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CLIENT ALERT

The Month in Wage & Hour – November 2019

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In this issue:

- **Top Wage & Hour Developments**
  - Litigation Perspective
    - Courts Consider Personal Jurisdiction Challenges to Nationwide FLSA Collective Actions
  - Department of Labor
    - Latest United States DoL Proposes Regulations to Eliminate the 80/20 Rule and Allow Tip Pools to Include Non-Tipped Employees
    - DoL Proposed Rulemaking on the Fluctuating Workweek
    - DoL Guidance on the Calculation of the Regular Rate
    - DoL's New Salary Thresholds Set to Expand Overtime Eligibility in 2020

- **Crowell & Moring Speaks**

This news bulletin is provided by the Labor & Employment Group of Crowell & Moring. If you have questions or need assistance on labor and employment law matters, please contact Tom Gies or any member of the Labor & Employment Group.

Top Wage & Hour Developments

Courts Consider Personal Jurisdiction Challenges to Nationwide FLSA Collective Actions

The Supreme Court's decision in *Bristol-Myers Squibb Co. v. Superior Court*, 582 U.S. ______,137 S. Ct. 1773 (2017) (BMS), continues to make waves in Fair Labor Standards Act (FLSA) litigation. It offers many employers intriguing personal jurisdiction arguments to limit the scope of FLSA nationwide collective actions.

Background: *BMS* itself was not an FLSA action. Rather, the Supreme Court ruled 8-1 that a California state court did not have personal jurisdiction over the pharmaceutical manufacturer in a mass tort case filed by a group of almost 600 non-California residents claiming injuries allegedly caused by a BMS prescription drug called Plavix. The Court distinguished between the concept of general personal jurisdiction (*i.e.*, jurisdiction for all purposes), which was not available on the facts of the case, and specific jurisdiction (*i.e.*, jurisdiction for the specific dispute at issue), reasoning that the latter concept requires a plaintiff to show a "personal affiliation between the forum and the underlying controversy." With reasoning that can be argued to apply to all types of litigation – including wage-hour cases – the Court concluded that there was insufficient evidence of such an

affiliation, noting that the nonresidents were not prescribed Plavix in California, did not purchase Plavix in California, did not ingest Plavix in California, and were not injured by Plavix in California. Accordingly, the Court held that the assertion of personal jurisdiction over the company would violate the Due Process Clause of the 14th Amendment.

Response by the Lower Courts: Large employers facing nationwide FLSA collective actions filed by forum-shopping plaintiffs have advanced the personal jurisdiction argument articulated by *BMS.* To date, district courts have taken divergent positions on this issue.

One line of cases, represented by decisions in California, New York, and Florida, rejects the application of BMS to wage-hour actions, holding that BMS does not extend to a "federal claim created by Congress specifically to address employment practices nationwide." *See, e.g., Swamy v. Title Sources, Inc.*, No. 17-cv- 01175 WHA, 2017 WL 5196780 (N.D. Cal. Nov. 10, 2017) at *2. *See also Gibbs v. MLK Express Servs., LLC,* No. 2:18-cv-00434, 29 W 190123 at * 14-16 (M.D. Fla. Mar. 28, 2019); *Molock et al v. Whole Foods Market Inc., et al.,* 297 F. Supp. 3d 114 (D.D.C. 2018), *appeal pending* No. 18-7162 (D.C. Cir.) (adopting the reasoning of other courts distinguishing between plaintiffs in mass tort actions and members of a putative class action).

But a majority of district courts, led by rulings in Massachusetts, Ohio, and Tennessee, have reached the opposite result in decisions that are good news for employers. These courts have concluded that *BMS* properly is interpreted to apply to FLSA collective actions. These judges have reasoned that opt-in plaintiffs in FLSA actions are more like named plaintiffs and qualitatively different from members of a putative class action filed under Rule 23.

A Positive Illustration: Chavira v. OS Restaurant Servs.: A recent decision by Judge Allison Burroughs in Boston illustrates the line of cases favorable to employers. In *Chavira et al v. OS Restaurant Services, LLC and Bloomin' Brands, Inc.* No. 18-cv-10029 ADB (D. Mass., Sept. 30, 2019), the court granted the employer's motion to strike notices of consent filed by proposed out of state opt-in plaintiffs in a nationwide FLSA overtime pay case brought in Massachusetts against the Outback Steak House restaurant chain. Observing that nationwide service of process is *not* authorized by the text of the FLSA, the court applied the Massachusetts long-arm statute according to the Supreme Court's directive in *BSM.* Judge Burroughs reviewed the competing lines of cases, and, consistent with the rationale and holding in *Roy v. FedEx Ground Package Systems, Inc.*, 353 F.Supp. 3d 43 (D. Mass. 2018), concluded that the plaintiffs had insufficient minimum contacts with Massachusetts to support personal jurisdiction over the employer in that court. More specifically, the court distinguished Rule 23 class actions from the collective action procedure contained in the FLSA, referring to the latter as a "rule of joinder under which only the individual opt-in plaintiffs have legal status." The court found that putative collective action members who had never worked at an Outback Steakhouse in Massachusetts lacked the necessary minimum contacts with Massachusetts. The court then denied the plaintiff's motion for initial conditional certification of the FLSA collective, concluding there was insufficient basis for such a ruling after the allegations of the non-resident putative plaintiffs were stricken. *Accord Turner et al v. Utiliquest, LLC,* No. 3:18-cv-99284 (M.D. Tenn. July 16, 2019).

Next Steps for Employers: As of this writing, there is no definitive appellate court decision on this issue. But that will soon change, with cases pending before the Seventh Circuit, and the District of Columbia Circuit (see *Molock v. Whole Foods,* discussed above, where the trial court authorized an interlocutory appeal of its decision).

Until then, decisions like *Chavira* may give employers an additional tool to limit the scope of FLSA nationwide collective actions. When an employer faces such a complaint in a state in which it is not incorporated and does not have its principal place of business, it should consider a personal jurisdiction challenge, mindful that there may be valid reasons not to pursue this

argument in a particular case. These reasons include the fact that the plaintiffs' counsel might try to move the case to a state that has general personal jurisdiction over the employer, or decide to file separate collective actions in other jurisdictions where the employer has substantial operations and which may not be more favorable venues for the employer.

Latest United States DoL Proposes Regulations to Eliminate the 80/20 Rule and Allow Tip Pools to Include Non-Tipped Employees

In a Notice of Proposed Rulemaking published on October 8, 2019, the Wage and Hour Division of the United States Department of Labor (DOL) proposed regulations which, if and when promulgated, will require employers to reexamine and adjust their existing practices in the handling of the tip credit, management and assignment of work for tipped employees, implementation of tip pools, and recordkeeping practices relating to time and pay records for tipped employees.

Background

Under the Fair Labor Standards Act (the FLSA), employers are permitted to take a credit for tip wages received by tipped employees against the current federal minimum wage of $7.25. Employers are able to pay as little as $2.13 per hour in cash wages to employees who earn sufficient tip wages to cover the remaining $5.12 of the minimum wage rate. The FLSA further requires employers to make up the difference if the cash wages and tip wages received by employees total less than the federal minimum wage rate. Over the past two decades, there has been a considerable amount of litigation and regulatory actions regarding the "80/20" or "dual job" provisions within the DOL's enforcement guidelines (*e.g.*, the Field Operations Handbook) that limit employers' ability to take the tip credit against the minimum wage obligations in connection with employees who spend more than 20 percent of their time performing non-tipped duties. Particularly, the plaintiffs' bar has been active in seeking to claim that employers inappropriately took the tip credit for hours spent on duties that are related to the duties of the tipped workers but do not directly generate tip income. In November 2018, the DOL reinstated a Bush-era enforcement position and eliminated the limits placed by the Obama Administration against employers' entitlement to take the tip credit against the minimum wage paid to employees who performed both direct tip generating and related non-direct tip generating work. Since that time, many courts have declined to grant deference to the DOL's changed position on the tip credit, particularly on a retroactive basis that would affect the outcome of pending litigations that involve alleged violations of the "80/20" or "dual job" rule that occurred prior to the reissuance of the 2009 Opinion Letter.

Regulations concerning tip pooling promulgated during the Obama Administration prohibited employers from requiring workers to pool their tip wages and share such wages with non-tipped workers regardless of whether employers take a tip credit. In March 2019, pursuant to the Consolidated Appropriations Act of 2018 (the CAA), Congress amended the FLSA to prohibit an employer from keeping tips received by employees "for any purposes, including allowing managers or supervisors to keep any portion of the employees' tips, regardless of whether or not the employer takes a tip credit." This amendment essentially permitted employers to promulgate tip pooling practices that allowed tipped employees paid above the minimum wage to share tips with non-tipped employees (*e.g.*, as long as supervisors, managers or the employer do not take any portion of the tips).

Proposed New Regulation

The DOL's proposed rule eliminates the "80/20 rule" by allowing employers to take a tip credit for all hours worked by their tipped employees on "related non-tipped duties, contemporaneously with his or her tipped duties, or for a reasonable time immediately before or after performing the tipped duties." According to the proposed rule, tasks constitute related to a tip-producing if they are listed as one of the tasks of a tip-producing occupation in the Occupational Information Network (O*NET). Examples of such tasks are cleaning glasses, making coffee and rolling silverware. The proposed rule essentially eliminates the impracticable task by task timekeeping requirement of the "80/20 rule" that was almost impossible for employers to satisfy.

The proposed rule also seeks to clarify the CAA amendment to the FLSA concerning permissible and prohibited tip pooling practices. Specifically, the proposed rule would confirm the FLSA's prohibition against employers (including persons owning 20% or more of the business), managers, and supervisors keeping tip wages earned by employees, regardless of whether employers take a tip credit against the tipped employees' minimum wage. The proposed rule provides that DOL would apply the duties test for "executive exemption" under the FLSA to determine whether an individual is a "manager or supervisor."

The proposed rule confirms that employers are able to implement tip pooling practices among their employees who "customarily and regularly receive tips," such as bartenders and servers. The proposed rule would also allow employers who pay employees the full minimum wage or above (and thus, do not take a tip credit) to implement a tip pooling practice that mandates the participation of employees who "customarily and regularly receive tips" in tip pools with employees who do not customarily and regularly receive tip wages (*e.g.*, back of the house employees such as kitchen staff). And it confirms the DOL's longstanding enforcement position that allows employers to withhold paying cash and credit card tip wages until the next regularly scheduled payday. Finally, the proposed rule requires employers who maintain compulsory tip pools to maintain records of tips received even though these employers do not take the tip credit.

Employers can submit comments on the proposed rule to the USDOL until December 9, 2019.

Bottom Line

While employers, particularly those in the hospitality industry, may find the proposed rule to be a welcoming development, we encourage employers to continue to evaluate their tip credit practices. We see three major takeaways from the new proposed rule:

- Are you entitled to take tip credit? An important question that all employers should continue to ask is whether they are entitled to take the tip credit in the first place. For example, the propose rule does not negate employers' responsibility to provide advanced notice to tip employees regarding the employers' intention to take the tip credit prior to any work is performed by these employees.
- Audit regularly. Employers must still regularly audit tip workers' wages to determine whether these workers receive adequate tip wages to cover the minimum wage. Employers should also regularly audit their pay and time records to ensure that their records accurately, precisely and adequately record employees' time worked, wages paid and deductions or allowances taken by the employer.
- Review state requirements. Employers should also consider the tip credit requirements of the states in which they operate to determine the best and most compliant practices.

DoL Proposed Rulemaking on the Fluctuating Workweek

The Department of Labor is again addressing employers' use of the "fluctuating workweek" method of pay for salaried non-exempt employees (FWW). This issue has been a political football in the most recent changes in administration, and the Trump DOL has now proposed rules that clarify that payments to employees in addition to a fixed salary – bonuses, premiums, and the like – will not defeat the application of the FWW compensation method. These additional payments, however, would have to be included in the calculation of the regular rate of pay.

FWW Background: FWW is a federally-permitted method of calculating overtime pay for non-exempt employees who are paid a fixed salary but whose work hours fluctuate from week to week. Under the FWW, such employees who work overtime receive an overtime premium, but that premium rate is one-half of the employees' regular rate instead of the usual 1.5 times the regular rate, because the base portion of the wage is provided via the agreed-upon fixed salary. More specifically, overtime obligations are met by (a) dividing the fixed weekly salary by the number of hours worked that week to determine the regular rate applicable to that week, and (b) paying half of that amount as overtime premium. This method, of course, is less expensive than paying time-and-a-half, and it results in decreasing overtime premiums as employees work more overtime hours in any particular week. As discussed below, it has also been controversial, and some states have rejected its use altogether.

DOL's Fluctuating FWW Position and Proposed Rule: The Obama DOL took the position that the compensation of employees subject to the FWW had to be limited to their pre-set salary. In a 2011 preamble to a revision to the applicable regulation, DOL stated that premium pay (bonuses, premiums, on call time, commissions, etc.) were inconsistent with the principle that such employees must earn a "fixed" salary for fluctuating workweeks. Now, however, DOL has revised its position on this issue. Citing to statistics showing that supplemental pay represents only a small fraction of employees' overall compensation, it proposes to permit employers to pay various forms of supplemental compensation to FWW employees without defeating the application of this overtime method. Importantly, however, such payments beyond the base salary must be allocated to particular workweeks and be included in the calculation of the regular rate of pay for each week.

Expected Next Steps: The DOL is accepting comments on the proposed rule through December 5, 2019. FWW has long been controversial, and the proposed rule is expected to draw many comments, both in favor and in opposition. The battle lines on this issue are so well drawn that the public comments appear unlikely to sway DOL's rulemaking plan. Expect a final rule with a year.

The publication of a final rule on this subject will not fully resolve this controversial issue.

First, the existing requirements that must be met before the rule can be applied continue in effect. Therefore, FWW is only available when (a) the employee's work hours actually fluctuate week to week, (b) the employee receives a guaranteed salary each workweek, regardless of actual hours worked, (c) the salary is sufficient to meet the applicable minimum wage for all hours worked, and (d) there is a "clear mutual understanding" between the employer and the employee that the salary constitutes base compensation for all hours worked.

Second, states and localities that issue their own wage-hour rules may not follow the DOL's lead. In fact, a number of states, whether by statute, regulation, or case law, specifically reject the use of FWW generally (these states include Alaska, California,

New Mexico, and Pennsylvania). In fact, the Pennsylvania Supreme Court just this month further established that the use of FWW is not permitted under the state's overtime laws. *See Chevalier and Hiller v. General Nutrition Centers, Inc.*, decided November 20, 2019. It is therefore imperative for employers to consider the full array of applicable laws before deciding whether to pursue the savings associated with the FWW method of calculating overtime.

DoL Guidance on the Calculation of the Regular Rate

The employer community awaits action by the DOL regarding its Spring 2019 proposed rules relating to the calculation of the "regular rate" for overtime purposes under the FLSA. These expected rules, which represent the first significant modifications to applicable regulations in more than 50 years, will provide important guidance to employers about whether certain perks and other payments to employees must be included in income for overtime calculations. According to DOL, the purpose of the proposed rules was not only to clarify the application of sometimes nebulous rules, but also to promote compliance with the FLSA and to encourage employers to provide additional and innovative benefits to workers without fear of consequences for the calculation of overtime.

Background: Under the FLSA, the regular rate that is used to calculate the overtime premium is to be based on "all remuneration for employment paid to, or on behalf of, the employee," subject to certain exclusions set forth in the statute (see FLSA §7(e)). While these exclusions have been extensively litigated, they continue to cause confusion, prompting DOL to issue clarifying rules earlier this year.

The Proposed Rules: The rules that DOL published this year provide specific examples of bonuses, reimbursements and other perks that can be specifically excluded from the regular rate calculations:

- The cost of wellness programs, onsite specialist treatment, gym access, and fitness classes, as well as employee discounts on retail goods and services.
- Payments for unused paid leave (including sick leave) and for time that would not otherwise qualify as "hours worked," such as meal periods (unless there is explicit agreement or established practice to the contrary).
- Reimbursed expenses, even if not incurred "solely" for the employer's benefit.
- Reimbursed travel expenses (subject to certain limits and conditions).
- Discretionary bonuses, as illustrated in the proposed rules, with specific guidance that the label applied to the bonus would not be determinative of its "discretionary" nature.
- Benefit plans such as accident, unemployment, and legal services.
- Tuition reimbursement programs.

On Call Time: Lastly, DOL is expected to finalize its proposed modification to existing regulations concerning "on call" time, 29 C.F.R. §§778.221, allowing the exclusion of such payments so long as they are not so regular that they are essentially prearranged.

We will update this matter further when DOL takes further action on this subject.

DoL's New Salary Thresholds Set to Expand Overtime Eligibility in 2020

A new DOL regulation will soon impact how much employers have to compensate employees to remain exempt from eligibility for overtime pay under the Fair Labor Standards Act.

The DOL's new rule – which will go into effect on January 1, 2020, barring legal challenges – marks the first change to overtime eligibility thresholds since 2004. The regulation:

- Increases the minimum "standard salary level" from $455 per week to $684 per week – equivalent to $35,568 per year for a full-time worker.
- Increases the total annual compensation requirement for "highly compensated employees" from $100,000 per year to $107,432 per year.
- Allows employers to use nondiscretionary bonuses and incentive payments (including commissions) paid at least annually to satisfy up to 10% of the standard salary level.
- Revises the special salary levels for workers in U.S. territories and the motion picture industry.

DOL estimates that 1.3 million more workers will be eligible for overtime as a result of these salary threshold changes.

The new rule makes no change in the familiar "duties test" also required to establish exempt status.

This marks the second attempt in recent memory that DOL has promulgated changes in the FLSA's minimum salary thresholds. A rule adopted by DOL in 2016 would have resulted in more significant increases to the minimum salary levels, and included an automatic "escalation" provision under which the threshold would have increased every four years. That rule was enjoined by a federal court in Texas shortly before its effective date, and was subsequently withdrawn by DOL. The new rule does not expressly contemplate future increases.

Employers should take this opportunity to re-examine their policies regarding employee classification and compensation for both exempt and non-exempt employees. Among other things, many companies may find it useful to conduct additional trainings on FLSA compliance, including ensuring that employees who will be converted to non-exempt status are familiar with company timekeeping and recording policies.

Crowell & Moring Speaks

Please join us for the next edition of **Third Thursday – Crowell & Moring's Labor and Employment Update**, a webinar series dedicated to helping our clients stay on top of developing law and emerging compliance issues. Kris Meade, Tom Gies, Rebecca Springer, and Kim Johnson will be speaking on November 21 on Pay Equity, State Law Developments, Transparency, and Best Practices.

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