EMPLOYER WINS IN 9TH CIRCUIT REGARDING TIP CREDITS

By Ikedi O. Onyemaobim

On September 6, 2017, in *Marsh v. J. Alexander's, LLC*, the Ninth Circuit refused deference to the United States Department of Labor's (the "DOL") 80/20 Rule, which interprets the "tip credit" under the Fair Labor Standards Act ("FLSA"). The Ninth Circuit held that the 80/20 Rule is inconsistent with the FLSA because the Rule improperly focuses on an employee's individual duties, rather than an employee's distinctive dual positions.

The FLSA requires all employers to pay their employees an hourly minimum wage of $7.25. However, the FLSA also provides a special provision for "tipped employees," who are engaged in an occupation in which they customarily receive more than $30 in tips each month. Under this provision, an employer may claim a "Tip Credit" against the minimum wage for tipped employees. In effect, the Tip Credit, which is commonly applied by employers in the food and hospitality industries, employers may pay their tipped employees $2.13 hourly. With respect to employees who work for the same employer in "dual jobs" (where one position is tipped, and the other is not), an employer is prohibited from applying the Tip Credit for any hours the employee works in a non-tipped position. However, an employer may still apply a tip credit when an employee performs duties related to the tipped position. In an effort to conceptualize the application of the Tip Credit to dual jobs, the DOL outlined the 80/20 Rule, which requires that an employee be paid the full minimum wage for all work "related" to tipped work if such work exceeds 20 percent of the employee's weekly hours.

In *Marsh*, the Ninth Circuit evaluated the application of the 80/20 Rule in nine consolidated cases brought by servers and bartenders. The named plaintiff explained that he was a tipped employee, but he alleged that he spent more than 20 percent of his work week performing the responsibilities of a non-tipped position (brewing coffee, cleaning soft drink dispensers, stocking ice, etc.). Accordingly, the Plaintiff argued that his employer violated the 80/20

Rule because he applied a credit for all the hours the Plaintiff worked, even when performing related side duties that did not earn tips.

The Ninth Circuit refused to apply the 80/20 Rule, explaining that the Rule improperly created a new regulation that interfered with a proper analysis of dual jobs. The Court explained that under the 80/20 Rule, an employer is required to track every moment of an employee's duties to determine when a tip credit properly applies. This strays from the original dual job analysis, which only looks to circumstances where an employee holds two distinct positions, rather than reviewing the employee's individual duties.

What does this mean for you? The Ninth Circuit created a circuit split with respect to the application of the 80/20 Rule. For employers within the Ninth Circuit (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), the Court has held that the tip credit properly applies to employees with dual jobs, without necessarily outlining the employee's individual duties. As such, employers in these states are not required to track the duties an employee performs to analyze under the 80/20 Rule.

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