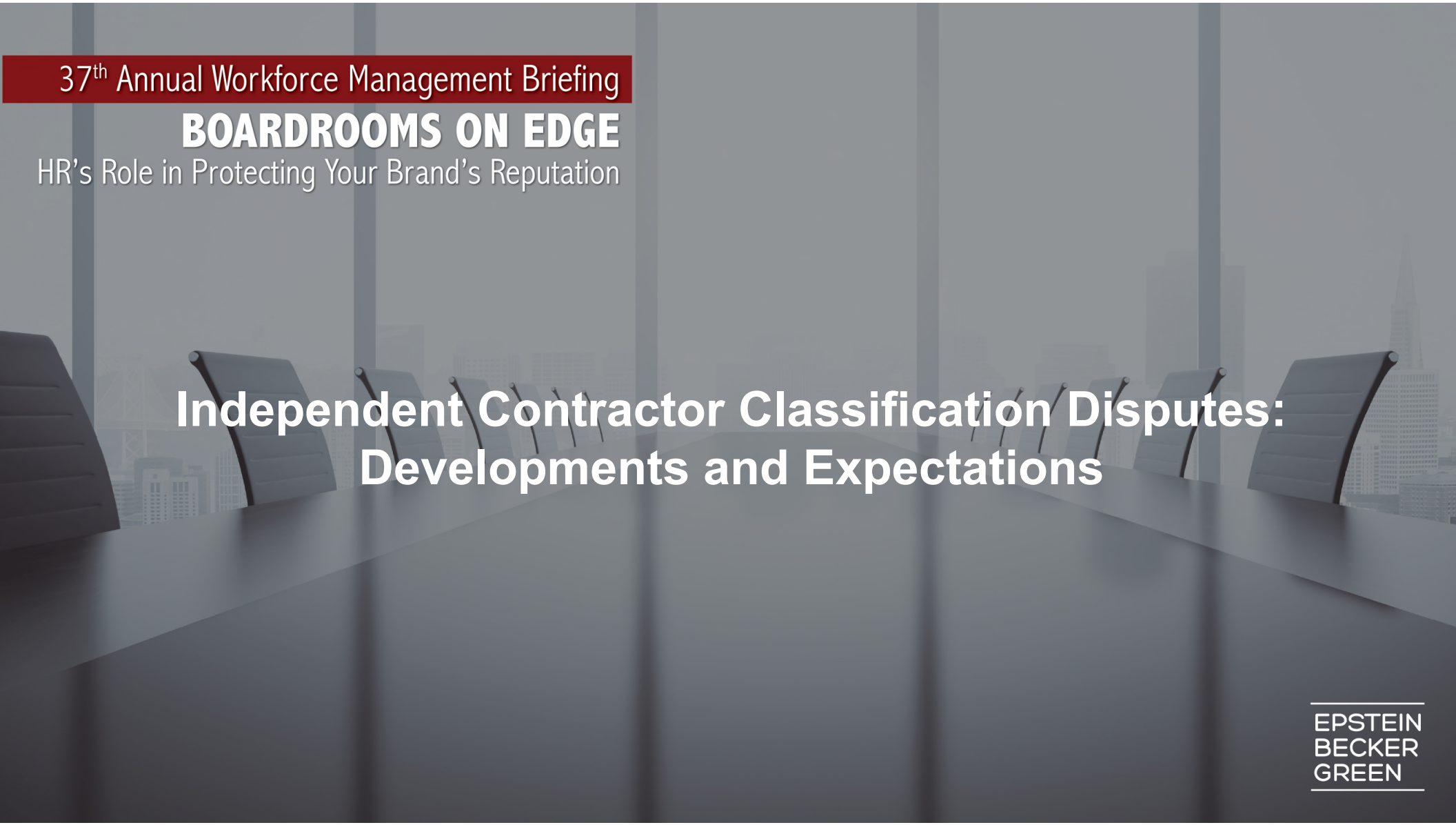
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Independent Contractor Classification Disputes:
Developments and Expectations
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Independent Contractor Classification Disputes: Developments and Expectations

Obama DOL

- Lack of control over the worker is not a determining factor for finding independent contractor status.
- "[M]ost workers are employees under the FLSA's broad definitions."

Trump DOL

- Withdrew Obama-era guidance on independent contractor status in 2017 but did not immediately replace it.
- Issued first substantive guidance on independent contractor classification in a July 13, 2018, Field Assistance Bulletin (FAB) about nurse and caregiver registries.
- July 2018 FAB signals DOL's return to the traditional, multi-factor balancing test to determine independent contractor status, primarily focused on control of the worker.

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Independent Contractor Classification Disputes: Developments and Expectations *(continued)*

Prior, Flexible California Standard: *S.G. Borello & Sons v. Director of Dept. of Industrial Relations, 48 Cal.3d 341* (1989)

Examines total circumstances of relationship between business and person performing the work in light of 11 factors

Nuanced, "economic realities" test

No single factor is determinative, but whether the individual's work is the service or product that is the company's primary business will be given the most weight

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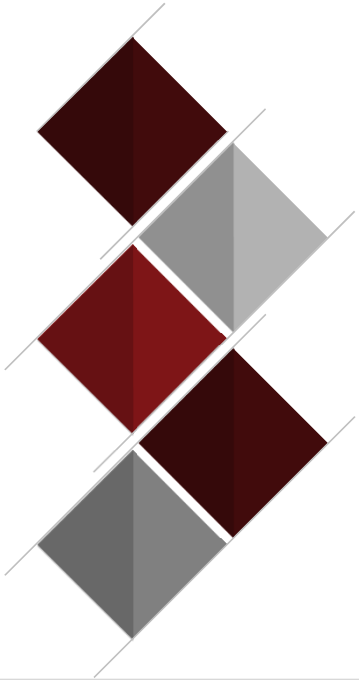
Independent Contractor Classification Disputes: Developments and Expectations *(continued)*

11-Factor *Borello* Test



1) Whether the one performing services is engaged in a distinct occupation or business;
2) Whether the work is part of the company's regular business;
3) Whether the company or worker supplies the equipment, tools, and the place for the person doing the work;
4) The worker's financial investment in the equipment or materials required to perform the work;
5) The skill required in the particular occupation;
6) How long the services are to be performed;
7) The worker's opportunity for profit or loss depending on his or her own managerial skill (a potential for profit does not include bonuses);
8) The degree of permanence of the working relationship;
9) The payment method, whether by time or by the job;
10) Whether the parties believe they are creating an employer/employee relationship; and
11) The kind of occupation, with reference to whether, in the locality, the work is usually done under the company's direction or by a specialist without supervision.

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Independent Contractor Classification Disputes: Developments and Expectations *(continued)*

New, Rigid California Standard: *Dynamex Operations West, Inc. v. Superior Court*

1) Presumption that individuals are employees

2) Entity claiming independent contractor status has the burden of establishing that independent contractor classification meets each requirement of the "ABC test":

A: Worker is free from the control and direction of the hiring entity in connection with the performance of work, both under the contract and in fact;

B: Worker performs work that is outside the usual course of the hiring entity's business; and

C: Worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed

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Independent Contractor Classification Disputes: Developments and Expectations *(continued)*

Rise of "ABC" Test

ABC Test

- ❑ Arkansas
- ❑ California
- ❑ Connecticut
- ❑ Delaware
- ❑ Florida
- ❑ Hawaii
- ❑ Illinois
- ❑ Louisiana
- ❑ Maine
- ❑ Maryland
- ❑ Massachusetts
- ❑ Nebraska
- ❑ Nevada
- ❑ New Hampshire
- ❑ New Jersey
- ❑ New Mexico
- ❑ Oklahoma
- ❑ Puerto Rico
- ❑ Rhode Island
- ❑ Vermont
- ❑ Virginia
- ❑ Washington
- ❑ West Virginia

A and C Test

- ❑ Arizona
- ❑ Colorado
- ❑ Georgia
- ❑ Idaho
- ❑ Oregon
- ❑ Pennsylvania
- ❑ South Dakota
- ❑ Utah

Economic Realities/Other Tests

- ❑ Alabama
- ❑ Arizona
- ❑ DC
- ❑ Indiana
- ❑ Iowa
- ❑ Kansas
- ❑ Kentucky
- ❑ Michigan
- ❑ Minnesota
- ❑ Mississippi
- ❑ Missouri
- ❑ Montana
- ❑ New York
- ❑ North Carolina
- ❑ North Dakota
- ❑ South Carolina
- ❑ Texas
- ❑ Virginia
- ❑ Wisconsin
- ❑ Wyoming

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Independent Contractor Classification Disputes: Developments and Expectations *(continued)*

Expectations

- Will apply only to the Industrial Welfare Commission Wage Orders, not to other wage and hour laws, which will continue to be governed by *Borello* standard
- Could apply retroactively
- May not apply when determining whether two businesses are joint employers of an individual already treated as an employee

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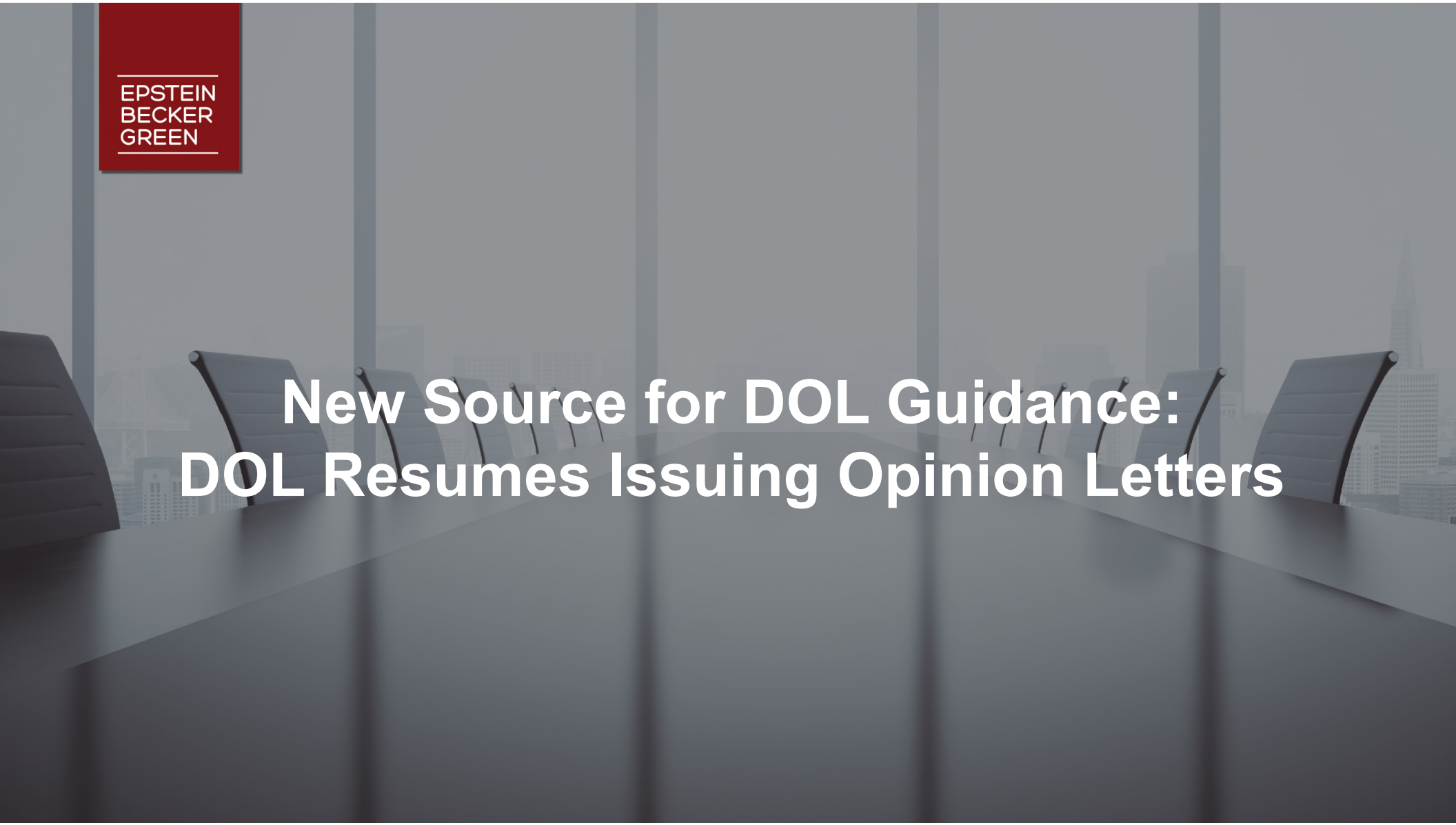

New Source for DOL Guidance: DOL Resumes Issuing Opinion Letters

New Source for DOL Guidance: DOL Resumes Issuing Opinion Letters

Prior to the Obama administration, the Wage and Hour Division of the DOL frequently issued "opinion letters" responding to employer questions with respect to applying the requirements of the FLSA and other laws to their workplace.

In 2010, the DOL started using administrative interpretations in lieu of opinion letters.

- Unlike opinion letters, administrative interpretations consist of general declarations of the administration's position on particular FLSA and Family and Medical Leave Act (FMLA) issues.
- Administration interpretations during this period were infrequent; just seven were issued.

On April 12, 2018, the DOL issued the first opinion letters since the Bush administration, as well as a new fact sheet, resuming an eminently useful practice.

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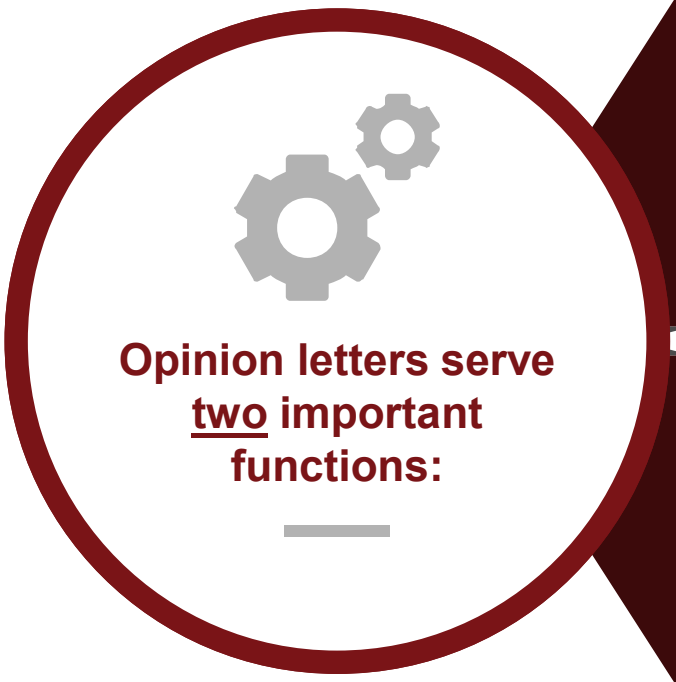
New Source for DOL Guidance: DOL Resumes Issuing Opinion Letters *(continued)*



Guidance

- As Secretary Acosta stated in the DOL's April 12 press release, opinions letters 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 FLSA and other laws.

Defense

- Pursuant to Section 10 of the Portal-to-Portal Act, opinion letters provide a complete affirmative defense to all monetary liability if an employer can plead and prove that it acted "in good faith in conformity with and in reliance on" an opinion letter.

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New Source for DOL Guidance: DOL Resumes Issuing Opinion Letters *(continued)*

Recent DOL Opinion Letters Have Addressed the Following Topics:

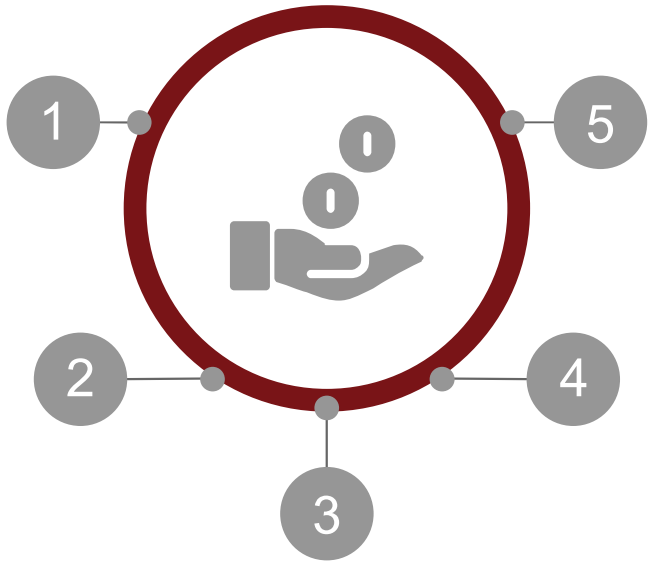
1) Compensability of travel time under the FLSA
2) Compensability of 15-minute rest breaks required every hour by an employee's serious health condition
3) Whether certain lump-sum payments from employers to employees are considered "earnings" for garnishment purposes under Title III of the Consumer Credit Protection Act
4) Organ donors' qualification for FMLA leave
5) Compensability of time spent voluntarily attending benefit fairs and certain wellness activities
6) Application of the movie theater overtime exemption to a movie theater that also offers dining services
7) Application of the commissioned sales employee overtime exemption to a company that sells an Internet payment software platform
8) Volunteer status of nonprofit members serving as credentialing examination graders
9) "No fault" attendance policies and a roll-off of attendance points under the FMLA

Tip Pools:
Passage of the Consolidated Appropriation Act

Tip Pools: Passage of the Consolidated Appropriation Act

"**Tip pooling**" – a practice in which the tip earnings of directly tipped employees are intermingled in a common pool and then redistributed among directly and indirectly tipped employees.

"**Tip sharing**" – a practice in which a directly tipped employee gives a portion of his or her tips to another service employee or food service worker who participated in providing service to customers and keeps the balance.



Indirectly tipped employees – workers who do not receive tips directly from patrons or customers but are eligible to receive shared tips or receive distributions from a tip pool.

Directly tipped employees – workers who receive tips from patrons or customers without any middle person.

"**Tip credit**" – a credit toward an employer's minimum wage obligation for tipped employees equal to the difference between the required cash wage (which must be at least $2.13) and the federal minimum wage.

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Tip Pools: Passage of the Consolidated Appropriation Act *(continued)*

Consolidated Appropriations Act (March 2018)

Amends FLSA's rule on tipped employees and tip ownership

Tip pooling among tipped and non-tipped employees as long as (i) tip credit taken and (ii) federal minimum wage paid

Keeping any tips earned by employees for any purposes, including for distributing portions of tips to managers or supervisors, even if tip credit taken

Increased penalties for violation of rule

- Damages = amount of tip credit taken and amount of the tip unlawfully taken, plus additional equal amount as liquidated damages
- Additional discretionary civil penalty = up to $1,100 per violation

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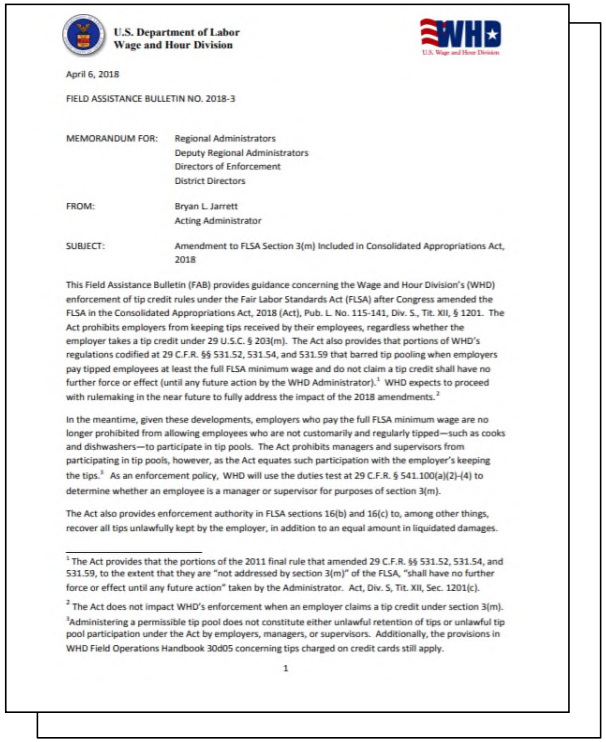
Tip Pools: Passage of the Consolidated Appropriation Act *(continued)*

DOL Interpretation: Field Assistance Bulletin No. 2018-3



U.S. Department of Labor
Wage and Hour Division

WHD
U.S. Wage and Hour Division

April 6, 2018

FIELD ASSISTANCE BULLETIN NO. 2018-3

MEMORANDUM FOR: Regional Administrators
Deputy Regional Administrators
Directors of Enforcement
District Directors

FROM: Bryan L. Jarrett
Acting Administrator

SUBJECT: Amendment to FLSA Section 3(m) Included in Consolidated Appropriations Act, 2018

This Field Assistance Bulletin (FAB) provides guidance concerning the Wage and Hour Division's (WHD) enforcement of tip credit rules under the Fair Labor Standards Act (FLSA) after Congress amended the FLSA in the Consolidated Appropriations Act, 2018 (Act), Pub. L. No. 115-141, Div. S., Tit. XII, § 1201. The Act prohibits employers from keeping tips received by their employees, regardless whether the employer takes a tip credit under 29 U.S.C. § 203(m). The Act also provides that portions of WHD's regulations codified at 29 C.F.R. §§ 531.52, 531.54, and 531.59 that barred tip pooling when employers pay tipped employees at least the full FLSA minimum wage and do not claim a tip credit shall have no further force or effect (until any future action by the WHD Administrator).[1] WHD expects to proceed with rulemaking in the near future to fully address the impact of the 2018 amendments.[2]

In the meantime, given these developments, 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. The Act prohibits managers and supervisors from participating in tip pools, however, as the Act equates such participation with the employer's keeping the tips.[3] As an enforcement policy, WHD will use the duties test at 29 C.F.R. § 541.100(a)(2)-(4) to determine whether an employee is a manager or supervisor for purposes of section 3(m).

The Act also provides enforcement authority in FLSA sections 16(b) and 16(c) to, among other things, recover all tips unlawfully kept by the employer, in addition to an equal amount in liquidated damages.

[1] The Act provides that the portions of the 2011 final rule that amended 29 C.F.R. §§ 531.52, 531.54, and 531.59, to the extent that they are "not addressed by section 3(m)" of the FLSA, "shall have no further force or effect until any future action" taken by the Administrator. Act, Div. S, Tit. XII, Sec. 1201(c).

[2] The Act does not impact WHD's enforcement when an employer claims a tip credit under section 3(m).

[3] Administering a permissible tip pool does not constitute either unlawful retention of tips or unlawful tip pool participation under the Act by employers, managers, or supervisors. Additionally, the provisions in WHD Field Operations Handbook 30d05 concerning tips charged on credit cards still apply.

1

- "[E]mployers 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."
- "The Act prohibits managers and supervisors from participating in tip pools, however, as the Act equates such participation with the employer's keeping the tips."
- "WHD will use the duties test at 29 C.F.R. § 541.100(a)(2)-(4) to determine whether an employee is a manager or supervisor for purposes of section 3(m)."
- "In assessing [civil monetary penalties], WHD will follow its normal procedures, including by determining whether the violation is repeated or willful."

EBG's Wage & Hour Guide for Employers App

The Wage & Hour Guide for Employers app puts federal and state wage and hour laws at the fingertips of employers.

Available without charge for iPhone, iPad, and Android devices, the app includes all 50 states, plus federal law, the District of Columbia, and Puerto Rico.

Rather than search through a variety of resources to find the applicable law, users can follow this easy-to-navigate app to find the answers to many of their questions, including citations of statutes, regulations, and guidelines. With wage and hour litigation and agency investigations at an all-time high, Epstein Becker Green's app offers an invaluable resource for employers, in-house counsel, and human resources personnel.

Key App Features:

- Summaries of wage and hour laws and regulations, including 53 jurisdictions (federal, all 50 states, the District of Columbia, and Puerto Rico)
- Quick access to, and a direct feed of, Epstein Becker Green's award-winning *Wage and Hour Defense Blog,* which provides up-to-date commentary on wage and hour developments
- Social media feeds from Twitter, Facebook, LinkedIn, and YouTube
- Quick links to Epstein Becker Green's attorneys and practices – and more!

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