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LABOR & EMPLOYMENT ALERT

HIGHLIGHTS OF THE U.S. DEPARTMENT OF LABOR'S FINAL RULE REVISING REGULATIONS BASED ON AMENDMENTS TO THE FLSA AND PORTAL-TO-PORTAL ACT

EFFECTIVE MAY 5, 2011

On May 5, 2011, the revisions to the Fair Labor Standards Act ("FLSA") and Portal-to-Portal Act recently adopted by the U.S. Department of Labor ("DOL") took effect. *Updating Regulations Issued Under the Fair Labor Standards Act; Final Rule*, 76 Fed. Reg. 65 (April 5, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-04-05/pdf/2011-6749.pdf. In addition to updating the FLSA regulations with technical amendments to reflect the latest increase in minimum wage and other threshold amounts, noteworthy substantive changes to the regulations include those involving tip credits. The DOL's final rule, however, did not adopt many of the changes that employer commentators had hoped for, including those to the fluctuating work week regulations. The following are the highlights of the revised regulations adopted by the DOL, as well as those notable revisions that the DOL failed to adopt. Employers should review the updated regulations to ensure compliance with the final rule.

TIP CREDIT REVISIONS:

Under the FLSA, employers may take a tip credit against the minimum wage paid to tipped employees (those that regularly receive at least $30 a month in tips). By utilizing the tip credit, employers may reduce minimum wage for tipped employees to $2.13 per hour. Thus, the maximum tip credit that an employer can claim is $5.12 per hour (the minimum wage of $7.25 less the minimum required wage of $2.13). The final rule changes the notice requirements for taking a tip credit. Now, employers must provide notice to tipped employees regarding the tip credit, employee ownership of tips, and tip pools.

- Notice of Tip Credit
    - While courts have disagreed over the level of notice required, the final rule mandates that an employer provide the following notice to a tipped employee prior to utilizing a tip credit:
        - The direct cash wage the employer is paying a tipped employee, which cannot be less $2.13 per hour;
        - The additional amount by which the wages of the tipped employee are increased on account of the tip credit claimed by the employer, which amount may not exceed the value of the tips actually received by the employee;
        - That all tips received by the tipped employee must be retained by the employee except for a valid tip pooling arrangement limited to employees who customarily and regularly receive tips; and

        - That the tip credit shall not apply to any employee who has not been informed of these requirements.

    - While the final rule does not require that the employer inform its tipped employees of these requirements in writing, the final rule provides that "employers may wish to do so, since a physical document would, if the notice is adequate, permit employers to document that they have met the requirements" of the notice provision. 76 Fed. Reg. 65.

- Ownership of Employee Tips

    - The final rule adopts the DOL's long-standing position that tips are the property of the employee.

    - As such, the DOL made clear that the only permitted uses of an employee's tips by an employer are through a tip credit or a valid tip pool (that is, one where employers require employees who customarily and regularly receive tips to contribute a portion of their tips to pools which are then divided among these employees – the contribution must be customary and reasonable and the employee must be able to keep at least the full minimum wage).

- Tip pools

    - The DOL modified 29 C.F.R. § 531.54 to read: "Section 3(m) does not impose a maximum contribution percentage on valid mandatory tip pools, which can only include those employees who customarily and regularly receive tips. However, an employer must notify its employees of any required tip pool contribution amount, may only take a tip credit for the amount of tips each employee ultimately receives, and may not retain any of the employees' tips for any other purpose."

FLUCTUATING WORK WEEK:

- The DOL rejected the 2008 Bush-era proposal that would have amended the fluctuating work week method of calculating overtime to allow bona fide bonus and premium payments to be included in the calculation of the regular rate, apparently siding with employee commentators noting: "[w]hile the Department continues to believe that the payment of bonus and premium payments can be beneficial for employees in many other contexts … the proposed regulation could have had the unintended effect of permitting employers to pay a greatly reduced fixed salary and shift a large portion of employees' compensation into bonus and premium payments, potentially resulting in wide disparities in employees' weekly pay depending on the particular hours worked."

- As it stands, the current regulation provides that an "employer may use the fluctuating workweek method for computing half-time overtime pay computation if an employee works fluctuating hours from week to week and receives, pursuant to an understanding with the employer, a fixed salary as straight time compensation (apart from overtime premiums) for whatever hours the employee is called upon to work in a workweek, whether few or many." 76 Fed. Reg. 65. An employer satisfies the overtime pay requirement if it

compensates the employee, in addition to the salary amount, at least one-half of the regular rate of pay for the hours worked in excess of 40 hours in each work week.

MEAL CREDIT:

The DOL rejected a proposal to amend the meal credit regulation that would have allowed employers to apply a meal credit even where the employee did not voluntarily accept the meal. The FLSA regulation currently permits employers to count the reasonable cost of a meal provided to an employee toward that employee's minimum wage.

PORTAL-TO-PORTAL ACT:

- The DOL adopted the convoluted amendment set forth in the Employee Commuting Flexibility Act of 1996, and then declined in the final rule to clarify the conditions or factors affecting an employer's obligation to compensate for time spent commuting in an employer-provided car or circumstances where commute time would be compensable – leaving the regulations just as confusing as before the final rule.

- As it stands: "The use of an employer's vehicle for travel by an employee and activities performed by an employee which are incidental to the use of such vehicle for commuting shall not be considered part of the employee's principal activities if the use of such vehicle for travel is within the normal commuting area for the employer's business or establishment and the use of the employer's vehicle is subject to an agreement on the part of the employer and the employees or representative of such employee."

YOUTH OPPORTUNITY WAGE:

- The final rule adopt Section 2105 of the Small Business Job Protection Act of 1996 which amended section 6(g) of the FLSA providing that: "[any] employer may pay any employee of such employer, during the first 90 consecutive calendar days after such employee is initially employed by such employer, a wage which is not less than $4.25 an hour." 29 U.S.C. § 206(g)(4). This means that an employer can pay a subminimum wage of $4.25 an hour to its employees under the age of 20 for this 90 day period.

- Employers should note, however, that the final rule protects current workers by preventing employers from reducing their workforce for the purpose of hiring only workers under the age of 20 to take advantage of the subminimum wage, subjecting violators of this section to the anti-discrimination provisions of the FLSA.

STOCK OPTIONS EXCLUDED FROM REGULAR RATE:

The final rule incorporates the exclusion of stock options from the regular rate of pay into the FLSA regulations which were originally set forth in the Worker Economic Opportunity Act of 2000.