Recent Ninth Circuit Decision Highlights An Employer's Obligation Under the Dual Jobs Regulation Of The FLSA

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On September 18, 2018, the Ninth Circuit Court of Appeals issued a decision which once again brings to the forefront employers' obligations under the Fair Labor Standards Act (FLSA) and other state minimum wage laws.

In *Marsh v. J. Alexander's LLC*, the Ninth Circuit reversed the dismissal of actions brought by multiple plaintiffs under the FLSA concerning tip credits towards servers' and bartenders' wages. The Ninth Circuit held that the Department of Labor's (DOL) dual jobs regulation barred an employer's ability to pay a reduced tip credit wage to an employee and treat them as tipped employees, where the employee engaged in either non-tipped tasks unrelated to serving and bartending, such as cleaning toilets, or non-incidental tasks related to serving or bartending, such as hours spent cleaning and maintaining soft drink dispensers, in excess of 20% of the workweek.

In determining that the court could give deference to the DOL's interpretation of the dual jobs regulation, the Ninth Circuit found that the guidance issued by the DOL "clearly contemplates" that a server who performs unrelated tasks, such as cleaning restrooms, and/or performs untipped tasks for more than 20% of the workweek, qualifies as a dual job employee entitled to the full minimum wage for the performance of those tasks.

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The Ninth Circuit noted that "Congress did not intend to give employers a blank check when it enacted the FLSA's tip credit provision" and the dual jobs regulation "clarified the boundaries of acceptable tip credit use" to "ensure that a server's tips serve as a gift to the server, as opposed to a cost-saving benefit to the employer."

The Ninth Circuit's decision is in line with previous decisions from the Seventh and Eighth Circuits and serves as a good reminder to all employers that use tip credit provisions under federal and state law that they need to be proactive when it comes to compliance with the FLSA and/or pertinent state minimum wage laws.

Proactive steps employers can take include making sure that tipped employees are not performing the job duties of non-tipped employees (i.e. washing windows, cleaning bathrooms), and monitoring the work of tipped employees to ensure that they are not engaged in untipped tasks more than 20% of the workweek.

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