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## LEGAL ALERT | October 1, 2018

### *Ninth Circuit Upholds DOL 20% Rule for Tipped Employees*

Last week the Ninth Circuit filed its *en banc* opinion by the Ninth Circuit in *Marsh v. J. Alexander's LLC*, No. 15-15791, 2018 WL 4440364 (9<sup>th</sup> Cir. Sept. 18, 2018). In this case, the full Ninth Circuit overturned previous panel and district court decisions and upheld the U.S. Department of Labor's "20%" rule for tipped employees.

In sum, that rule provides that an employer cannot take a tip credit where a tipped employee spends over 20% of his or her time engaging in activities that are related to their work but do not directly result in the generation of tips. For example, in the case of a restaurant server, this would include tasks such as rolling silverware, brewing coffee, or wiping tables. The rule also states that a tip credit cannot be taken, and tipped employees must be paid the full minimum wage for the time they spend working on activities that are unrelated to their duties as servers or bartenders. These kinds of activities include maintenance work such as cleaning restrooms and washing windows.

*Marsh* was a consolidated appeal in which the defendants were J. Alexander's, I-Hop, P.F. Chang's, and other restaurant companies. Given the number of restaurants involved and possible future involvement by different trade groups, there's a good chance that the defendants may petition for a writ of certiorari to the U.S. Supreme Court. And, given the Court's recent interest in the different federal deference doctrines, there's an equally good chance that may be granted.

**Questions?** Contact Stokes Wagner.