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I. Cases

Encino Motorcars, LLC v. Navarro, et al., No. 16-1362, argued January 17, 2018, decided April 2, 2018.

Issue: Respondents, current and former service advisors for Encino Motorcars, LLC, sued for backpay, alleging that Encino Motorcars violated the Fair Labor Standards Act (FLSA) by failing to pay them overtime. Encino Motorcars moved to dismiss, arguing that service advisors are exempt from the FLSA's overtime-pay requirement under 29 U. S. C. §213(b)(10)(A), which applies to "any salesman, partsman, or mechanic primarily engaged in selling or servicing automobiles, trucks, or farm implements."

Case History: The District Court agreed and dismissed the suit. The Court of Appeals for the Ninth Circuit reversed. It found the statute ambiguous and the legislative history inconclusive, and it deferred to a 2011 Department of Labor rule that interpreted "salesman" to exclude service advisors. In 2016, with a 6-2 vote, the Supreme Court vacated the Ninth Circuit's judgment, holding that courts could not defer to the procedurally-defective 2011 rule, *Encino Motorcars, LLC v. Navarro*, 579 U. S. ___, ___–___ (*Encino I*),[1] but did not decide whether the exemption covers service advisors, remanding to the Ninth Circuit. On remand, the Ninth Circuit again held that the exemption does not include service advisors. This finding was contrary for findings from the Fourth and Fifth Circuits, several district courts, and the Supreme Court of Montana," all of which held that service advisors are exempt employees.

Holding: Because service advisors are "salesm[e]n . . . primarily engaged in . . . servicing automobiles," they are exempt from the FLSA's overtime-pay requirement.

I. A service advisor is a "salesman." The ordinary meaning of "salesman" is someone who sells goods or services, and service advisors "sell [customers] services for their vehicles," *Encino I*, supra, at ___.

[1] The 2011 DOL policy change, the Court determined, was a complete change from a 1978 DOL policy, and the DOL did not provide adequete rationale for its change. As such, the Court ruled that the Ninth could not consider the 2011 DOL ruling as part of its decision."Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change," Justice Anthony Kennedy wrote for the majority, but in this case the Labor Dept. "offered barely any explanation."

II. Service advisors are also "primarily engaged in . . . servicing automobiles." "Servicing" can mean either "the action of maintaining or repairing a motor vehicle" or "[t]he action of providing a service." Oxford English Dictionary. Service advisors satisfy both definitions because they are integral to the servicing process.

III. They "mee[t] customers; liste[n] to their concerns about their cars; sugges[t] repair and maintenance services; sel[l] new accessories or replacement parts; recor[d] service orders; follo[w] up with customers as the services are performed (for instance, if new problems are discovered); and explai[n] the repair and maintenance work when customers return for their vehicles." *Encino I*, supra, at ___. While service advisors do not spend most of their time physically repairing automobiles, neither do partsmen, who the parties agree are "primarily engaged in . . . servicing automobiles."

IV. The Ninth Circuit invoked the distributive canon—matching "salesman" with "selling" and "partsman [and] mechanic" with "[servicing]"—to conclude that the exemption simply does not apply to "salesm[e]n . . . primarily engaged in . . . servicing automobiles." But the word "or," which connects all of the exemption's nouns and gerunds, is "almost always disjunctive." *United States v. Woods*, 571 U. S. 31, 45. Using "or" to join "selling" and "servicing" thus suggests that the exemption covers a salesman primarily engaged in either activity. Statutory context supports this reading. First, the distributive canon has the most force when one-to-one matching is present, but here, the statute would require matching some of three nouns with one of two gerunds. Second, the distributive canon has the most force when an ordinary, disjunctive reading is linguistically impossible. But here, "salesman . . . primarily engaged in . . . servicing automobiles" is an apt description of a service advisor. Third, a narrow distributive phrasing is an unnatural fit here because the entire exemption bespeaks breadth, starting with "any" and using the disjunctive "or" three times.

V. The Ninth Circuit also invoked the principle that exemptions to the FLSA should be construed narrowly. But the Court rejects this principle as a guide to interpreting the FLSA. Because the FLSA gives no textual indication that its exemptions should be construed narrowly, they should be given a fair reading.

VI. Finally, the Ninth Circuit's reliance on two extraneous sources to support its interpretation—the 1966–1967 Occupational Outlook Handbook and the FLSA's legislative history—is rejected.

845 F.3d 925, reversed and remanded.

The majority opinion was written by Justice Clarence Thomas joined by Justices Roberts, Alito, Kennedy, and Gorsuch, while Justice Ruth Bader Ginsburg wrote the dissenting opinion joined by Justices Breyer, Sotomayor, and Kagan.

Epic Systems Corp v Lewis, et al.*, *138 S.Ct. 1612, Nos. 16-285, 16-300, 16-307, argued October 2, 2017, decided May 21, 2018.

Issue: In each of these cases, an employer and employee entered into a contract providing for individualized arbitration proceedings to resolve employment disputes between the parties. Each employee nonetheless sought to litigate FLSA and related state law claims through class or collective actions in federal court. Although the Federal Arbitration Act generally requires courts to enforce arbitration agreements as written, the employees argued that its "saving clause" removes this obligation if an arbitration agreement violates some other federal law and that, by requiring individualized proceedings, the agreements here violated the National Labor Relations Act. The employers countered that the Arbitration Act protects agreements requiring arbitration from judicial interference and that neither the saving clause nor the NLRA demands a different conclusion. Until recently, courts as well as the National Labor Relations Board's general counsel agreed that such arbitration agreements are enforceable. In 2012, however, the Board ruled that the NLRA effectively nullifies the Arbitration Act in cases like these, and since then other courts have either agreed with or deferred to the Board's position.

Held: Congress has instructed in the Arbitration Act that arbitration agreements providing for individualized proceedings must be enforced, and neither the Arbitration Act's saving clause nor the NLRA suggests otherwise.

VII. The FAA requires courts to enforce agreements to arbitrate, including the terms of arbitration the parties select. These emphatic directions would seem to resolve any argument here. The Act's saving clause — which allows courts to refuse to enforce arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any contract," § 2 — recognizes only "`generally applicable contract defenses, such as fraud, duress, or unconscionability,'" *AT & T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, not defenses targeting arbitration either by name or by more subtle methods, such as by "interfer[ing] with fundamental attributes of arbitration," *id*., at 344. By challenging the agreements precisely because they require individualized arbitration instead of class or collective proceedings, the employees seek to interfere with one of these fundamental attributes.

VIII. The employees mistakenly claim that, even if the FAA normally requires enforcement of arbitration agreements like theirs, the NLRA overrides that guidance and renders their agreements unlawful yet. When confronted with two Acts allegedly touching on the same topic, this Court must strive "to give effect to both." *Morton v. Mancari*, 417 U.S. 535, 551. To prevail, the employees must show a "`clear and manifest'" congressional intention to displace one Act with another. There is a "stron[g] presum[ption]" that disfavors repeals by implication and that "Congress will specifically address" preexisting law before suspending the law's normal operations in a later statute. *United States v. Fausto*, 484 U.S. 439, 452.

IX. The employees ask the Court to infer that class and collective actions are "concerted activities" protected by § 7 of the NLRA, which guarantees employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively..., and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157. But § 7 focuses on the right to organize

unions and bargain collectively. It does not mention class or collective action procedures or even hint at a clear and manifest wish to displace the Arbitration Act. It is unlikely that Congress wished to confer a right to class or collective actions in § 7, since those procedures were hardly known when the NLRA was adopted in 1935. Because the catchall term "other concerted activities for the purpose of ... other mutual aid or protection" appears at the end of a detailed list of activities, it should be understood to protect the same kind of things, i.e., things employees do for themselves in the course of exercising their right to free association in the workplace.

X. The NLRA's structure points to the same conclusion. After speaking of various "concerted activities" in § 7, the statute establishes a detailed regulatory regime applicable to each item on the list, but gives no hint about what rules should govern the adjudication of class or collective actions in court or arbitration. Nor is it at all obvious what rules should govern on such essential issues as opt-out and optin procedures, notice to class members, and class certification standards. Telling too is the fact that Congress has shown that it knows exactly how to specify certain dispute resolution procedures, cf., e.g., 29 U.S.C. §§ 216(b), 626, or to override the Arbitration Act, see, e.g., 15 U.S.C. § 1226(a)(2), but Congress has done nothing like that in the NLRA.

XI. The employees suggest that the NLRA does not discuss class and collective action procedures because it means to confer a right to use existing procedures provided by statute or rule, but the NLRA does not say even that much. And if employees do take existing rules as they find them, they must take them subject to those rules' inherent limitations, including the principle that parties may depart from them in favor of individualized arbitration.

XII. In another contextual clue, the employees' underlying causes of action arise not under the NLRA but under the Fair Labor Standards Act, which permits the sort of collective action the employees wish to pursue here. Yet they do not suggest that the FLSA displaces the Arbitration Act, presumably because the Court has held that an identical collective action scheme does not prohibit individualized arbitration proceedings, see *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32. The employees' theory also runs afoul of the rule that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions," *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468, as it would allow a catchall term in the NLRA to dictate the particulars of dispute resolution procedures in Article III courts or arbitration proceedings — matters that are usually left to, Federal Rules of Civil Procedure, the FAA, and the FLSA. Nor does the employees' invocation of the Norris-LaGuardia Act, a predecessor of the NLRA, help their argument. That statute declares unenforceable contracts in conflict with its policy of protecting workers' "concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 102, and just as under the NLRA, that policy does not conflict with Congress's directions favoring arbitration.

XIII. Precedent confirms the Court's reading. The Court has rejected many efforts to manufacture conflicts between the FAA and other federal statutes, and its § 7 cases have generally involved efforts related to organizing and collective bargaining in the workplace, not the treatment of class or collective action procedures in court or arbitration.

XIV. Finally, the employees cannot expect deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* because *Chevron*'s essential premises are missing. The Board sought not to interpret just the NLRA, "which it administers," *id*., at 842, but to interpret that statute in a way that limits the work of the FAA, which the NLRB does not administer. After "employing traditional tools of statutory construction," including the canon against reading conflicts into statutes, there is no unresolved ambiguity for the Board to address.

***Cordua Restaurants, Inc and Steven Ramirez, et al.*, Cases 16-CA-160901, 161380, 170940, 173451**

Order vacating Decision and Order,

On May 21, 2018, the Supreme Court issued its decision in *Epic Systems*. On August 15, 2018, in view of the decision, the Board *sua sponte* vacated its earlier April 26, 2018 decision and order finding that discharge of an employee for filing a collective action in breach of an arbitration agreement was interference with / retaliation for protected, concerted activity.

II. Developments

1. Return of Opinion Letters

On June 27, 2017, the DOL announced the reinstatement of the issuance of Opinion Letters by its Wage & Hour Division. Per the DOL announcement, 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."

In 2010, Opinion Letters were replaced by Administrator's Interpretations. These give general interpretations of law and regulations for industries, categories of employees, or as to employees and employers globally. They are far less specific than Opinion Letters, which have authoritative impact.

Under President Obama, the DOL issued seven Administrator's Interpretations. On June 7, 2017, two relating to joint employment and independent contractors were withdrawn. Under President Trump, the DOL has issued 19 Opinion Letters, 15 of which related back to the George W. Bush DOL. The Trump DOL also elevated two non-administrator letters to authoritative Opinion Letter status, issuing all 17 Opinion Letters on January 5, 2018, and two more followed on April 12, 2018. [2]

[2] Tammy McCutchen, a former WHD administrator, disclosed in March 2018 that immediately before the Obama inauguration, then-acting WHD Administrator Passantino signed 18 opinion letters. However, although two were faxed to the parties requesting them, none were mailed. The Obama Administration withdrew the letters because they were not officially issued. Presently, the DOL database of Opinion Letters describes them historically as issued January 16, 2009, withdrawn March 2, 2009, and reissued on the applicable date in 2018.

The letters cover a variety of topics. While they are issued long after requested, they provide guidance on a variety of issues with more specificity than the Administrator's Interpretations used by the Obama Administration, which addressed issued more broadly.

The reintroduced opinion letters are summarized below:

1. FLSA 2018-1: Ambulance personnel on-call hours are compensable time if they restrict or prevent the employee from using his or her time freely. Whether the conditions on on-call conditions are restrictive utilize a totality of circumstances review of the following factors of whether the personnel are required to carry a pager; must report to work within a reasonable time; are disciplined if they fail to respond during the prescribed time; receive a high number or frequency of callbacks during on-call hours; and/or travel a great distance to report to work or before using their time without restriction.

2. FLSA 2018-2: This opinion addresses plumbing sales/service technicians or retail or service establishments. The exemption from overtime pay applies to an employee of a retail or service establishment, if (i) the regular rate of pay 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 of at least a month is commissions on goods or services. The "retail concept" applies to a business that provides drain cleaning and minor plumbing repair and replacement services if a threshold 75% of its annual dollar-volume of sales is not for resale. Computing compensation using a percentage of the customer charge, such as for labor and/or for service and parts used in repair, can constitute commissions on goods and services.

3. FLSA 2018-3: Helicopter pilots generally do not qualify for an administrative, executive or professional exemption. Aviation is not a field of science or learning, and a pilot does not customarily acquire knowledge by a prolonged course of specialized intellectual instruction.

4. FLSA 2018-4: Commercial construction project superintendents' exempt status is analyzed. For occupations in which most employees have acquired their skill by experience rather than by advanced, specialized, intellectual instruction, the learned professional exemption is inapplicable. However, primary duties that fall within the administrative exemption include: (i) overseeing a commercial construction project from start to finish; and (ii) securing or hiring subcontractors and overseeing the work of subcontractors.

5. FLSA 2018-5: The regular rate calculation for fire fighters and alarm operators is analyzed.

6. FLSA 2018-6: The FLSA status for coaches is examined. The teacher exemption applies if the primary duty is teaching and imparting knowledge to students in an educational establishment. Coaches whose primary duties are not related to

teaching (for example, 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 meet the exemption. No teaching certificate, minimum education, or academic degree is required to qualify for the exemption.

7. FSLA 2018-7: The effect on an employee's status of salary deductions for full-day absences is analyzed. Exempt status is not affected if an employer calculates a deduction for a full-day absence based on the number of hours actually missed. However, deductions if the employee is absent for less than one full day of work will affect exempt status.

8. FLSA 2018-8: The following primary duties of client services managers are within the administrative exemption: (i) comparing / evaluating possible courses of conduct and acting or making a decision after the possibilities are considered; (ii) having authority to execute insurance and finance contracts that legally bind the agency and its clients; (iii) consulting with clients to identify risk and exposure, advising on proper values for the clients' assets, and then recommending solutions to manage risk and exposure; and (iv) acting as an insurance advisor and consultant to the agency's clients, not selling an insurance product.

9. FLSA 2018-9: A non-discretionary bonus need not be included in the regular rate that is based on previous payments properly excluded from the regular rate. For example, here, a year-end, nondiscretionary bonus was calculated as a percentage of an employee's total, annual, straight- and overtime earnings. FLSA 2018-10: The following primary duties of construction project supervisors are within the scope of the administrative exemption: (i) evaluating quality and efficiency of subcontractors' and suppliers' work; (ii) having authority to stop subcontractor work to correct observed deficiencies, and to require subcontractors to remove its employees from worksite; (iii) recommending where necessary dismissal of subcontractors and suppliers with unsatisfactory work; (iv) providing significant input as to contracting of future services; (v) assuring the absence of conflicts between construction plans and the physical home construction; (vi) negotiating solutions for conflict or disagreement among building inspectors, subcontractors or suppliers; and (vii) scheduling subcontractors and suppliers, with commitment of the homebuilder to pay as appropriate. Ordinary inspection work generally is insufficient to establish the duties requirements for the administrative exemption, such as inspecting subcontractors' work to ensure compliance with the builder's plans to schedule subcontractors and supplies to ensure scheduling requirements are satisfied. That the work is important to the company's profitability and reputation is not a factor in determining exempt/non-exempt status.

10. FLSA 2018-11: All remuneration paid for employment, including "job bonuses," must be included in the regular rate unless explicitly excluded under the law.

11. FLSA2018-12: The following primary duties of consultants, coordinators, clinical coordinators, and business development managers are within the scope of the administrative exemption: (i) screening, interviewing, recommending candidates for hire; (ii) supervising and counseling to resolve issues about housing complaints and payroll timeliness; (iii) directly handling client concerns about facility problems; (iv) working with client facilities to monitor performance; (v) working as second-line supervisors to counsel and discipline employees about clinical and behavioral issues; (vi) analyzing market conditions to determine existing needs, competitors' capabilities, and competitive billing and compensation rates; (vii) training consultants and employees; and (viii) analyzing client facilities' staffing needs, bill rate tolerance, and contract expectations.

12. FLSA 2018-13: Examines the following primary duties for fraud/theft analysts and agents as within the administrative exemption: (i) managing collection of intelligence information; (ii) coordinating the collection efforts of area personnel; and (iii) evaluating / approving information for accuracy and relevancy. The following primary duties are not within the administrative exemption: (a) conducting investigations; (b) collecting and analyzing data; and (c) producing analytical reports.

13. FLSA 2018-14: Permissible and impermissible salary deductions for exempt, salaried employees' work absences are reviewed. Full-day salary deductions for exempt employees’ absences for personal reasons are allowed. Salary deductions for partial-day absences are not. Salary deductions for 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 salary loss from sickness or disability.

14. FLSA 2018-15: The administrative exemption for product demonstration coordinators is reviewed as to the following primary duties: (i) developing and implementing strategies for relationships with demonstrators; (ii) deciding how much effort to devote to expanding the pool of demonstrators; (iii) ensuring that a demonstrator executes a contract prior to an event; (iv) receiving and resolving demonstrator complaints; (v) ensuring the appropriate number of demonstrators staff events and are fully-prepared; (vi) setting the order of staffing events, and acting as liaison to managers of retail locations where events are scheduled; and (vii) developing a contingency plan for demonstrator no-shows or late cancellations.

15. FLSA 2018-16: Clarifying that paid employees of an employer cannot "volunteer" the same services for that employer, or any joint employer.

16. FLSA 2018-17: Incorporates by reference FLSA 2018-10, responding to a request that the WHD re-issue the opinion letter, formerly known as FLSA 2009-29.29

17. FLSA 2018-18: Analyzes the compensability of travel time in the context 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.

18. FLSA 2018-19: Analyzes 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 Supreme Court's test in the *Armour & Co. v. Wantock*, 323 U.S. 126 (1944) 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, but cautions that employers must provide employees who take FMLA-protected breaks with as many compensable rest breaks as coworkers, if any.

2. Status of the DOL's Overtime Regulation

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

- 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.

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

A coalition of 21 states challenged the Final Rule. On November 22, 2016, a federal judge here in Texas issued a preliminary injunction barring the implementation and enforcement of numerous portions of the Final Rule. The DOL appealed the injunction ruling to the Fifth Circuit. The varying positions that the DOL took during the appeal reflect significantly on the policy differences between the Obama and Trump Administrations. The DOL's opening brief, filed December 2016, fully defends the Final Rule. In June 2017, after three extensions of time to file, the DOL submitted its reply brief, in which the DOL defended only its authority to implement a salary standard for these exemptions and with no attempt to defend the specific levels stated in the Final Rule.

On July 26, 2017, the DOL published in the *Federal Register* a Request for Information (RFI) 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;

- 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.

While describing the pending litigation, the RFI and notes that "[a]s stated in our reply brief filed with the Fifth Circuit, the [DOL] 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." And further, "the [DOL] has decided to issue this RFI rather than proceed immediately to a notice of proposed rulemaking… " The DOL 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.

On August 31, 2017, the Texas district court granted a motion for summary judgment against the DOL, holding that the 2016 Final Rule is invalid. *See* Nevada v. U.S. Dep't of Labor, 2017 U.S. Dist. LEXIS 140522 (E.D. Tex. Aug. 31, 2017). The court held 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. Clarifying language from its earlier preliminary injunction ruling, the court explained that the DOL has the authority to impose a salary-level requirement, and that the only thing the court was considering in its ruling is the salary level specifically set in the 2016 rulemaking. *Id.* at *21-28. The DOL then voluntarily dismissed its appeal of the preliminary injunction order as moot. On October 30, 2017, the DOL 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 lawsuit concerning the 2016 Final Rule on hold and the comment period for the RFI closed, it is anticipated that the DOL will issue a new Notice of Proposed Rulemaking ("NPRM") proposing the Trump Administration's version of an updated test for exempt status. Secretary of Labor Acosta's publicly stated views suggest that the NPRM will propose a salary threshold in the range of $32,000 to $37,000. The DOL's current regulatory agenda indicates an NPRM in January 2019, though that date may change.

3. Tip Pooling Amendments to the FLSA

In March 2018, the FLSA was amended with bipartisan support, and with minimal public awareness of the amendment until after Trump signed the omnibus appropriations bill.

a. The Old FLSA Section 3(m) and tips

Under Section 3(m) 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:

> 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—
>
> (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; 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.

From the time of the 1974 FLSA amendments that gave the tip credit provision its current structure, the DOL 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.

b. Cumbie v. Woody Woo and DOL's 2011 Rule

In 2010, the Ninth Circuit decided *Cumbie v. Woody Woo, Inc*. 596 F.3d 577 (9th Cir. 2010), rejecting the DOL'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 embodying the Department's longstanding enforcement position, expressly rejecting

the Ninth Circuit's decision. *See,* Final Rule, Updating Regulations Issued Under the Fair Labor Standards Act, 76 Fed. Reg. 18,832 (Apr. 5, 2011).

This of course spawned multiple lawsuits in various circuits, challenging the Final Rule, with opinions split as cases developed among multiple federal circuit courts.

c. The Trump Administration

On July 20, 2017, the Trump Administration issued its first semiannual regulatory agenda, which included a statement of intent to undo the 2011 Final Rule. The DOL issued a NPRM on December 5, 2017, proposing, as indicated in the regulatory agenda, to rescind the portions of the 2011 Final Rule affecting tip pooling. 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." Tip Regulations under The Fair Labor Standards Act (FLSA), 82 Fed. Reg. 57,395, 57,399 (Dec. 5, 2017).

The NPRM resulted in the submission of approximately 376,000 comments, the majority opposing the proposed change. The concern was 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. An economic impact analysis performed on the change was not released.

Then, on February 5, 2018, the DOL's Inspector General informed the WHD that it would investigate the rulemaking process, and Democratic lawmakers pressed the issue in Congress.

d. The FLSA Amendment

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 spending bill, which appears at pages 2,025 to 2,027 of the legislation, makes 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.

Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. S, Tit. XII, § 1201(a). This language 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 is confusing:

> 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)) (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]

Consolidated Appropriations Act, 2018, Pub. L. No. 115-141, Div. S, Tit. XII, § 1201(c). The intent seems to be to nullify the 2011 Final Rule, though there likely will be many interpretations advanced. The DOL's WHD now 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." U.S. Department of Labor, Wage & Hour Division, Field Assistance Bulletin 2018-3, at 1 (Apr. 6, 2018). The DOL indicates it will issue regulations implementing these statutory changes with a publication date of August 2018.